

THE DISSOCIATION OF CIVIL ACTION INSTITUTION BETWEEN CIVIL LAW AND CIVIL PROCEDURE LAW IN REPUBLIC OF MOLDOVA

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ABSTRACT: *The civil action is, in principle, governed by the law of civil procedure as a way of formulation in the court the plaintiff's claims against defendant in the contentious proceedings. The civil law contains a set of rules which governing the forms of civil action, without claiming penetration of procedural elements of nature, often through this discontinuity being created the vague concepts about the mechanism to make use of such actions.*

On the other side, in some cases the person address in the court without focus of some form of civil action, or hesitates to make an appeal, believing erroneously that there isn't judicial way to protect his rights.

Through this study I intend to gather the material and procedural concept of civil action, thus there can be made a natural transition from one side to the other.

KEYWORDS: *civil action, plaintiff, defendant, material element, element of procedural.*

JEL CODE: *K 11, K 12, K 13, K 41*

The defining of civil action is exposed in all treaties of Civil Procedure and in essence it is about the most important legal means of protequire by judicial constraint of violated civil rights or of interests protected by the law, through which a subject of law (physical or juridical person) requires to judicial authority the recognition of existing subjective right or provision of a new legal situation or termination of the obstacles put in the exercise of his right to another person, or payment of compensation when the establishment and enforcement of an obligation is necessary to achieve the subjective right.¹ Some of Romanian authors² consider that civil action is one of elements of

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¹ Gruşcă I. Dicţionar de drept procesual civil. Chişinău, 2003, p. 10

² Ciobanu V.M. Tratat teoretic şi practic de procedură civilă, vol. I. Bucureşti, 1996. p. 247-303; Radu D. Acţiunea în procesul civil, iaşi 1974. p. 20 şi urm.; Deleanu I. Tratat de procedură civilă, vol I, Bucureşti 1995. p. 97-223 etc.

subjective civil law that allows the possibility to use coercive force of the state when the right or a legitimate interest wasn't respected or is challenged, so in this sense the emphasis are putted even from a civil perspective – of subjective right – that belonging to the entitled according to material rules to refer to court for protect their legal rights and interests, making the procedural element an accessory right, as is natural, or this right of action wouldn't exist if its legitimate rights weren't violated. The Republic of Moldova' legislator is more laconic in exposure and formulation a default definition for civil action in context and through the summons of the proceedings, as art. 166, paragraph 1 of the Code of Civil Procedure of the Republic of Moldova stipulates that "anyone who claims a right against another person or has an interest in finding or absence of a right must submit a request summons to the competent court".

In the speciality doctrine is remarked³ that both branches of the unit law, civil and civil procedural law condition each other, as the civil procedural law, as the special form of coercion, helps in the exploitation of violated subjective right, it (subjective right) didn't be found their protection in case of appeal or violation in material right, and the civil procedural law through civil action wouldn't have what to defend if there were no rules of subjective civil law. Also, we mention that the legal nature of the civil action must be detached from the "subjective right", even if they are closely related, these belonging to different branches of law: civil procedural law and respectively - civil law. The link between this two concepts, meaning between subjective civil rights and civil action, is the right of action which is a guarantee of subjective right.⁴

The relationship between subjective rights and the action making the action to borrow from nature and characteristics of the right inferred in the court, in other words the claimed right determines the character of the action and print it qualification.⁵ Here we find one of the most expressive link between the material and procedural nature of the civil action, through their classification criteria, mostly based on the material element (movable, immovable, real, personal, prescriptive, imprescriptive, etc.). Therefore we observe that the legal nature of the action is determined by the material element, following that it will be accepted, examined and eventually resolved by the court according to its employment in certain types.

The legal prerogative of the holder of the right to bring civil action in court is essentially supported by an judicial relation of material nature, often civil one, and it is, without doubt, the point of connection between this two branches of law. It is unimaginable a civil action that is not formulated based on material claims made against a person or to a circle more or less range of people. The doctrine of specialty makes a clear distinction between procedural and material acknowledge of civil action based on claims, being one of the obvious criteria of determination. On this basis we can draw a clear line between the material claims that the plaintiff submits to the defendant, as the expression of basic objective for which was addressing to court, and procedural claims submitted to the court, of which the essential – the admission to the civil action. Being the object of civil action that claims will be assessed only together without affecting the content of action, they are essentially inseparable.

Passed through the differences of the bottom, the procedural side is somewhat shaded of the material side as in fact as in law. The fact merits of the civil action do nothing

³ Ionașcu A. Drept civil. Partea generală. București, 1963. p. 42

⁴ Măgureanu Florea. Drept procesual civil român. Vol. I. București, 1997. p. 54

⁵ Constantinescu M. Raportul dintre acțiune și situația juridică proteguită, R.R.D. nr.9/1969, p. 38

than narrate the content of the juridical material report under which was developed the dispute which is the object of civil cause. The law merits of the action makes way alike and to the procedural side, as, along with material rules (civil) which governing that report, will invoke the procedural rules which entitled the plaintiff to addressing in court. The requirement of specification the rules what constitutes the basis of law is relative, being rather a result of common law, so is possible the situation is which the person who addressed in court doesn't know the modality of interpretation of the legal norms and can't find correct and appropriate the letter of the law or even to include erroneous legal norms.

The same opinion is shared by the doctrine of specialty⁶ which is talked about the deficient inapplicability of the requirement of insertion in the summons of the law circumstances for justifying the applicant's claims, arguing even, in compared aspect the regulations from the Civil Procedure Code of the Russian Federation which doesn't indicate the necessity of specifying of normative support on which the plaintiff's claim is based, but that requires reference to a right violated, whose protection is required.⁷

The issues relating to the obligation to indicate the basis of law are noteworthy in the context of the constitutional principle of free access to justice which could be endangered by the incidence of such obligation, the more so as the art. 5, paragraph. 2 of the Code of Civil Procedure of the Republic of Moldova stipulates that "to any person can't be refused the judicial defense on the basis of non-existence of the law, the imperfection, collision or obscurity of the law in force", which leads us to conclude that the legislator recognizes situations in which the legal basis may be excluded on the reason of non-existence, for example. On the other side, the Code of Civil Procedure of the Republic of Moldova stipulates express in art. 166, paragraph 2, letter. e) that the plaintiff must indicate in the summons, along with other elements, also "the facts and law circumstances on which he bases its claims". The provisions of art. 168 and 171 of the same source, make the way for the sanction of leaving case without the examination (will not comply with the summons) for reasons that is considered formal, namely for unspecification basis of the law. This bracket is not extended, in fact, a digression, but *per a contrario*, is just an indication *ad rem* in order to delineate the procedural elements of material civil action.

Another perspective on the meaning of cleavage of the legal nature of the civil action could be taken forward under the conditions of advancing and exercise of it in court. The exercise of civil action is free in the sense that the onset of action isn't compliant of guarantees or prior authorization,⁸ nobody can be held liable for formulation of unjustified claims, with except of consequences that they may incur. In order to provide the civil action pending, the person who resort to this procedural means for turning his right what was been ignored or violated he must submit to the following conditions:

- the assertion of subjective civil law that requires to be protected;
- the interest pursued by the initiation of action;
- the legal proceeding / party in a lawsuit;
- the standing / the capacity to pursue the proceedings.⁹

In the following we intend to analyze these conditions in terms of civil law and civil procedural law, so that we can define, but also combines the specific features of the civil action. We note that subjective civil law is in this context as a condition of exercise of the action, being in the same time the most detached civil condition. We say detached only

⁶ Cojuhari Alexandru. Drept procesual civil. Partea specială. Chișinău, 2009. p. 10

⁷ Комментарий к Гражданскому процессуальному кодексу Российской Федерации. Москва, 2008. p. 336

⁸ Ciobanu V.M. Drept procesual civil. Vol. I. București, 1986. p. 69

⁹ *Ibidem*, p. 69-70

for requirement that is necessary exclusive in civil aspect and concerns not only the existence of a claimed right in court, but also, a series of under conditions based that's to be able to trigger a civil procedure. These additional conditions refer to the legality, morality, legal recognition of the right, the exercise of it with good faith, and also, its actuality, in the sense of not affected the ways (conditions, tasks or appointments). In principle we refer to the nature and content of material right, that requires protection through the court and that exists outside of the procedural relations or of decisions which may be taken from jurisdiction body, only that is affected, challenged, restricted, violated or injured in another way by a person who hasn't the right and legal basis to affect the legal prerogative of the holder. Regarding to the possibility of legal protection of rights affected by the modalities, may be added some brackets in the form of exceptions, but we consider unnecessary and inappropriate a such trip, as the goal of research is directed in another direction.

The interest, considered by some authors as "the benefit of legal proceedings for turning of subjective civil right law that requires to be protected"¹⁰, is a condition that is extending so on the civil element (material) and as well as on the procedural. The material interests resulting from plaintiff claims to defendant and aims to target meeting which led the plaintiff to address to the court, such as for example damage, execution of an obligation, an amount of money collection etc.. and the procedural interest is that to have prevailed in all claims included in the summons.¹¹ We note that the other participants in the civil process have the material and/or procedural interest, but it can't be confused with the plaintiff's interest in owning civil action for and for who the interest should transpires in the moment of materialization of the right to action - at appeal of court on instituting civil proceedings.

The conditions for existing a plaintiff's interest is more than the evident taking into account the concept of civil procedure being under empire of the adversarial principle (in the contentious procedure, of course). The lack of material interest will determine the lack of the procedural interest also, which is an accessory form. The condition of interest isn't specified in legislation, but is inferred from the specific features of contentious civil procedure through various methods of ensure the involvement and contribute of plaintiff for finding the truth and namely by paying a fee of risk (imposed judicial costs), the striking out of summons in the case of unjustified absence of the plaintiff legal summoned in the trial, the application of procedural sanction in the case of intentional abuse of procedural rights etc.. The court will ensure in existence of a plaintiff's interest, and in the case of detection that it doesn't exist, the court will leave the case without examination or will reject the civil action.

In the doctrine of specialty is encountered the expression "judicial interest",¹² and is insisted on a difference between it and the interest protected by law (subjective right), which may be relevant as in the above exposures. This expression is convenient for crop the complex interest of the parts in the civil process (as a condition of civil action) from any other form of legal interest.

The doctrine of specialty requires the fulfillment of conditions for an authentic interest, namely

¹⁰ Stoenescu I, Zilberstein S. Drept procesual civil. Teoria generală. București, 1993. p. 297

¹¹ Треушников М.К. Гражданский процесс. Москва, 2003. p. 220

¹² Grușcă I. Op. Cit. p. 151-152

a) be born and current,¹³ which requires justification of violation of plaintiff's material right. The interest is born when the holder of violated right decides to defend it within justice, the moment which precedes, of course, the addressing to the court with a summons. This requirement is somewhat indispensable for civil action, being extremely difficult to imagine a situation in which action is based on an unborn interest. It should not be confused the interest situation and the situation of born right, which are different by definition, or a right (inclusive at action) which was born doesn't require as a consequence does not require the born of interest in acceptance of a civil action, just as interest may arise before the right of action, which however will not allow to subject to address with action to court. The actuality of interest can be attributed to the moment in which the subjective civil right of the person was violated and throughout the time in what it's holder doesn't losing the motivation to realize and protection the right.

b) be legitimate and moral; the requirement of legality is characteristic to all legal forms, and in the case of interest, we understand the compliance of plaintiff's interest with legal provisions, for not allowing situations in which within the action the person follows the some aims which are foreign of good-faith and spirit of the law passed by the principles of law and its various institutions. The plaintiff can't hide behind the legal way of interests contrary to the law, such as for example unfair competition, unjust enrichment, etc. The morality is a more subjective condition reported being to morality and honest practices often can be appreciated discretionary because there aren't some well defined criteria in the sense of morality. Could be considered immoral the hidden interest, vicious which while not encroaching to any legal norms, exceeds the acceptance of normality and morality, such as, for example an act of revenge, a betrayal continuity etc. Being so fragile, the condition of morality imposes more difficult and the mechanism of translation of it in practice is almost nonexistent.

c) be personally - for the benefit of those who resort to procedural form – and directly, meaning that a person can't defend the right of another person.¹⁴ This two conditions may be presented only together, because result one from other. The personal character refers to the person in the benefit of which action is based, and therefore we are not in presence of a violation if in the name and interest of it, acts a legal or conventional representative (on the attorney or mandate basis). On the other side the incidence of the condition of direct interest makes the relationship between the holder of action right and those against it action is formulated, or here should be formulate another requirement strictly linked to the material side of the civil action: the participation of the parts (plaintiff and defendant) to the legal material litigious report. So, as nobody isn't entitled to take place of plaintiff in contentious procedure, so that the defendant can't be another person than that who is required by the law to answer for violation or disregarding of the right, it is an issue that occurs within a relation of civil law and generates criteria of attracts to contractual or tort liability, if it is necessary. We note however, that the requirement which is referred at the direct character of the civil action, known the exception of oblique action,¹⁵ considering the legal prerogative of the creditor's to require in the court the execution of debtor's obligation to its debtor to the own creditor and their collective actions, such as for example in the case of protection the rights of an unlimited group of people or society, according to art. 7, paragraph. 2 of the Code of Civil Procedure. Both categories of

¹³ Stoenescu I, Zilberstein S. Op. cit. p. 299

¹⁴ Măgureanu Florea. Op. cit. p. 65

¹⁵ Badan-Melnic L. Referințe și dileme referitoare la natura juridică procesuală a acțiunii oblice în conformitate cu legislația Republicii Moldova. STUDIA UNIVERSITATIS nr. 3/43. Chișinău, 2011. p.

exceptions bears an intermediate or indirectly character, because is formulated by the person who wasn't a part at the material litigation report and hasn't a personal direct interest which will in court promote that action. These people will be guided by self-interest which, in oblique action is the creditworthiness its debtor, and in case of collective actions¹⁶ is deal about the people which tangentially or implicitly protect their legitimate interests.

The legal proceeding is governed by art.57 and 58 of the Code of Civil Procedure. The ability to use the civil procedural rights is recognized, according to law, in equally measure to all physical and juridical persons which have the right to addressing in court for protection of the rights, freedoms and their legitimate interests. Regardless of age, discernment, mental or physical condition, people have the ability of procedural use. The condition of procedural capacity should be provided for the purposes of the exercise of procedural rights. According to art.58 of the Code of Civil Procedure the ability to exercise in full, personal or through a representative the procedural rights and obligations in court, have the physical persons from the age of 18, as well as juridical persons, and in cases prescribed by the law, the juridical entities which haven't the juridical personality, but have their own governing authorities. Also, the procedural capacity have the minors who have reached age 16 and have been declared the full legal competence or got married, based on the paragraph 3 of the same article.

Of those exposed to this section is not detected any distinction between civil juridical capacity and legal proceedings, but the legislator filled with some capacity requirements specification namely: minors between 14 and 18 and adults with limited in legal competence will be introduced obligatory in binding in the proceedings, even if the procedural acts are made in their interests through legal representatives, in cases prescribed by law, in cases that arise from civil juridical relations, marriage, family, work and other legal relations, the minors defend personal in court their rights, freedoms and legitimate interests, and the court will decide on the necessity of introducing in process of the representative of minor. We observe an extension of the concept of capacity and that these statements couldn't be deduced *ex officio*, we consider that this condition is a trial one, and the conditions of capacity specified in the law are sufficient to delimit the circle of people who have procedural competence.

The standing implies the existence of an identity between the person of plaintiff and the person who is the holder of subjective rights in the juridical relation derived before the court (active standing) and between the defendant and the person bound by that juridical relation (passive standing).¹⁷ The dictionary of private law¹⁸ specified by standing the legal concept used to designate justification of physical or juridical person to participate in judicial activity. In this sense standing (*legitimatia ad causam*) is an essential condition for the exercise of civil action. It doesn't necessarily imply the existence of an identity between the plaintiff person and the person who holds the legal right to subjectively derived, and between individual defendant and the person required in report of substantial right, being sufficient just justification of the right and the obligation of a person to participate (as a part) in civil process. We see a dissension between this two views and strive to give the right to the last view, which doesn't be construed as an absolute liberty, but restricted to the legal argument that allows the person to be a part in that process, this sense being more

¹⁶ Ciobanu V.M. Tratat. Op. cit. p. 272

¹⁷ Ciobanu V.M. Drept procesual civil. Op. cit. p. 287

¹⁸ http://dictionardreptprivat.avocatpledant.ro/index.php?option=com_glossary&id=382

generous and can be applied in atypical civil actions, such as the oblique and paulian, where is obvious non-participation of the plaintiff at the material report.

The quality of standing isn't strictly procedural fairness, because the correctness of it choice, and the merits / motivation of the person to have specific standing depends directly of participation at the juridical report, in the base of which was born the subjective civil right and the accurate assessment can be made only by court, if in the meantime parts don't will amiably resolve the dispute or the plaintiff doesn't withdraw the civil action. We want to mention that in that in its initial version Code of Civil Procedure of the RM contains the notion plaintiff / defendant "respectively" and "unobserved", the regulations that allow the replacement of respectively part to the unobserved, in other word, the one that figures wrong in a civil lawsuit, at the discretion the applicant. The provisions in this sense were excluded for various reasons, it implies that in the case that one of the parts in process sets wrong in a certain standing, the court will reject the civil action.

The condition of standing is required also in aspect of determine the positions of the parts in process. The part which makes the claim will have the offensive position and this will be deducted for it certain possibilities and procedural rights, and the part against which the claims were will have a defensive position which gives some of the defenses modalities in the process. The establishing of this position is not definite. Usually the plaintiff has the offensive position and defendant defensive one, but the possibility of the defendant to formulate counter action could change the configuration. This however not will reverse the roles and not will change the standing of the parts in process, just as that doesn't give to defendant which formulates the counter action the rights on the plaintiff's action.

Speaking of standing we don't resume only about the plaintiff and defendant, but to all categories of people involved with interest in civil proceedings and which the law grants a legal status proceedings. The parts shall determine their standings depending of the level to which the civil cause is litigate (first instance, appeal or recourse).

The Civil Code of the Republic of Moldova and other acts that constitute sources of civil law refers directly or deductible directly to the following civil actions: the claim, deniers, owner, of the regression, oblique and paulian.

That being said, we generalize with conclusion title that the civil action can't be strict attributed to civil law or civil procedural law, because it is conditioned by the elements which belonging to both domains and will be exist only in two cumulative meanings: material and procedural. Still remains to distinguish these connotations in concrete legal situations and find with ability, intelligence and fairness the legal regulations that govern each juridical report regarding to the institution of civil action, and it (civil action) should be treated, as such not only at doctrine level, but especially in legal aspect.

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