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ACCESS TO AND EFFICIENT FUNCTIONING OF JUSTICE: EXCESSIVE LENGTH OF PROCEEDINGS

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INTRODUCTION

Being a fundamental right, the right to a fair trial and in particular the right to have a case examined in reasonable time is enshrined both in the Constitution (Article 50) of the Republic of Armenia (hereinafter RA), as well as international documents, such as the European Convention on Human Rights (hereinafter the Convention). The general understanding of the legal community and one of the basic principles upon which the justice system is built upon is the saying ***"Justice delayed is justice denied"***. Having regard to the importance of this right, particular attention is given to this right in every Procedure Code of RA. Nevertheless, the existing situation shows that the need for remedial and preventive mechanisms still persists. As a result of continuously unaddressed issues in Armenia, the European Court of Human Rights (hereinafter the European Court) has delivered 2 judgments in respect of Armenia, finding a violation of a person's right to have their case examined in reasonable time. In particular, on 5 April 2018, the European Court delivered the judgment of *Aganikyan v. Armenia* (application no. 21791/12), where it found a violation of Article 6 paragraph 1 of the Convention. The case concerned the excessive length of criminal proceedings in respect of the applicant, who was charged for five counts of offences stipulated in the Criminal Code of the Republic of Armenia. The overall period of the proceedings, including the pre-trial investigation, lasted from 30 December 2004 till 21 November 2011 and failed to meet the reasonable time requirement. The European Court noted that the pre-trial investigation and the appeal phases were concluded quite rapidly, but the District Court phase took about four and a half years. During the course of judicial proceeding the case was adjourned for 136 times.

On 31 January 2019 the European Court delivered a second judgment, *Fil LLC v. Armenia* (application no. 18526/13). This case concerned the excessive length of civil proceedings related to the applicant's compensation claim against a private company which failed to meet "reasonable time" requirement. The proceedings started in January 2008 and lasted nine years and two months over three levels of jurisdiction. The Court found that this delay was attributable to the domestic courts, which ordered five technical expert examinations over the course of nine

years that were necessary for the resolution of the case, but failed to ensure that four of those orders were implemented by the corresponding authorities. In both cases European Court found a violation of Article 6, i.e. right to a fair trial in regard to the "reasonable time" requirement.

Moreover, according to the Armenian public informative portal datalex.am, court hearings are scheduled for as late as November 2021.The existing situation of having judicial case proceedings that last for anywhere between 2-12 years in the Armenian judicial system has become so prominent, that it has even been brought to the Armenian Constitutional Court's attention by the Human Rights Defender in December 2019. Moreover, as a further testament to the existence of the issue, as of March 2020, there are several decisions of the Armenian Supreme Judicial Council subjecting judges to disciplinary liability for failing to take measures provided by law to prevent unnecessary delays of court proceedings.

In the light of all the above mentioned, it becomes vital to analyze efficiency of the existing legislation in terms of the protection of a person's right to have a case examined within reasonable time at a national level. In order to better determine the existing issues that result in excessive length of proceeding, the peculiarities of civil proceeding in contrast to criminal proceedings, and vice versa, also need to be closely examined. Moreover, while the RA Government is particularly attuned to the situation at the courts nowadays, there is still a pressing need to come up with both flexible preventive mechanisms, as well as sufficient remedies for the efficient functioning of the courts and justice in general.

To be able to best address the issue, it is vital to get to the root of the problem and to understand what exactly is considered "reasonable time". Furthermore, it is necessary to understand whether the Armenian law conforms to the European Court's case law requirements as to the reasonable length of proceedings. Finally, it should be determined how the legislation can be improved in this regard.

This paper will discuss the criteria that the RA legislation provides and their correspondence with the international standards that Armenia has committed to maintain. It will also cover the analysis of Armenian legal framework enshrining the fundamental right of a person to have their case examined in reasonable time. Parallels between Armenian legislation and commitments under the European Court's case-law will be drawn with a view to reveal the possible gaps of Armenian practice and legislation hindering proper implementation of this right.

Afterwards, the particularities of the reasonable time requirement of civil cases in comparison to criminal cases will be brought to light. As a result of in detail analysis of the issue, certain protection mechanisms available to the parties and recommendations in this regard based on the relevant research of the best international practice will be further elaborated.

CHAPTER 1: The "reasonable time" criterion in the European Court's case-law and Armenian legislation

Article 6 of the Convention prescribed that *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."* However, there is no definition of what exactly is "reasonable time" in the Convention itself. Instead, the term is further elaborated in the European Court's case-law. The Republic of Armenia, as a high contracting state, has undertaken the obligation to ensure the realization of a person's fundamental rights prescribed in the Convention in a domestic level.

The reasonableness of the time of judicial examination is, as a rule, determined based on the analysis of all the circumstances of the specific case. In other words, what may be considered as a judicial examination conducted in reasonable time for one case, may not be so for another case. The concept of "reasonable time", as every other evaluative concept, is dependent upon the unique facts and circumstances of every specific case.

The European Court delivered the basic criterion for the "reasonable time" requirement in a number of cases, which have then served as precedents for future judgments. More specifically, the European Court stated that *"the "reasonableness" of the length of proceedings must be assessed* ***in the light of the circumstances of the case*** *and with reference to the following criteria:* ***the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute****".*[1]

While this definition gives the initial roadmap for determining "reasonable time" as a legal concept, in order to better understand just what type of delay constitutes a breach of the "reasonable time requirement" under European Court case-law, however, the criteria mentioned above should be examined more closely.

[1] *Frydlender v. France,* 2000 ECHR 30979/96, §43.

I. Complexity of the Case

The complexity of the case has a myriad of aspects that are usually dependent on a number of factual and procedural factors. Thus, case-law indicates that factual complexity of a case may be due to different circumstances such as for example extensive materials of the case, a big number of victims and participants, participation of foreign citizens as key witnesses in criminal cases, problems with ensuring the presence of said witnesses during the hearings, necessity to conduct various expertise, the incapability of conducting said expertise due to the complexity or lack of corresponding experts[2], etc. On the other hand, the case may become complex due to legal issues as well, such as for example a change of legislation, the combination of different cases, the interpretation of international treaties.[3]

For instance, in case the *Matusik v. Poland* the European Court found no violation of Article 6 paragraph 1. The case concerned a mother's application for custody of her child. Even though such cases of child placement and parental rights require particular promptness from the relevant authorities, the complexity of this specific case was enough for the European Court to consider the overall length of more than three years not to be excessive.[4]

After close examination of the circumstances of a case and consequently recognizing a case as complex, the European Court allows that the proceedings may last longer than average, without breaching the requirement of "reasonable time". Nevertheless, by its case-law the European Court has established that even if the cases are recognized as complex, the excessive length of proceedings may be found to still be in breach of reasonable time.[5] The length of proceedings should therefore be assessed from the perspective of the timeliness of the conduct of the necessary procedural acts. It should be highlighted that the complexity of the case does not relieve the domestic courts of their obligation to undertake all the necessary and possible measures to avoid a period of inaction or unnecessary delays.

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[2] *Fil LLC v. Armenia,* 2019 ECHR 18526/13.

[3] *Beaumartin v. France,* 1994 ECHR 15287/89, §33.

[4] *Matusik v. Poland,* 2013 ECHR 3826/10, §38.

[5]

II. Conduct of the Parties to the Proceedings

Delays in court proceedings are more often than not caused by the actions of parties to those proceedings, especially in criminal cases. As such, to better analyze the consequences of the action of parties to the proceedings, it would be more effective to distinguish between the action of the applicant and the action of state authorities.

In the light of the European Court's approach the applicant's action is perhaps the only justification which may lead to a non-violation decision, even if the length of proceedings is excessive, with the condition that no inaction can be attributed to the domestic courts. In other words, take a situation where the domestic courts have undertaken all the measures under their disposal to prevent unnecessary delays. However, the applicant's certain actions, such as abuse of right to bring motions for example, may have still resulted in excessive length of proceedings. In such circumstances, the European Court might not find a violation of Article 6 paragraph 1. Such conduct may include but is not limited to

(i) systematic recourse to challenge of judges,[6]
(ii) excessive quantity and unreasonably grounded motions of postponing the proceedings,[7]
(iii) frequent change of representatives, etc.[8]

Accordingly, sometimes the delay of the judicial proceedings caused by the conduct of the applicants is considered the key factor of deducing that the reasonable time requirement was indeed maintained by the respondent state.

In the light of such circumstances, the determination of the applicant's bad faith is vital for the determination of the excessiveness of the length of proceedings. However, it should still be examined whether the domestic court have done their part in ensuring that no unnecessary delays have happened. The actions of the domestic court should also be examined closely, along with

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[6] *Eckle v. Germany* , 1982 ECHR 8130/78, §82.

[7] *Lazariu v. Romania,* 2014 ECHR 31973/03, §149.

[8] *Klamecki v. Poland,* 2002 ECHR 25415/94, §93.

the actions of the prosecutorial side or the actions of the relevant authorities in the pre-trial stages.

Turning to the conduct of the authorities, the actions of the courts and other authorities is perhaps the main criterion in determining the reasonableness of the length of proceedings. The European Court often highlights that the inactions and misconduct of the state, which caused delays, is the only base upon which it may be possible to find a violation to the reasonable time requirement.

According to the Convention, the state has a positive obligation to organize the judicial proceedings so that the courts may be able to meet each of the requirement of the provisions of Article 6 paragraph 1, including the obligation to hear and deliver final decisions on cases within reasonable time. Thus, while there can be various cases for the misconduct of the relevant authorities, such as the overload of the courts in general, it can never be considered as valid justification for such breaches of obligation.

Nevertheless, the European Court recognizes that certain circumstances are above the government's control and accordingly absolve the state from responsibility. Among such reasons are certain factors such as requests for international judicial assistance or the consequences of lawyers' strikes.

Moreover, certain actions of domestic courts, even if they result in delay of proceedings, are not always in breach of reasonable time. Among such action are decisions to join certain cases[9] or collecting evidence from other states[10].

III. What is at Stake for the Applicant

This particular criterion was first employed by the European Court to determine the reasonableness of the time of the proceedings in a civil case. After that, with the passage of time, the criterion was applied to criminal cases too. The European Court has no umbrella guide as to what the generally acceptable "stakes" for the applicant are. Thus, what is at stake should always be determined on a case by case basis. However, having regard to the general practice adopted by

[9] *Wejrup v. Denmark*, 2002 ECHR 49126/99.

[10] *Wloch v. Poland,* 2000 ECHR 27785/95, §149.

the European Court on this matter, these "special" cases generally include: employment disputes, compensation detainment proceedings, cases where the applicant's health or age is at the heart of the issue and thus should be taken account of, cases concerning the preservation of family life, cases concerning violation of absolute rights, etc.[11] A more detailed analysis of this criteria in regard to civil cases is provided in the second Chapter of the Paper.

Turning to the Armenian legislation, it should be mentioned that prior to the adoption of the new Judicial Code of RA in 2018, no such criteria were provided on a legislative level. This in itself left a lot of room for discretion for the domestic courts to determine just what exactly constituted as reasonable time in judicial proceedings.

With the aim to provide a consolidated and unified approach to this matter, on 7 February 2018, a **new Judicial Code of RA** was adopted, which brought clarification upon the issue of defining the "reasonable time" criterion. In contrast to the former Judicial Code of RA which merely stated that the case should be heard within a reasonable time, the new Judicial Code of RA clearly prescribes the criteria for assessing the reasonableness of the length of proceedings, which are as follows:

(i) the circumstances of the case, including its complexity, the conduct of the participants to the proceedings, as well as the consequences of the lengthy examination of the case for a participant to the proceedings;

(ii) the actions of the court for examining and resolving the case within the shortest time possible and their effectiveness;

(iii) cumulative length of the proceedings;

(iv) the average recommended duration for proceedings defined by the Supreme Judicial Council.[12]

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[11] European Commission for the Efficiency of Justice (CEPEJ), *"Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights"*, 3rd edition by Nicolas Regis (2018).

[12] Republic of Armenia Judicial Code No. HO-95-N, adopted on 7 February 2018, Art. 9.

Thus, the criteria set out in the new Judicial Code of RA are quite in line with the European Court's case-law indicated above. Moreover, according to the Venice Commission Opinion on the then draft Judicial Code of RA (hereinafter the Draft Code), it implements positive changes brought by the constitutional reform. Venice Commission stated that, legal mechanisms proposed by the Draft Code were, in general, compatible with the European standards and best practices; they enhanced the independence of judges and potentially might strengthen the public trust in the judiciary.[13]

Turning to the practical improvements of applying the "reasonable time" criteria in courts and in decision making stages, as a result of the legislative reforms of 2018, on 18 September 2019, the Court of Cassation of RA delivered a decision in which it gave a clear and unified approach as to the interpretation of the reasonable time criteria set out in the Judicial Code of RA. In particular, the Court of Cassation reinstated the internationally approved approach that "justice delayed is justice denied" and highlighted that the principle to have a case heard in reasonable time is a fundamental right of a person. The Court of Cassation stated that in addition to the complexity of the case and the conduct of the participants, regard to the overall length of the case should also be paid. In determining the reasonableness of the overall length of the case, the following should be considered:

(i) the total period of application of the judicial appeal procedure within that period,
(ii) time gaps caused by procedural actions requiring a lengthy period,
(iii) the ratio of the volume of investigation and the period to the volume and length of the overall investigation of remitted cases. The Court of Cassation has concluded that the provisions enshrining the right of a person to have their case heard in reasonable time and the criteria of its determination aim to protect a person from a lengthy period of uncertainty and to ensure the deliverance of justice without delays, thus ensuring the efficiency and trustworthiness of the judicial system in general. Such a well-grounded approach led the Court of Cassation to conclude that the proceedings

[13] Venice Com' Op. No. 893/ 2017 (October 9, 2017).

of that particular case at issue was conducted in breach of the reasonable time requirement.[14]

This decision of the Court of Cassation will hopefully prove to be a small but vastly significant reform all on its own, since now the domestic courts have a well-rounded example of practical application of the criteria provided by both domestic legislation, as well as European Court case-law.

In the light of the abovementioned, it should be noted that the European Court has considered the applicability of the other criterion of the "reasonable time" requirement, among which is the actions of the parties, as well as the courts. However, it becomes obvious that the actions of the court, i.e. appointment of hearings, request for reports, prompt questioning of witnesses, etc., and the general effectiveness of the judiciary is closely link to the workload placed on its shoulders. In this regard, the judicial system of RA is definitely under high pressure of both previously unresolved cases, as well as new ones, especially civil cases. In fact according to the 2019 Annual Report of the Supreme Judicial Council of RA, the statistics of the period of 2013-2018 speak for themselves. In particular, the annual average number of civil cases per judge in Yerevan were 632 cases in 2013, 1068 cases in 2014, 1425 cases in 2015, 1374 cases in 2016, 1308 cases in 2017 and 1290 cases in 2018. This only the average number of civil cases per one judge in Yerevan. There are 1628 current pending civil cases in Yerevan, the judicial proceedings of which are over two years. Moreover, the proceedings of some of these cases have even reached the 10 year mark. The cumulative number of cases pending examination of only 7 judges has reached 1123. Most of these cases will be appealed, thus prolonging the time of proceedings even more. It quickly becomes obvious that in circumstances of such workload, the judicial system is faced with a real risk of sacrificing quality due to unimaginable quantity. Thankfully, the Supreme Judicial Council of RA is aware of the issue and is seriously considering all measures available. It should be noted that the Judicial Code of RA prescribes that the Supreme Judicial Council shall determine the average time limits for judicial proceedings according to the specifics of the case, i.e. nature and complexity of the case, and shall exercise supervisory functions in regard to the courts.

[14] Republic of Armenia Court of Cassation, Decision No. ԵՄԴԴ/0016/01/14, adopted on 18 September 2019.

CHAPTER 2: Particularities of the Reasonable Time Requirement of Civil Cases

While the determination of the reasonable time requirement can appear pretty straightforward in the light of the criteria described in the previous chapter, civil cases may present a different challenge. Criminal cases usually require the investigative authorities to act as promptly as possible, with the aim to preserve the evidence or secure witness statements, etc., and the domestic courts to proceed with the examination as efficiently and quickly as possible to avoid leaving the parties in uncertainty. Civil cases, with the few exceptions of custodial cases, generally do not deal with urgent matters such as deprivation of liberty. Thus, this fact presents ample ground for overloaded domestic courts to adjourn hearings in civil cases with far more carelessness than they would express in criminal cases.

With this in mind, it is necessary to understand just how "reasonable time" should be calculated in civil cases. To do so, first we need to understand what should be considered the starting and ending points of civil proceedings.

As a general rule, the starting point of civil proceedings is considered to be the moment the application of a party is brought to the court. However, in certain occasions the European Court holds a few exceptions as to the starting point of the civil proceedings. Thus, in certain circumstances regarding the question of the beginning of the proceedings, the European Court notes that when under the national legislation an applicant has to exhaust a preliminary administrative procedure before having recourse to a court, the proceedings before the administrative body are to be included when calculating the length of the civil proceedings for the purposes of Article 6 of the Convention.[15]

In various other civil cases, the beginning point of the proceedings was considered to be any of the following moments:

[15] *Sierminski v. Poland*, 2014 ECHR 53339/09.

(i) the date of lodging an objection against the withdrawals of a license or authorisation to administrative bodies[16],

(ii) the date of lodging an objection to the authority that decided on expropriation of the lodger's property[17],

(iii) the date of preliminary application to social protection authorities.[18]

When in the course of criminal proceeding, civil proceedings are lodged, which are not examined during the criminal proceedings and thus are subject to the separate jurisdiction of civil court, the beginning of the proceedings is considered to be calculated from the date of lodging the claim to the civil court.

Turning to the ending point of the civil proceedings, as a general rule, civil proceedings are considered to have ended by the coming into force of the final decision resolving the dispute. However, in certain circumstances the European Court has found that the civil proceedings can end by a final decision in the enforcement proceedings[19].

As to the period between the start and the end points of the proceedings, in some cases, the enforcement stage may also be included into the overall civil proceedings. Such cases may include the lengthy objection of the respondents to comply with the final decision of a domestic court. However, this has never been applied by the European Court in regard to Armenia. In cases concerning Armenia, enforcement proceedings are usually regarded separately from judicial proceedings and are often regarded under the umbrella of the general right to a fair trial[20].

While all of the abovementioned helps us determine the starting and ending points of civil proceedings and helps us to narrow down the period where the "reasonable time" requirement is applicable, due to the nature of civil cases, specifically the lack of moral urgency in resolving

[16] *Konig v. Germany* , 1978 ECHR 6232/73), §98.

[17] *Erkner and Hofauer v. Austria,* 1987 ECHR 9616/81, §64.

[18] *Mocie v. France,* 2003 ECHR 46096/99, § 64.

[19] *Silva Pontes v. Portugal,* 1994 ECHR 14940/89, §33.

[20] *Dngikyan v. Armenia,* 2017 ECHR 66328/12.

them, the issue of delayed proceedings is especially prominent in civil case. This in turn creates at times an insurmountable backlog for the courts, who become overwhelmed with the issues still pending before them and thus create more delays. In such a vicious cycle of incompatible case to judge ration present in the RA judicial system, certain civil cases especially require timely examination and resolution.

Thus, with the application of the "what is at stake" criterion and its consequent evolution, a special category of cases, demanding timely and accelerated examination, was brought to light. Accordingly, the European Court has adopted a stricter approach regarding the application and maintenance of the "reasonable time" requirement in connection to these several types of specially classified cases.

First of this category are the cases regarding the redress for the harm to health, or cases where the parties, in view of age or health, risk not being able to witness the resolution of their cases. For example, in the case of *Pailot v. France* (application no. 32217/96), the applicant was infected with AIDs during a blood transfusion procedure in a local hospital, and the subsequent proceedings had lasted for over 5 years. The respondent governments had then concluded a friendly settlement agreement with the applicant, with the promise of monetary redress for sustained harm to health. However, the respondent state had not upheld their part of the agreement for over 2 years, as a result of which the applicant had brought a complaint. The European Court considered that what was at stake in the proceedings complained of was of crucial importance to the applicant in view of the disease from which he was suffering and, thus, could not consider the time taken in the present case as "reasonable". On another case, according to the factual circumstances of which the applicant had sustained grave injuries to his health as a result of ill-treatment from police officers, the European Court held that in such cases special diligence is required of the judicial authorities.[21]

Another category are cases regarding domestic disputes, especially when these concern children rights, revocation of parental rights or removal of children from existing home conditions. Thus, in the case of *Cunha Martins Da Silva Couto v. Portugal* the European Court reestablished that that child custody cases must be dealt with speedily, all the more so where the

[21] *Krastanov v. Bulgaria*, 2004 ECHR 50222/99.

passage of time may have irreversible consequences for the parent-child relationship. In the present case, the proceedings lasted two years and eleven months for one level of jurisdiction, because the Family Court of Portugal continuously requested social reports, thus stretching the time needed for a decision. This was enough for the European Court to conclude that the respondent state had failed to meet the reasonable time criteria.

The third category includes cases related to the civil standing of a person, recognizing them capable or incapable. In the case of *Laino v. Italy,* the applicant complained of the breach of the "reasonable time" criteria in the light of the fact that the divorce proceedings had lasted for more than 8 years, with the case remaining dormant for close to 3 years of the proceedings. The European Court concluded that the various periods of inactivity attributable to the state failed to satisfy the "reasonable time" requirement, and the domestic courts failed to act with the special diligence required by Article 6 § 1 of the Convention in such cases.

And the last category, requiring especial promptness from domestic courts, are the cases related to employment disputes and social benefits.

Returning to the current state in Armenia, having regard to the persistent nature of the problem in the judicial system of RA regarding the "reasonable time" requirement, the Human Rights Defender of RA has published an ad hoc report on the absence of restorative mechanisms for "reasonable time" requirement violations. According to the report, in the recent months the Human Rights Defender has received a vast number of applications concerning excessive length of proceedings. For example, in one of the applications, during the whole course of proceedings the court hearings were adjourned for more than 50 times. In another case, the dispute has been proceeding before the court for more than 8 years and there has still not been a final decision. In most of the cases, court hearings are being appointed with 2-3, or 3-6 month intervals in between. Based on such observations, in December 2019 the Human Rights Defender of RA has applied to the Constitutional Court of RA challenging that the RA Constitutional Law on the Judicial Code of the Republic of Armenia does not provide for a flexible mechanism to properly ensure the constitutional requirement for a judicial hearings within reasonable time in courts. According to the Human Rights Defender's position, the constitutional right to court hearing within a reasonable time is not fully ensured due to the existing legislative gap. This, in turn,

results in the unnecessary restriction of the right to an effective remedy, prescribed by Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

A similar issue has been raised in the Supreme Judicial Council of RA's 2019 Annual Report. In the Annual Report, detailed information about the current workload of all the courts, as well as the overall situation in the judicial system is provided. In light of thorough analysis of the RA practice, the Supreme Judicial Council of RA has underlined the importance of arranging and implementing effective mechanisms both for prevention, as well as redress in case of violations of reasonable length of proceedings.

CHAPTER 3: Preventive Mechanisms and Redress

In line with the above mentioned, it should be noted that while the domestic courts and relevant authorities should aim to maintain the "reasonable time" requirement to the best of their abilities, in some situations the breach of this requirement becomes inevitable. As seen by the European Court's case-law, Article 13 of the European Convention guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time. Moreover, the domestic courts and relevant authorities should be provided with the tools and mechanisms necessary for the prevention of such breaches or else all their individual efforts will be wasted. Furthermore, when the application of the aforementioned mechanisms and tools still does not prevent a breach of a person's right to have their case heard in reasonable time, a certain mechanism for redress or compensation may also be needed to prevent a possible violation of Article 6 of the Convention. In this context, it should be noted that the existing situation in Armenia is generally due to the workload delegated to the courts, which is of considerable weight. The Armenian Government, aware of the existing issues, has implemented a number of preventive and remedial mechanisms. Nevertheless, after close examination of such mechanisms it becomes obvious that while their existence on the legislative level is quite encouraged, the existing measures are hardly sufficient as preventive or remedial in the general theme of things.

I. Available Preventive and Redress Mechanisms

A turning point for the Armenian legislation in terms of preventive measures and redress mechanisms was the Constitutional amendments of 2015. Thus, for the first time constitutional protection was guaranteed for the right to compensation of damages inflicted through a non-legitimate action or inaction of state and local self-government bodies and officials by Article 62 of the Constitution of RA.

Following the constitutional reforms of 2015, key amendments were made to the chapter related to the judiciary for the purpose of vesting, by the Constitution, the judiciary with necessary and sufficient functional, institutional, material and social independence. Among other

innovations, the Supreme Judicial Council as an independent state body guaranteeing the independence of courts and judges was provided for by the amended Constitution, the composition, procedure for its formation and the powers thereof were defined, the requirements for judge candidates, the procedure for the election and appointment of judges, mechanisms for ensuring the independence of the judiciary were amended. More importantly, the constitutional amendments of 2015 resulted in the process of bringing the fundamental legal acts in conformity with the Constitution of RA, including the **adoption of the new Judicial Code of RA on 7 February 2018**. According to the Venice Commission Opinion on the then Draft Code of RA, it implements positive changes brought by the constitutional reform..

As stated in previous chapters, Venice Commission stated that, legal mechanisms proposed by the Draft Code of RA were, in general, compatible with the European standards and best practices; they enhanced the independence of judges and potentially might strengthen the public trust in the judiciary.[22]

Additionally, as already mention in Chapter 1, relevant amendments were made to the institute and established practice of determining the reasonableness of the length of proceedings by the adoption of the new Judicial Code of RA. More specifically, the Judicial Code of RA for the first time in Armenian legislation provided the criteria of the reasonable time requirement, which are to guide domestic courts during the examination of the cases. Moreover, the decision of the Cassation Court of RA described in Chapter 1 further provided the main guidelines which are to be followed by the domestic courts.

However, the new Judicial Code of RA did not stop at establishing the criteria. The current Judicial Code of RA gives a range of mechanisms and tools to oversee the overall efficient functioning of justice. In particular, the new Judicial Code of RA provides for criteria for the performance evaluation of a judge. In particular, according to the new Judicial Code of RA, criteria for evaluation of the effectiveness of a judge's work, *inter alia*, shall be:

(i) examination of cases and delivery of judicial acts within a reasonable time;

[22] Venice Com' Op. No. 893/ 2017 (October 9, 2017).

(ii) observance by a judge of time limits prescribed by law for the performance of individual procedural actions.

The aim of such provisions is to ensure that the judges follow the "reasonable time" requirement and to provide a possibility to lodge disciplinary proceedings against judges who fail to meet the performance standards laid out in the legislation. This will in turn result in judges keen on maintaining a high performance, while also clearing up the backlog of existing cases still pending before the courts.

To ensure proper implementation of the provisions on performance evaluation of a judge, the Action Plan of the Government of Armenia for 2019-2023 provides for the necessity to put in place performance evaluation tools.[23] In particular, it is envisaged to develop and introduce e-justice system which will provide electronic platform for court cases, digital communication between justice sector bodies and electronic monitoring tools for assessing the effectiveness of operation of justice sector bodies (police, investigation, courts, etc.).

Having regard to the previoud disbalance of case distribution between the courts of different districts, the new Judicial Code of RA further enhanced the existing mechanism of random distribution of cases in courts.[24] Thus, cases are distributed between the judges according to their existing backlog, meaning that if a certain judge has considerably more pending cases than the other judges of the same court, cases will be distributed in such a way to create an equal balance between all the judges.

In this context, it is of especial importance that the new Judicial Code of RA provides the opportunity that where a judge is in charge of a case of particular complexity, he or she may apply to the Supreme Judicial Council with a suggestion to temporarily remove his or her name from the distribution list or define a different percentage of cases to be distributed to him or her.[25]

Given the specific nature of the European Court judgment on the case of *Aganikyan v. Armenia*, i.e. that the violation found by the Court was the direct consequence of the lengthy

[23] Republic of Armenia Government Resolution N 650-L, adopted on 16 May 2019.

[24] Republic of Armenia Judicial Code, Chapter 9.

[25] Ibid. Article 42(2).

criminal proceedings at the judicial examination stage, it would be of interest to note the improvements proposed by the draft Criminal Procedure Code (hereinafter, the Draft). It would appear that the proposed amendments can have an accelerating effect and mitigate the potential risks of delays in proceedings.

In particular, the Draft specifies that if the examination of the charges in court requires an exceptionally long period of time, then the chairman of the court shall, based on a decision of the court, appoint a reserve judge from amongst the judges of the court, who shall be obliged to be present in the courtroom during the court examination. In case of the recusal or self-recusal of the judge examining the case, or termination of his/her powers, or the existence of other grounds precluding his/her participation in the proceedings, the reserve judge shall replace him/her and continue the proceedings. Therefore, this institute will serve as a ground for continuing the proceedings, where another judge takes over the examination of a case, instead of starting it anew, as it was in the *Aganikyan's* case. This will considerably decrease the length of the proceedings of a criminal case and will ensure the seamless continuation of the proceeding without any unnecessary delays.

Furthermore, the Draft provides for more comprehensive and foreseeable provisions regarding the postponing of court hearings. In particular, Article 285 of the draft Criminal Procedure Code prescribes an exhaustive list of situations when the court shall and may postpone court hearings.

In addition, a wider range of instruments for ensuring normal course of the proceedings are stipulated by the Draft. More specifically, it is proposed to enhance the mechanism of procedural sanctions by introducing new types of judicial sanctions. In particular, Article 141 of the Draft Criminal Procedure Code reads as follows:

"1. In case of contempt of Court or obstruction of the normal course of the proceedings by a Participant in the Proceedings or another person by means of abuse of their rights or malicious non-performance of their obligations, the Body Conducting the Criminal Proceedings shall have the right to impose a judicial sanction on such persons.

2. The following are the procedural sanctions:

1) Warning;

2) Limiting the exercise of the right;

3) Removal from the courtroom;

4) Coercive presentation before the Court;

5) A judicial fine;

6) Removal from the proceedings.

3. In case of abuse of rights, only the procedural sanction envisaged by sub-paragraph 2 of Paragraph 2 of this Article may be imposed.

4. The imposition of a procedural sanction must pursue the aim of ensuring the normal course of the proceedings. A sanction imposed on a person shall be proportionate with the nature and consequences of his conduct.

5. The imposition of a procedural sanction shall not hinder the imposition of other liability envisaged by law on the sanctioned person."

In other words, for example, the sanction of limiting the exercise of a right, will give the court a right to set time or quantity conditions on the exercise of certain rights by an appropriate decision, if such rights are regularly abused by a participant to the proceedings or a witness. This procedural sanction may be imposed only in case of regularly abusing the following rights:

(i) filing a petition;

(ii) expressing a recusal;

(iii) presenting evidence for annexing to the materials of the proceedings and for examining;

(iv) becoming familiar with the materials of the proceedings and copying out any information from them;

(v) making an opening statement, a closing speech, and a conclusive statement;

(vi) waiving a defender.

Another sanction proposed is removal from proceedings. In particular, an attorney or representative, as well as a prosecutor participating in the proceedings may be removed from those proceedings by a reasoned decision of the body conducting the criminal proceedings if:

(i) he/she has twice failed, without a valid excuse, to appear at the court session or at the performance of a procedural action, which is mandatory for him/her; or

(ii) after having had three procedural sanctions imposed on him/her in accordance with the procedure stipulated by the Draft, he/she continues the malicious failure to honor his/her obligations.

Guided by a number of recommendations and official documents[26], on 10 April 2018 the Prosecutor General of Armenian issued the order No 27, by which an obligatory rule of conduct was reinstated to exclude the prosecutor's absence from the court hearings without a valid excuse.

By the Prosecutor General's order No 32 of 11 April 2018 the heads of the corresponding divisions of the General Prosecutor's Office were, *inter alia*, tasked to find out the reasons for delays of criminal proceedings before the courts that lasted more than 4 months in the cases of not very grave and medium gravity crimes and more than 6 months in the cases of grave and particularly grave crimes. In case of violations, they shall report to the Deputy Prosecutor General. This is aimed, *inter alia*, at improving the efficiency and the quality of the prosecution in courts.

Additionally, the issues of ensuring proper participation of a prosecutor in the court proceedings, as well as the exclusion of prosecutor's absence without a valid reason from the court hearings and unjustified delays of court proceedings upon motions are constantly discussed during the Prosecutors' collegiums and in the course of operational discussions with the Deputy Prosecutors General.

[26] Resolution of the UN General Assembly as of 17 December 1979: A/RES/34/169 - Code of Conduct for Law Enforcement Officials and Recommendations R(2000)19 and R(94)12 of the Committee of Ministers to Member States

Compensatory Remedies

As a result of a number of amendments starting from 2014, compensation for non-pecuniary damage in case of a number of violations of fundamental rights and freedoms, including the right to a fair trial, is prescribed by the Civil Code of Armenia.

Additionally, although the existing legislation stipulates benchmark amounts for compensation of non-pecuniary damage sustained as a result of violation of one of the fundamental rights prescribed in the acrticel, domestic courts enjoy certain margin of appreciation. According to Article 1087.2 (5) of the Civil Code of RA the court shall determine the amount of compensation of non-pecuniary damage in accordance with the principle of reasonableness, equitableness and proportionality. According to Article 1087.2 (6), when determining the amount of non-pecuniary damage, the court shall consider the nature, degree and duration of physical or psychological suffering, the consequences of the damage caused, the presence of guilt at the time of causing the damage, personal features of the person who has suffered the non-pecuniary damage as well as other relevant circumstances. Article 1087.2 (3) further provides that non-pecuniary damage shall be subject to compensation regardless of the guilt of the official of the correspondent state authority at the time of causing the damage.

Lastly, according to Article 1087.2 (10) the state or the community that provided compensation are entitled to file a regressive action against the state or local self-government authority or the official of the state authority whose decision, action or inaction resulted in violation of a person's fundamental rights and freedoms, and thus, seek monetary compensation. The ground for this action is the presence of guilt. The preventive policy behind this provision is to increase the responsibility of competent state bodies, local self-government authorities and officials in passing decisions, taking actions or inactions concerning a person's fundamental rights and freedoms.

During the recent years of the new regulation being in force, and in particular Articles 162.1 and 1087.2 of the Civil Code of RA, these provisions have proven to be effective. This is

made evident by the following statistical data provided by the Judicial Department of RA regarding the claims for monetary compensation received as of December 2018.

As of December 2018, 39 claims have been filed with the general jurisdiction courts of the Republic of Armenia under Article 1087.2 of the Civil Code of RA, 32 of which have been considered admissible. 17 of those cases are currently under judicial review. These cases include appeal proceedings in the Court of Appeal and the Court of Cassation of RA. In 8 of these cases the claims in terms of non-pecuniary compensation have been partially granted, 3 cases have been discontinued and in 4 cases the claims have been rejected.

Turning to the amounts of compensation awarded in the 8 partially granted claims, 7 cases had been submitted for the violation of the right to liberty and security. In 5 cases the compensation awarded ranged from AMD 2.000.000 to AMD 3.000.000 and in 2 cases - from AMD 250.000 to AMD 500.000. 1 case concerned the damage suffered as a result of violation of the right to a fair trial and the sum awarded was AMD 500.000.

It should be highlighted that while determining these amounts, domestic courts made their assessments based on the circumstances of each case, in accordance with the principle of reasonableness, equitableness and proportionality and have taken the European Court's case-law into due consideration.

Moreover, as a specific example it should be noted that recently, Yerevan Court of General Jurisdiction found a violation of the right to a fair trial in the civil case No. ԵԱԴԴ/0008/02/14, as the proceedings failed to comply with the reasonable time requirement, and awarded the plaintiff AMD 500,000 in respect of non-pecuniary damage.

II. Suggested Preventive and Remedial Mechanisms

In terms of remedial mechanisms, the compensation of non-pecuniary damage is generally accepted by the European Court as a minimum requirement from a respondent state. However, Article 13 of the Convention implies effective remedies of prevention of violation, acknowledgment of violation, as well as redress. In its framework program, the European Commission for the Efficiency of Justice noted that the mechanisms which are limited to compensation are too weak and do not adequately incite the states to modify their operational

process, and provide compensation only *a posteriori* in the event of a proven violation instead of trying to find a solution for the problem of delays.

It should be stated that in Armenian practice, the only remedy in place of appealing against excessive length of proceedings is within the scope of the judicial proceeding of the merits of the case. Moreover, according to the provisions of the Criminal Procedure, Civil Procedure and Administrative Procedure Codes of RA, the otherwise sound decision on the merits of a case cannot be overturned due to judicial errors of technical nature (excessive length of proceedings). For example, in a materially not complex civil case the proceedings have taken over 3 years, after which the domestic court has delivered a final decision, which is manifestly reasonable and sound according to domestic law. However, one of the parties would like to apply to a court seeking to have it acknowledge that his/her right to have a case heard within reasonable time was violated. In the light of the present legislation, the party will have no other option than to appeal the final decision to a higher instance court, which will subsequently reject the appeal due to the previous decision being manifestly sound and lack on ground. This means that the fact of the violation of the "reasonable time" criteria will not be acknowledged and the party's right to a fair trial will be violated. This in itself is in line with European Court standards, as the European Court has previously established that appeals to a higher authority cannot be regarded as an effective remedy whereby the length of proceedings can be contested.[27] In fact, such a mechanism of contest presents the risk of delaying the length of the initial proceedings even longer, which is counterproductive. Thus, as a suggested mechanism, ***the contestation of length of proceedings can be separated from the on merits proceedings and taken out of the appellation system***.

Turning to preventive remedies and mechanisms, it would be prudent to examine the international practice in this regard. It is noteworthy that in the case of excessive length of proceeding the European Court considers acceleratory remedies as highly effective. There are a number of acceleratory remedies that may be considered to be implemented in Armenia.

As one such measure, Section 73 (2) the Australian General Administrative Procedure Act provides that *"If the decision is not served on the party within the 6 month time-limit,*

[27] *Hartman v. The Czech Republic*, 2003 ECHR 53341/99.

jurisdiction will be transferred to the competent superior authority upon the party's written request. ...This request has to be refused by the competent superior authority if the delay was not caused by preponderant fault of the authority." The European Court held that in most cases the transfer of jurisdiction to the superior authority could be considered an effective remedy to be used for preventing the alleged breach of a reasonable time requirement with respect to administrative proceedings[28].

As another example of acceleratory remedy, Article 37 (5) of the Law on Court of Montenegro prescribes that ***one of the parties may appeal to the president of the court with the demand to accelerate the proceedings.*** The president of the court then may demand a written report and/or explanation about the reasons for not concluding the proceedings within a reasonable time.

The Croatian domestic law prescribed that even before the conclusion and/or the exhaustion of other domestic remedies a party may ***bring an appeal to the Constitutional Court of Croatia regarding the excessive length of proceedings, if the domestic courts are not administrating justice in a reasonable time***. The Constitutional Court of Croatia then fixes a time limit for the proceedings of the case. Additionally, in the corresponding decision the Constitutional Court of Croatia decides on the amount of compensation to be awarded to the party for the violation of the party's constitutional right to have their case heard in reasonable time.

The international practice shows that such mechanisms and remedies are usually sufficient for effectively preventing any further violation of the reasonable time requirement and any of the abovementioned remedies and mechanisms can be implemented into the domestic law of RA. Moreover, the expansion of the number of judges and judicial servants would additionally contribute to clearing up the current backlog and workload of the judges. The latter will contribute to having less overworked judges, and consequently bring up their efficiency and also encourage the high legal quality of the judgments and decisions.

[28] *Egger v. Austria*, no. 74159/01, 9 October 2003

CONCLUSION

It is a priority of the state to ensure the proper protection of a person's fundamental rights, including the right to a fair trial, which in and of itself is one of the pillars of a democratic society. The reasonable time requirement is one of the most vital principles of justice, as justice delayed is justice denied. The right of a person to have their case heard in reasonable time is a constitutional, and thus a fundamental right. The Republic of Armenia has undertaken the obligation to ensure the fundamental rights of each and every person under its jurisdiction. Thus, the recent constitutional amendments and legislative reforms in the legal system of the Republic of Armenia have continuously aimed at addressing any issues that may challenge the efficient functioning of the judicial system and thus the delivery of justice. In the recent years, the Armenian Government has taken considerable steps to ensure the basic right of a fair trial in a more efficient and sophisticated manner. Moreover, certain institutional bodies of the Republic of Armenia, such as the Supreme Judicial Council of RA, the Human Rights Defender of RA, as well as several NGOs are constantly monitoring and recording the current situation and progress in this regard. The Annual Reports of the Supreme Judicial Council of RA ensure the transparency of the judicial system and along with the Ad Hoc Report of the Human Rights Defender on the current issues of maintaining the reasonable time criteria raise awareness on the issues that still persist in the judicial system. Moreover, the new Judicial Code of RA has prescribed the obligation of the Supreme Judicial Council to determine the landmark time limits for cases, based on their nature, complexity, etc.

Nevertheless, as evident from the statistical data provided above, as well as from the applications brought to the Human Right's Defender Office, the issue of excessive length of proceedings persists on all levels of judiciary, both in civil and criminal cases. Even though the Armenian legislation provides for compensatory remedies, in the current situation there is a real need for preventive mechanisms and other forms of redress as well. Thus, certain measures such as acceleratory remedies, illustrated above by the examples of the international practice, should be considered to be introduced to the domestic legislation.

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