Constitutional dilemma on the immediate return of the lawsuit

Mag. Florjan KALAJA[1]
Judge at the Court of Appeal in Durres
florjankalaja@gmail.com

Abstract

This paper aims to analyze the Constitutional dilemma on the immediate return of the lawsuit. Since 2001, the third paragraph of Article 154 / a of the Code of Civil Procedure provides: '' When the lawsuit does not meet the conditions mentioned in this chapter, the judge returns it to the plaintiff at the time of its filing or he is notified in writing of the completion of the deficiencies and, after the filing date is indicated in the lawsuit, a deadline is set for filling in the gaps. Until this date, the lawsuit remains without action. "

In as specific case the Court of Appeal decided to immediately return the request for the issuance of an execution order, concluding that the request had not fulfilled the elements of the respective accompanying documentation as required by Articles 154 - 156 of the Code of Civil Procedure. Through this interim decision it was asked the Constitutional Court to repeal the legal provision that legitimizes the court to immediately return the lawsuit [2].

To our opinion the third paragraph of Article 154 / a of the Code of Civil Procedure, in the part that provides "returns to the plaintiff at the time of its submission or", is

[1] Mag. Florjan Kalaja is an experienced lawyer, judge at the Court of Appeal in Durres and external lecturer at the Albanian School of Magistrates. He is an expert in Constitutional Law, International Law, Criminal Law, European Law, and International Humanitarian Law.

[2] See Decision no. 883 / 90114-1317, dated 15.12.2021 "On the suspension of the trial and sending the case to the Constitutional Court" of the Court of Appeal of Durres, through which it was asked to asked the Constitutional Court to repeal the third paragraph of Article 154 / a of the Code of Civil Procedure, in the part where it is provided "it returns to the plaintiff at the time of its submission or", as it is contrary to Articles 4, 17 and 42 of the Constitution and Article 6 of the ECHR.

contrary to Articles 4, 17, 42 of the Constitution and Article 6 of the KEDNJ. In similar case, to my personal experience, it has never been decided to immediately return the lawsuit or the request, according to the provision of article 154 / a of the Code of Civil Procedure. The inconclusive decision-making of the return of the request or lawsuit, in my case law, was preceded by the intermediate decision-making of ascertaining the procedural shortcomings of the procedural act and was further accompanied by the non-fulfillment of judicial duties by the plaintiff. The same approach was held pe the author in the capacity of Assistant Magistrate in the High Court and further in the capacity of a judge of the Court of Appeal of Durres.

Keywords: *constitutional lawsuit; immediate return of the lawsuit, civil procedure regulations*

Introduction

As an expert in the Committee of Experts on amendments to the Code of Civil Procedure, which was established by the Assembly in the period January - March 2017 within the package of legal changes of the Justice System Reform, the author proposed with the respective explanations to be repealed this part of the third paragraph of Article 154 / a of the Code of Civil Procedure (https://www.academia.edu/31108874/Propozim_p%C3%ABr_reform%C3%ABn_n%C3%AB_Kodin_e_Procedur%C3%ABs_Civile, visited on 09.01.2022.). Nothing changed then in the law in this regard and nothing has changed in the case law of the courts of first instance with general jurisdiction as long as the law has not changed since 2001.

In November 2021, the author initiated an incidental constitutional review procedure on this part of the third paragraph of Article 154 / a of the Code of Civil Procedure. This article reflects all the constitutional dispute that the author has filed with the Constitutional Court with the conviction that this part of the civil procedural legal regulation should be repealed and, even if it is not repealed, it should not be enforced by courts with general jurisdiction.

General considerations on the shortcomings of the lawsuit

One of the procedural presumptions of the validity of the civil or administrative judicial process is the validity of the lawsuit or request as a procedural act. The validity of the lawsuit or request as a procedural act is closely related to the existence of its formal and substantive elements that perfect it, as provided in Article 154 of

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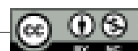
the Code of Civil Procedure[3]. A lawsuit or request that is not perfected in form and content as a procedural act can not constitute a valid court process, within the meaning of Article 153 of the Code. It also brings to attention that directly, in Article 154 - 156 of the Code of Civil Procedure, as well as in Article 21 of Law no. 49/2012, regulates the validity of the lawsuit as a procedural act and not the request as such. However, based on and for the application of the second paragraph of Article 1 of the Code of Civil Procedure, since there are no special regulations of this nature for the request as a procedural tool, it is concluded that exactly these regulations of the law are applied by analogy, whether in civil litigation and administrative adjudication.

The lawsuit or request in this sense and in terms of its fundamental importance as a procedural act enters into the typical procedural acts, which means that their form and content must strictly respect the legal requirements that are opposed. In this sense, Article 115 of the Code of Civil Procedure provides that procedural acts, for which the law does not require certain forms, can be performed in the most useful form to achieve their purpose. Since Article 154 of the Code of Civil Procedure defines the mandatory elements of the form and content of the lawsuit or request, then it is concluded that all these extremes are mandatory for the active litigants of the civil or administrative judicial process. On the other hand, the civil and administrative procedural law has provided that some acts must be attached to the lawsuit or request in order to meet the legal condition of the proceedings. In article 154 - 156 of the Code of Civil Procedure and in point 1 of article 21 of Law no. 49/2012 provides for written acts which the plaintiff or claimant must attach to the lawsuit.

The lack of conformity of the active litigant of the civil or administrative judicial process in drafting the content or form of the lawsuit or request and on the other hand the non-compliance with the legal obligations to enclose written acts individualized in law, civil and administrative procedural law considers defects of the lawsuit or claim. The civil and administrative procedural law has also provided for the eventuality when the lawsuit or claim may have a deficiency of these formal and substantive legal elements or in the legal requirements on the written acts that must be attached to the lawsuit. Common to both procedural laws is the fact that all the shortcomings of the lawsuit refer to those provided by Articles 15 - 156 of the Code of Civil Procedure. The common denominator of all these substantive, formal and procedural shortcomings is that in these cases all the shortcomings of the lawsuit of this nature are correctable or validable.

This is the reason why Article 154 / a of the Code of Civil Procedure provides for the obligation of the single civil judge to determine the shortcomings by an intermediate decision and to leave time for the plaintiff or the requesting party

[3] See by analogy the regulation of article 21 point 1 of Law no. 49/2012 "On administrative courts and adjudication of administrative disputes".



to complete them. This is the reason why letter "a" of point 1 of article 25 of Law no. 49/2012 provides that, in case of ascertaining the defects of the lawsuit or the request by the single administrative judge, the intermediate decision-making of ascertaining the defects is proceeded and leaving time for the plaintiff or the requesting party to complete them. This is why letter "dh" of Article 467 of the Code of Civil Procedure provides for the incomplete defects of the lawsuit or request in the court of first instance as a cause for dismissal and for returning the case for retrial, with the task of rectification. of defects and of this invalidity of the lawsuit as a procedural act. On the other hand, the shortcomings of another nature of the lawsuit in the procedural sense that the law distinguishes must be brought to attention and distinguished. It should remain in mind that civil or administrative litigation requires the existence of some positive or negative procedural presumptions in order to avoid legal impediments to non-proceedings (see Article 299 of the Code of Civil Procedure). Positive procedural presumptions are those legal conditions without which the civil or administrative judicial process is terminated, such as the will of the parties to proceed. On the other hand, negative procedural presumptions are those legal conditions which, if proven to exist, terminate the process, such as the existence of a judiciary or the adjudicated item.

These legal reasons are found to be sometimes typified in law[4] and sometimes provided as pilot causes, which the court must identify case by case [5]. Proof of these legal obstacles of a procedural nature constitutes the universal legal cause of inconclusive decision-making of the civil and administrative court, according to Article 127 of the Code of Civil Procedure, decisions which end the trial and do not allow the continuation of the trial to assess the merits and the basis of the lawsuit. Universally, these procedural reasons affect the lawsuit or the request in the procedural sense and weigh exclusively on the ability of the lawsuit or the request to constitute a valid court process.Therefore, the consequence and civil procedural sanction is the final decision or the termination of the trial and the termination of the civil or administrativejudicial process.The procedural reasons for the termination of the civil litigation are flaws of the lawsuit, as they represent causes of procedural pathology of the lawsuit or the request in the procedural sense which enable it to produce a lawsuit. But unlike the shortcomings of the lawsuit provided and regulated in Articles 154 - 156 of the Code of Civil Procedure which are all valid, the shortcomings of the lawsuit that terminate the civil or administrative judicial process are invalid and that their finding extinguishes with immediate and

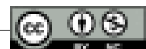
[4] See for example Article 58, Article 59, Article 154 / a, Article 179, Article 201, Article 299, Article 392, Article 451 / a of the Code of Civil Procedure or Article 9, letter "a" of point 1 of Article 25, Article 39 of Law no. 49/2012.

[5] See the former Article 468 of the Code of Civil Procedure or letter "c" of Article 299 of the Code of Civil Procedure, which among other things provides that the court decides to adjourn the trial when it is found that "the lawsuit can not be filed" or when the trial could not continue.

retrospective or retroactive effect any procedural activity performed (Article 300 of the Code of Civil Procedure.).

It is in this essential difference that the change in the way the civil or administrative court administers the judicial process in each case of identifying these procedural flaws of the lawsuit in the procedural sense lies. This means that the ascertainment of procedural shortcomings provided in Article 154 - 156 of the Code of Civil Procedure or in Article 21 of Law no. 49/2012 does not immediately lead to the termination of the civil or administrative judicial process. They can also be validated and that the lawsuit or request as a procedural act has causes of invalidity that can be corrected and that if corrected the trial continues normally and validly and the act is validated with retrospective force. Only if the shortcomings of the lawsuit or claim are not met in time, then the civil or administrative court process is terminated with retroactive effects. On the other hand, the ascertainment of the irreparable flaws of the lawsuit immediately leads to the termination of the civil or administrative judicial process. But it should remain in mind that all this category of legal causes that immediately and retroactively extinguish the civil or administrative judicial process are different from those regulated in Articles 154 - 156 of the Code of Civil Procedure and that consequently their legal regime cannot be procedurally unified.

Given that any defect of the lawsuit and the claim according to article 154 - 156 of the Code of Civil Procedure or according to article 21 of Law no. 49/2012 can be corrected, I consider unreasonable the legal regulation of the third paragraph of article 154 / a of the Code of Civil Procedure, in the part that provides discretionary the way of administration of the judicial process in case of ascertaining the defects of the lawsuit, immediately allowing the single judge to proceed with the immediate return of the lawsuit. The author considers that the inconclusive decision for the return of the lawsuit and the termination of the civil or administrative trial for the reasons of non-fulfillment of the tasks left by the court to correct the validable defects should in any case be preceded by the interim decision on the defects of the lawsuit or the request and ability of the plaintiff or claimant to meet them. The author also considers that the premise for the validity of the incomplete decision to terminate the trial through the return of the acts to the plaintiff or the applicant is the non-fulfillment of the individualized obligations directly by the court of the plaintiff or the applicant. Failure to complete the deficiencies constitutes a circumstance of ineligibility according to article 154 / a and letter ”c” of article 299 of the Code of Civil Procedure or letter ”a” of point 1 of article 25 of Law no. 49/2012. Exactly the existence of this discretion of the court in the Code of Civil Procedure, in the conditions when there should be only one way for the administration of the civil or administrative process, leads to incompatibility with the principles of the right to due process.



Arguments on the unconstitutionality of the challenged legal regulation.

i) Violation of the principle of proportionality

Considers that it is necessary to note that initially the legislator in Article 154 / a of the Code of Civil Procedure, in the part that provides for the discretion of the court to decide the immediate return of acts and this way of disposition, did not respect the principle of proportionality restricting the right of active subjects of civil litigation to access the court. The procedural tool and legal solution used by the legislator does not match the factual and legal situation that dictated the legal intervention.

Attention should also be paid to Article 17 of the Constitution, which provides that:

"1. Restrictions on the rights and freedoms provided for in this Constitution may be imposed only by law in the public interest or for the protection of the rights of others. The restriction must be in proportion to the situation which has dictated it.
2. These restrictions may not infringe the essence of the freedoms and rights and in no case may they exceed the restrictions provided for in the European Convention on Human Rights. "

This constitutional norm constitutes the universal test of the constitutionality of any law in terms of the restrictions it imposes on the fundamental rights and freedoms of the individual. At the core of this principle is the "fair balance of interests", their important and objective assessment, as well as the avoidance of conflict through the selection of appropriate means for their realization. A limitation would be considered in line with the standards of the principle of proportionality if:

(i) the objective of the legislature is sufficiently significant to justify the restriction of the right
(ii) the measures taken are reasonably relevant to the objective - they may not be arbitrary, unfair or based on illogical assessments;
(iii) the means used are not harsher than to achieve the required objective - the greater the detrimental effects of the selected measure, the more important the objective to achieve, in order to the measure to be justified

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> as necessary (Decision no. no. 52, dated 05.12.2012 and Decision no. 71, dt. 27.11.2015 of the Constitutional Court. Decision of the Constitutional Court of the Republic of Albania no. 30, dated 01.12.2005 on Summary of Constitutional Court Decisions, 2005, p. 254; Decision of the Constitutional Court of the Republic of Albania no. 18, dated 14.05.2003 on Summary of decisions of the Constitutional Court, year 2003, p. 100).

Among othersa, the ECtHR has held that the principle of proportionality implies the use of the most appropriate and least harmful means to achieve the goal in the conditions dictated by them and that states are given a wide margin of appreciation in the implementation of economic policies and social or law-making, but by no means can Member States neglect to update this principle ("Jahn and others vs. Germany"; decision of the ECtHR. dated 30.06.2005; "Jahnes and others v. United Kingdoom"; decision of ECtHR dated 21.02.1986). All this jurisprudence of the Constitutional Court and the ECHR at its core has the principle that the means used by the legislator should be appropriate in relation to the need that has dictated the intervention in restricting the right of the individual.

The author considers that this principle, from all other legal regulations, has not been respected by the legislator only in the third paragraph of Article 154 / a of the Code of Civil Procedure. It is noted, as will be shown below, that the legislator has respected this principle in all other provisions of the same Code or in other laws regulating the same or similar issues. First of all, attention should be paid to Article 44 of the Code of Administrative Procedures, which provides for the shortcomings of the administrative request addressed to a public administration body and further the procedure for their correction. This provision, among other things, regulates that the public body examines in advance the request regarding the fulfillment of formal legal criteria, such as the competence of the public body, legitimacy, deadline, form and any other criteria provided by law. Further, if corrective procedural deficiencies are found, the public administration body notifies the requesting party in writing of the completion of the deficiencies related to the fulfillment of the formal legal criteria, setting a reasonable deadline. The procedural law continues to be regulated by the provision that in these cases the public body actively assists the party in completing the identified shortcomings.

Failure to meet the deficiencies within the set deadline is a reason for non-acceptance of the request. The Code of Administrative Procedures in its article 44 goes further in the arrangements to help the party to have access to the administrative proceeding and provides that the public administration body notifies the requesting party if it is necessary to perform further administrative actions before deciding on the admission or not of the request and, if such a need exists, in this case the body also sets a reasonable deadline for carrying out further

actions. Article 454 of the Code of Civil Procedure regulates the content and form of the procedural act of appeal or recourse. Meanwhile, in Article 455, the Code has regulated the acts that must be attached to the appeal in each case. The lack of conformity of the appellant with these procedural rules does not lead to the disposition with inconclusive decision-making of the only judge of the court that gave the decision or of the court with reviewing jurisdiction. Letter "b" of Article 450 of the Code of Civil Procedure provides that the inconclusive decision-making of the rejection of the appeal against his shortcomings of the only judge of the court that issued the decision or the court with review jurisdiction, in the deliberation room and immediately after submission will be taken only when the appellant or recursor has not fulfilled in time the deficiencies found by an intermediate decision by the court.

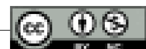
This means that even in this legal provision there is no possibility of immediate return of the appeal and that the inconclusive decision of rejecting the appeal should be preceded by the intermediate decision of ascertaining the defects and only if the defects are not corrected in time the court decides with an inconclusive disposition, ending the litigation without resolving the matter on the merits. On the other hand, letter "dh" of Article 467 of the Code of Civil Procedure provides for the invalidity of the lawsuit as a procedural act, in the sense of Articles 154 - 156 of the Code, as a legal cause that nullifies the trial held in the first instance not to extinguish entirely judgment but to repeat it from the beginning. Therefore, this provision provides that the court of appeal decides in these cases to overturn the decision of the court of first instance and send the case for retrial (letter "ç" of Article 466) and not to overturn the decision of the court of first instance and dismiss adjudication of the case (letter "c" of Article 466). The meaning of this legal remedy used by the legislator is determined precisely by the validity of the procedural act of the lawsuit or request and that for this reason the trial is not terminated but is repeated by repeating from the beginning.

Articles 474, 475 and 476 of the Code of Civil Procedure regulate in a special way the procedural act of recourse from the point of view of form and content. Point 3 of Article 476 of the Code provides that, when it does not complete the formal and substantive shortcomings as a procedural act, the rapporteur who gave the decision or the single judge notifies the party to complete the shortcomings of the recourse within 5 days. In this case, the recourse is reviewed in the deliberation room and the ascertainment of the shortcomings is realized through an intermediate decision of the monocratic judicial body. When the appellant does not complete or correct the deficiencies within the deadline, the recourse is considered not to have been filed and is returned to the party together with the other acts submitted by him. It is further provided that, when the deficiencies of the recourse have not been ascertained by the lower court, the rapporteur of the case in the High Court by

decision notifies the party to complete the deficiencies within 5 days. When the shortcomings of the recourse are not met within the deadline, the rapporteur, in the counseling room, decides to return the recourse. This means that in these cases of legal regulation, the final decision to return the recourse is always preceded by the intermediate decision to ascertain the shortcomings of this procedural act. Article 515 of the Code of Civil Procedure provides for the formal and substantive validity of the creditor's request to the bailiff service for the enforcement of the executive title. After regulating the content and form of this typical procedural act and the documents to be attached to the act, the provision provides that, when the above documents for the execution of the execution order are not completed properly, the bailiff finds the defects and leaves the applicant a 5-day deadline for filling in the gaps.

When the applicant does not complete these deficiencies within the set deadline, the documentation is returned to him. This means that in these cases of legal regulation the final decision of the bailiff to return the request and the attached documents is always preceded by the intermediate decision to ascertain the shortcomings of this procedural act and the legal opportunity left by this authority to the creditor to validate the shortcomings of the procedural act. In 2017, Article 161 of the Code of Civil Procedure was amended, regulating for the first time the mandatory co-litigation as a procedural defect of the lawsuit or request. Letter "ç" of this provision stipulates that, if the decision can not be given except against many persons, in the case of compulsory co-litigation, the latter must be summoned as defendants in the same process. In these cases, when the judge finds that the mandatory co-litigation on the part of the defendants is incomplete, he leaves the plaintiff a period of up to 20 days to fix it, according to letter "c" of this article, and article 154 / a of this Code.

If the plaintiff does not act within the above deadline, the court decides to adjourn the trial. If the deficiencies are rectified in time, the lawsuit is rectified and validated with retroactive effect. In all the tests cited above by the following legal provisions it is provided that, when the shortcomings of the procedural act have been corrected within the deadline set by the procedural authority, then it is considered that it has been presented regularly from the moment of filing. So the corrected flaws validate the procedural act in each case with retrospective effect. On the other hand, the same issue that regulates the third paragraph of article 154 / a of the Code of Civil Procedure, is regulated differently from letter "a" of point 1 of article 25 of Law no. 49/2012. This provision does not allow for two options available to the single administrative judge in preparatory actions or in other words does not allow discretionary opportunities for the administration of the process by the single judge. This part of the provision provides that:" 1. For the conduct of the trial, according to the principle of a regular judicial process and within a quick



and reasonable time, the presiding judge, within 7 days from the date of filing the lawsuit, performs the following actions: a) Requests the plaintiff to complete the deficiencies of the lawsuit, setting him a deadline of up to 10 days. When the plaintiff does not meet the shortcomings of the lawsuit, within the set deadline, the judge issues a decision on the return of the lawsuit and the acts attached to it. A special appeal is allowed against this decision ".

In this law there is no discretionary possibility for the immediate return of the lawsuit or the request for validable defects, the defects which under the blanket provision of article 21 of this law are determined to be exactly those that are regulated by article 154 - 156 of the Code of Civil Procedure. Article 46 of Law no. 49/2012 provides for the eventuality of ascertaining the shortcomings of the appeal. In case the appeal does not meet the conditions provided in point 1 of this provision, or when the appeal is not signed, the litigants are not indicated, the decision against which an appeal is made or what is required by the appeal, the single judge notifies the party to correct flaws within 5 days. It is further provided that, when the appellant does not complete or does not correct the deficiencies within the deadline, the appeal is deemed not to have been filed and is returned to the appellant by decision, together with the other acts submitted by him. Correction of shortcomings in time, validates the appeal as a procedural act with retroactive effect.

Article 57 of Law no. 49/2012 provides the same legal regulations and the same way of proceeding with the court in case the defects of the recourse are ascertained as a procedural act. Point 2 of this provision stipulates that, if the recourse does not meet the conditions provided in paragraph 1 of this article, and when the recourse is not signed, the litigants are not indicated, the decision against which the recourse is made or what is required by the recourse, the judge by decision notifies the party to correct the deficiencies within 7 days. It is further provided that, when the complainant does not complete or does not correct the deficiencies within the deadline, the recourse is deemed not to have been filed and is returned to the complainant by decision, together with the other acts submitted by him. When the deficiencies of the recourse are filled in time, it is considered presented from the date of its registration in court. In article 32, point 2 of Law no. 8577, dated 10.2.2002 "On the organization and functioning of the Constitutional Court of the Republic of Albania" regulates the formal and substantive shortcomings of the individual constitutional appeal as a procedural act in the same way and differently from what is provided by article 154 / a of the Code of Civil Procedure.

This legal regulation stipulates that, when the request has various procedural defects, the Panel of the Constitutional Court returns it to the applicant for completion, giving the reasons for the return and the deadline for its completion. When the request is submitted within the deadline set for the correction of the

defects, it passes again for preliminary review in college (Decision no. 146 dated 06.12.2021 of the Constitutional Court). In this case, the date of submission of the request is considered the date of its submission to the court for the first time. In case the request is submitted to the court within the deadline set for the correction of the defects, but is not fulfilled, the panel decides not to pass the trial. From all these analogous examples it is understood that the proportional solution of restricting access to court in the procedural sense to plaintiffs or claimants who have filed claims with valid defects is only one, namely the intermediate decision of the prosecuting authority to ascertain it shortcomings of the procedural act and leaving time to the active subject of the process to correct the shortcomings. And if they are not remedied within the set deadline, then the proceeding authority with an inconclusive decision terminates the process. And if they are corrected, automatically and ex legge the procedural act is considered valid with retroactive effect.

Consequently, it is naturally and logically concluded that the provision in the third paragraph of Article 154 / a of the Code of Civil Procedure of the part "returns the plaintiff at the time of its submission or" is contrary to Article 17 of the Constitution, as the legislator can not provided as a restrictive means of the right of access to court for the active litigant of the process the immediate non-final decision and also the discretion of the single civil judge to proceed in this way. The only proportional constitutional remedy in this case is that the procedural laws universally provide as a solution in analogous cases and that in this way it is concluded that for the corrective shortcomings of the procedural act lawsuit or request this is the only constitutional way of proceeding of the procedural authority.

ii) Violation of the right of access to court

I must point out that the right of access to a court derives directly from the constitutional principle of the rule of law and the prohibition of any arbitrary power which the ECHR itself seeks to exercise ("Zubac c. Croatie ", Decision of the Grand Chamber of the ECHR, 2018, paragraph 76 et seq). The ECtHR has ruled that a court's refusal to review the lawsuits of litigants at trial violates their right of access to a court (Al-Dulimi et Montana Management Inc. c. Suisse ", Decision of the Grand Chamber of the ECHR, 2016, paragraph 131). It is true that this fundamental right has no absolute character and that the law may provide for restrictions, but these restrictions must in any case pursue a lawful purpose and be proportionate and in direct proportion to the state of the fact that they have justified the restrictions ("Paroisse gréco-catholique Lupeni et autres c. Roumanie ", Decision of the Grand Chamber of the ECHR, 2016, paragraph 89; ECtHR Decision, 1991, paragraph 59; the case "De Geouffre de la Pradelle c. France ",

ECtHR Decision, 1992, paragraph 28), as otherwise the right would be violated in its substance (“Stanev c. Bulgaria ”, Decision of the Grand Chamber of the ECHR, 2012, paragraph 229; “Baka c. Hongrie ”, Decision of the Grand Chamber of the ECtHR, 2016, paragraph 120; “Naït-Liman c. Suisse ”, Decision of the Grand Chamber of the ECHR, 2018, paragraph 114; “Philis c. Greece (no. 1).

In any case these restrictions must pursue a legitimate aim. In any case, the right of access to court is violated in its substance while its legal regulation ceases to serve the purposes of legal security and good administration of justice and immediately creates legal barriers that prevent litigants from seeing that their case is considered meritoriously by the court (Zubac c. Croatie ”, Decision of the Grand Chamber of the ECHR, 2018).

The author considers that these requirements for the quality of the law restricting the right of access to court have not been complied with by the third paragraph of Article 154 / a of the Code of Civil Procedure in the part that provides for the discretion of the single civil judge for immediate non-final decision. It is therefore concluded that this way of legally regulating access to court has created obstacles for the plaintiff or applicant without the necessary constitutional and convention qualities and that the right of access to court has been incompatibly restricted.

iii) Violation of a reasonable trial time

It should be noted that the ECHR as well as the Constitutional Court in their consolidated jurisprudence have determined that the laws should outline the organization and functioning of the judiciary in such a way as to enable the fulfillment of the convention and constitutional obligation to conclude the trial in a reasonable term (H. c. France ”, ECtHR Decision 1989, paragraph 58; “Katte Klitsche de la Grange c. Italy ”, 1994, paragraph 61; “Comingersoll S.A. c. Portugal ”, Decision of the Grand Chamber of the ECHR, 2000, paragraph 24; “Paroisse gréco-catholique Lupeni et autres c. Romania ”, 2016, paragraph 142). In each case the duration of the process is assessed taking into account the circumstances of the concrete case (“Comingersoll S.A. c. Portugal ”, Grand Chamber, 2000; “Frydlender c. France ”, Decision of the Grand Chamber of the ECHR, 2000, paragraph 43; “Sürmeli c. Allemagne ”, Decision of the Grand Chamber of the ECHR, 2006, paragraph 128; “Paroisse gréco-catholique Lupeni et autres c. Roumanie”, Decision of the Grand Chamber of the ECHR, 2016, paragraph 143; “Nicolae Virgiliu Tănase c. Roumanie”, Decision of the Grand Chamber of the ECtHR, 2019, paragraph 209).

The author points out that in this case the delays in adjudicating the case are brought about by the very manner provided for in the third paragraph of Article 154 / a of the Code of Civil Procedure. The civil procedural law in all other

provisions as sister, including the general provisions on the validity of procedural acts from article 119 to article 124 of the Code, is regulated in such a way as to save the process and at the same time preserve the validity of the procedural acts and why flawed. This legal regulation derives directly from the legal philosophy of the constitutional and convention principle of concluding the trial within a reasonable time.

The purpose of legal regulation is that through conservation due to the law of validity of valid procedural acts is given the opportunity for the parties to validate them and the trial to achieve the constitutional goal for which it is intended, namely the resolution of the civil case. In procedural legislation, the third paragraph of Article 154 / a of the Code of Civil Procedure constitutes the unique case where the law itself prevents the validation of the procedural act, providing for the immediate decision-making of returning the lawsuit and the acts attached to them.

This way of legally anticipating the judge's discretion causes unjustified and unreasonable length and delay of the trial, as the deficiencies found by the court of first instance to rectify the lawsuit will need the plaintiff or claimant. to appeal the decision to the appellate court and this review court to overturn the decision and return the case for retrial with the task for the court with initial jurisdiction to enable the active litigant to validate the procedural act by correcting the deficiencies.

Given the discretionary nature of the civil procedural law, the possibility is not ruled out that the appellate court may apply Article 154 / a of the Code of Civil Procedure in the same way. In these cases, the party will have to exercise special recourse to the High Court to validate his procedural act and to finally have a meritorious trial, the reason for which he has exercised the right to sue or lawsuit.

When considering the procedural scenario that even the High Court can discreetly apply the third paragraph of Article 154 / a of the Code of Civil Procedure, then we easily assume that the plaintiff or plaintiff may have the right to sue or request and that the subjective right sought to be protected has been substantially violated precisely by the way Article 154 / a of the Code of Civil Procedure has regulated the manner of proceeding of the civil court on the shortcomings of the procedural act that initiates the process. In these conditions, the only possibility for the individual to explode from everything has gone wrong with all three levels of trial, due to the third paragraph of Article 154 / a of the Code of Civil Procedure, remains Article 131 letter "f" of the Constitution, specifically the individual constitutional complaint. This is unacceptable. Given the commitment that our Republic has made at the time of ratification of the ECHR and given the element of evaluation criteria of the behavior of state authorities in achieving the standard of reasonable time, considers that our Republic through the regulation of the third paragraph of Article 154 / a of the Code of Civil Procedure, in the part that recognizes the discretion of the only civil judge to dispose immediately

with an inconclusive decision, has violated the right to conclude the trial within a reasonable time and together with it is found again violated the right of the subject active litigation for due process. Consequently, this part of the provision must be abrogated by the Constitutional Court as incompatible with Articles 4, 17 and 42 of the Constitution and Article 6 of the ECHR.

iv) Violation of the principle of legal certainty

The law, in order to comply with the requirements required by the Conditions and the ECHR, must meet the requirement of predictors, as well as clarity. The Constitutional Court has determined that the principle of legal advocacy guarantees the predictability of the normative system (Decision no. 20 dated 20.04.2021 of the Constitutional Court.). The issuance of legal norms does not only serve the resolution of a possible conflict or the settlement of a previously unregulated situation.This process should create the impression among the subjects of law that the content of legal norms guarantees security and stability for the future. Legal certainty is also treated as a condition for the material validity of an act, guaranteeing the immutability in principle of normative acts, where attention is paid to the regulation of situations without substantial changes continuously, as otherwise we would put the subjects of law in position unpleasant and unfavorable to them (Decision no. 20 dated 20.04.2021 of the Constitutional Court.)

In its jurisprudence, the Court has stated that legal certainty itself, as an element of the rule of law, has as a necessary requirement that the law as a whole or its specific provisions in their content must be clear, defined and understandable (Decision no. 9, dated 26.02.2007 of the Constitutional Court). Understanding and applying the principle of legal certainty requires, on the one hand, that the law in a society provide security, clarity and continuity, so that individuals can direct their actions correctly and in accordance with it, and on the other hand, the law itself should not remain static if it is to shape a concept. An incorrect regulation of the legal norm, which leaves the way for the implementer to give it different meanings and which brings consequences, does not go in accordance with the purpose, stability, reliability and effectiveness of the norm itself (Decision no. 10, dated 26.02.2015; Decision no. 36, dated 15.10.2007 of the Constitutional Court.).

In the present case it is found that the third paragraph of Article 154 / a and Article 154 - 156 of the Code of Civil Procedure has no legal criteria expressed to clearly and distinctly separate the cases when the court proceeds immediately with a non-final decision and when the court proceeds with an intermediate decision for ascertaining the defects of the lawsuit. It is incomprehensible on what legal basis this discretionary power of the single civil judge is exercised and when the shortcomings of the lawsuit or are found to be such that the trial should cease and

on the other hand when the shortcomings of the procedural act are such which dictate the intermediate decision-making of ascertaining defects and leaving time for their correction.

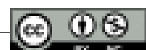
Not only active litigants are unclear about this arrangement but also their lawyers, legal advisers, representatives and the courts themselves as well. I consider that this way of regulation violates the constitutional and convention principle of legal certainty of the litigants active in the effective enjoyment of the right of access to court. They always remain vulnerable in these cases in the face of the exercise of the discretion of the single civil judge in the initial jurisdiction or further even before the civil courts with review jurisdiction, as the civil procedural law does not define any clear legal criteria when the lawsuit or the request made by them can be returned immediately and when it is found to be defective and will be given the opportunity to be corrected. I therefore conclude that the challenged part of the third paragraph of Article 154 / a of the Code of Civil Procedure should be repealed by the Constitutional Court because it contradicts the principle of legal certainty regarding the effective enjoyment of the right of access to court.

Conclusion

For all the reasons given above, the author considers that the Constitutional Court should repeal the third paragraph of Article 154 / a of the Code of Civil Procedure, in the part that provides "returns to the plaintiff at the time of its submission or", as this normative civil procedural regulation is in contradiction with Articles 4, 17, 42 of the Constitution and Article 6 of the ECHR.

However, even if the Constitutional Court does not repeal it, given all the above reasoned, courts with general jurisdiction should not apply this part of the legal regulation, as it violates the right of the plaintiff or requesting party to due process in the element of excess in court, the reasonable time limit of the trial and with them the principle of legal certainty.

In any case, the shortcomings of the lawsuit according to Articles 154 - 156 of the Code of Civil Procedure are correctable and that the immediate return of the lawsuit in these conditions is an unjustified, unfounded decision-making. If the lawsuit has procedural flaws of the invalidity type that is not validated, then the legal cause of immediate inconclusive decision-making in these cases will always be another cause than that provided in the third paragraph of Article 154 / a of the Code of Civil Procedure. Civil Procedure. In this way, the author considers that the case law has the opportunity to correct itself and over time this unconstitutional provision of the third paragraph of Article 154 / a of the Code of Civil Procedure, despite the fact that the appropriate constitutional and legal solution is that this part of does not exist as a legal provision in force.



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