

Some Aspects of the Right to a Fair Trial from the Perspective of the European Convention on Human Rights

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ABSTRACT: The European Convention through Article 6 establishes a fundamental principle for a democratic society and a rule of law. The right to a fair trial is applicable both in civil matters and in criminal matters, where the rights, freedoms and legitimate interests of the justiciable must be guaranteed. This right must be respected by all the judicial bodies, because by violating it or ignoring it, serious damages can be brought about the person's freedom, access to justice, equality of arms, the right not to incriminate s.a.m.d. Precisely for its importance, the right to a fair trial is considered as a pillar of support for the democratic state. In Romanian domestic law the right to a fair trial can be found in the Romanian Constitution art. 21 paragraph (3), the Code of civil procedure in art. 6, the Criminal Procedure Code art. 8, as well as in art. 6 of Law no 304/2004 on judicial organization. The right to a fair trial should not and cannot remain only at the theoretical level, but it must receive effective applicability in practice, otherwise it will remain an illusory right. But in order to be used in practice he must be well known and promoted at the same time, in order not to allow his violation.

KEYWORDS: democracy, equality of arms, free access to justice, fundamental principle, justiciable, rule of law, the right to a fair trial

Introduction

Article 6 of the European Convention on Human Rights on the right to a fair trial provides: (1) “Everyone has the right to a fair, public and reasonable trial of his case, by an independent and impartial court established by law, which will decide either on the violation of his rights and obligations with civil character, either on the merits of any criminal prosecution against him. The decision must be made publicly, but access to the meeting room can be forbidden to the press and the public for the entire duration of the trial or part of it in the interest of morality, public order or national security in a democratic society, then when the interests of the juveniles or the protection of the privacy of the parties to the proceedings challenge it or to the extent considered absolutely necessary by the court when, in particular circumstances, the publicity would be liable to prejudice the interests of justice”.

Paragraph (1) of art. 6 of the E.D.O. states that the right to a fair trial is applicable in civil and criminal matters, also devoting the guarantees offered by it. In verifying compliance with this right, the European Court of Human Rights has the task, through the provisions of the Convention to ascertain whether the procedure as a whole was a fair procedure.

The notion of “fair” has the meaning, according to *Dexonline*, something which is based on truth, justice and non-partisanship. In this sense the court hearing must have a public character, so that any person can attend a trial, whether he has an interest or is a foreigner of the trial. But the public character of the court hearings is not an absolute one, but it can be restricted only in certain exceptional situations, when the publicity of the trial would prejudice the interests of minors (e.g. victims of sexual offenses with minors; rape on a minor, etc.), when certain statements made before the court could undermine national security (e.g. terrorism), witness statements could harm the intimate life of a party in the trial (e.g. one of the spouses is unfaithful).

Also, the trial must be conducted within a reasonable time, in the sense that a trial should not drag on for too long, considering that in court proceedings the parties are summoned to appear before the judicial bodies and have give explanations regarding certain facts, circumstances etc.

These calls, if they are for long periods, become embarrassing and lead to the loss of citizens' trust in justice. The reasonable term must be appreciated in relation to the complexity of the cause, the behavior of the parties and of the competent authorities.

With respect to the content of art. 6 paragraph (1) of the Convention E.D.O. in Romanian civil procedural law, instead of “reasonable term”, the Romanian legislator used the phrase “optimal term”, this because there were different opinions regarding the meaning of the acceptance of “reasonable”. In one opinion (Roşu 2019, 13), it is considered that the Romanian legislator's choice to replace “reasonable” with “optimal” is justified by objective considerations that circumscribe both the rights and interests of all parties to the process, even if they are contradictory, but also the procedure, the actual circumstances of the case, the intrinsic as well as the extrinsic aspects, which can influence the duration of the civil process. Therefore, it is appreciated that the solution in a “optimal” term of the civil process does not necessarily mean “with celerity”, because, sometimes, celerity can be harmful to one party, even if favorable to the other from the perspective of the right to a fair trial, indifferently what procedural position he holds (active or passive), this being in close connection with the right to defense, with free access to justice etc.

In the criminal case, the legislator imposes the respect of the right to a fair trial, stating in art. 8 Code of Criminal Procedure: “The judicial bodies have the obligation to carry out the criminal and judicial prosecution with respect to the procedural guarantees and the rights of the parties and of the procedural subjects, so that the facts constituting offenses, no innocent person can be ascertained in time and completely not be criminally liable, and any person who has committed an offense shall be punished according to the law, within a reasonable time”. In criminal cases, in order to comply with the requirement provided by art. 6 para. 1 of the Convention, it will be followed as the initial moment the official formulation of a criminal prosecution against a person. The notion of “accusation” is an autonomous one, including the notification of the accusation of a person for committing an offense, and the opening of a preliminary investigation, arrest or other such facts.

The scope of art. 6 of the Convention

This right is applicable to complaints regarding the rights and obligations of a civil character or to criminal charges of any natural or legal person. The electoral litigation, the civil service litigation and the tax litigation are excepted. The constitutional dispute is included in the analysis of art. 6 of the Convention, insofar as it influences the solution in the litigation analyzed by the court of common law.

The judges of the Court analyze the criminal character for each act separately, without taking into account the qualification given by the national law. The criminal character of an act is determined according to the purpose and severity of the sanction. It includes in the sphere of criminal applications: all the criminal procedures of a state, some disciplinary procedures (e.g. deviations regarding the penitentiary discipline), certain administrative procedures (road contraventions or disturbance of public order and peace). Over time, the Court removed from the scope of art. 6 of the Convention: the expulsions and extraditions, the procedures regarding the electoral sanctions, the procedures regarding the dismissal of the president of a state as a result of the violation of the Constitution (Spătaru-Negură 2019, 148).

Guarantees the right to a fair trial

Article 6 of the Convention offers the following guarantees to all trial participants:

- 1) The right of access to a court or, more precisely the right to be effectively judged by an independent court vis-à-vis the executive and the parties, impartially, stability of law.
- 2) The right to settle the case within a reasonable time - the speed of the procedure (Spătaru-Negură 2019, 149-151).
- 3) The right to publicize the procedure.
- 4) The right to an internal appeal for exceeding the reasonable duration of the judicial procedure by accelerating the procedures and granting compensation.
- 5) Special guarantees for criminal proceedings according to article 6 paragraph 2 of the Convention:
 - a) the presumption of innocence, which is essential to ensure a fair trial.
 - b) the burden of proof lies with the prosecution, doubt taking advantage of the accused person.

- 6) Special guarantees for criminal cases according to article 6 paragraph 3 of the Convention:
- a) the right to be informed about the nature and cause of the accusation.
 - b) the right to have the time and the necessary means of defense.
 - c) the right to defend oneself, the right to free legal aid or the right to be represented by an elected lawyer.
 - d) the right to benefit from witnesses.
 - e) the right to an interpreter.

The obligation of some independent and impartial courts, is provided in art. 124 paragraph (3) of the Constitution, which provides that “the judges are independent and subject only to the law”, and one of the guarantees of this independence is their immovability, provided by art. 125 par. (1) of the Constitution (rule according to which judges can be moved by transfer, delegation, detachment or promotion only with their agreement - article 2 paragraph (2) of Law no 303/2004 regarding the status of judges and prosecutors). Also, in order to ensure impartiality of judges, the law establishes a series of incompatibilities and prohibitions.

Also, the contradictory nature of the procedures provided by the code of criminal procedure that specifies that the judgment is made before the court in the adversarial, being immediately forced to question the requests of the prosecutor, the parties or other procedural subjects and the exceptions raised by them or *ex officio* (Micu, Slăvoiu, Păun 2017, 13).

The right to a fair trial also includes the possibility that the parties and procedural subjects may defend themselves or be assisted by a lawyer. Therefore the defense can be realized either personally or with the help of a person specialized in the field of law. In some situations, the law establishes the obligation of legal assistance from the lawyer, starting from the premise of the impossibility of the party or of the main procedural subject to provide a single defense efficiency (for example, when the defendant is a minor or is arrested, even in another case or the injured person or the civilian party lacks exercise capacity or limited exercise capacity).

The parties, the procedural subjects and the lawyer have the right to benefit from the time and facilities necessary to prepare the defense. This right includes the right of the defendant to consult the file in accordance with the law. But the consultation of the file can be restricted during the criminal prosecution by the prosecutor, but only if this would affect a good progress of the criminal prosecution, and after starting the criminal action, only for a period of maximum 10 days.

Also, in order to prepare the defense, the defendant's lawyer has the right to become acquainted with the whole material of the criminal prosecution file in the proceedings carried out before the judge of rights and freedoms regarding the private or restrictive measures of rights, to which the lawyer participates.

Conclusions

The knowledge of human rights and freedoms is essential for the progress of democratic states, because only by respecting these rights will the arbitrariness of decisions be avoided and more than that, the confidence of the citizens of a state in public institutions and authorities will be even greater. Knowing our rights we will be able to protect them and demand their respect, but at the same time we have the obligation to respect the rights of others. These rights are of particular importance to each of us. If we go back in time we will find that these rights we enjoy today, for our forebears were some ideals for which they fought, even at the cost of life. Therefore it is our responsibility to defend these rights and to promote them through education in this regard. The more effective the promotion of human rights, the fewer violations of these rights. The right to a fair trial can also be viewed from a subjective point of view, in the sense that its owner can ask the authorities involved to adopt a certain conduct under the sanction provided by law. The provision of this right in the E.D.O Convention and then the introduction into the fundamental law is a first guarantee of its respect.

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