

THE RIGHT TO A FAIR TRIAL. FREE ACCESS TO JUSTICE

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Summary:

The right to a fair trial is a fundamental principle of civil process provided for by the code of civil procedure governed by the provisions of Article 6 so that everyone has the right to the judgment of the case in its fair, within optimal and predictable, by an independent and unbiased judgment and established by law. To this end, the instance is obligated to provide for all measures are permitted by law and to ensure that the trial.

The right to a fair trial has several components, namely:

- Free access to justice;*
- examining the case in the fair and public hearing within a reasonable period of time;*
- examining the case by a court independent, unbiased as established by law;*
- the advertising of the pronouncement of judgments.*

The right to a fair trial enshrined in Article 6 of the Code of civil procedure shall establish and certain guarantees conferred on consumers in order for there to be a fair trial and so provided for the right of every person in the judgment of the case in its fair, within optimal and predictable, by an independent and unbiased judgment and established by law.

Free access to justice is a right that belongs to any person the right to address the justice for the defense of the rights and freedoms and the interests of his legitimate, while ensuring that the exercise of this right may not be restricted by any law.

Key words: *fair trial, within reasonable time, free access to justice.*

State functions can be understood as groups of public documents. Duguit Leon said that neither Montesquieu, when he spoke about the separation of powers simply did not understand anything but the separation of functions in the state, unlike Rousseau, who predicted separation of state powers (Leon Duguit, 1911).

The tripartite theory of state functions. Leon Duguit makes a division of state functions as the intrinsic nature of the acts that are performed by public authorities, covering public services. It is a material classification of state functions departing from the legal nature of the acts and the object function (Erast Tarangul Diti, 1944).

The legislative function is characterized by the fact that it aims to establish rules of social conduct, general and impersonal, binding and subject to sanctions if it were to be violated through the coercive force of the state. These rules are general and impersonal in the sense that although called upon to apply to individuals, they are formulated in the abstract, meaning they either concern all persons in a society or a category or more categories of persons defined by certain common features .

The executive function or administrative, as it is called by some authors (Erast Tarangul Diti, 1944) is to organize the implementation and application specific laws, ensuring the proper functioning of public services created for this purpose and issue normative acts and individual acts performing the physical operations through which, under the law, it intervenes in the lives of individuals to direct their activity or exercise certain benefits (Drăganu □, 1998).

The judicial function, is to resolve a legal dispute or finding with res judicata, of a report disputed or disputable.

Justice enforcement is a fundamental function of the state and its administration is one of the essential attributes of the sovereign power. This function involves state

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structures able to perform judicial activity. These structures must be organized on the basis of its own principles, functional and autonomous.

These principles mention: access to justice, judicial independence, security of tenure, equal justice and gratuity justice in all of them closely related to justice and to guarantee the right of citizens to a fair trial.

The right to a fair trial has a special place among the fundamental rights in a democratic society whose level should be inherent in any system of law.

In reality, the right to a fair trial does not have a single dimension, but reflects a complex law with a series of exigencies that the domestic legislator but also those who are called to enforce the law, including the addressees must comply with.

Given that the right in question applies not only under national rules but also of supranational covered by the European Convention on Human Rights, it is important to determine the meaning of the European Court of Human Rights scope of the principle of the right to a fair trial.

The right to a fair trial set out in article 6 paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms¹.

However, the Constitution stipulates in art. 21 para. (3) that the parties have the right to a fair trial and to resolve cases within a reasonable time.

The right to a fair trial is a fundamental principle of civil proceedings prescribed by Code of Civil Procedure governed by Article 6 so that everyone is entitled to a fair hearing of his case within optimal and predictable by an independent court, impartial and established by law. To this end, the court is obliged to order all measures permitted by law and shall ensure the prompt judgment.

The fairness of the criminal trial and the reasonable time provided for by article 8 of the Code of Criminal Procedure, thus judicial bodies have an obligation to prosecute and judge with respect to procedural guarantees and rights of the parties and the procedure subject, so there are detected on time and in full the facts constituting the offense, no innocent person may be prosecuted, and anyone who committed a crime would be punished according to law in a reasonable time.

According to article 11 of the Constitution, the Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a part of.

Treaties ratified by Parliament are part of national law.

The constitutional text applies a number of principles on the trust between states and the relationship between international law and national law to incorporate those rules pertaining to international law into national law. Integration which is achieved through ratification of international instruments by the Romanian Parliament and conferring these rules a mandatory character in Romania including specific regulations regarding human rights.

In this respect Article 20 of the Constitution states that rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party.

Where inconsistencies exist between the covenants and treaties on fundamental human rights to which Romania is a party and internal laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions.

According to article 3 of the Civil Procedure Code, the provisions on rights and freedoms shall be interpreted and applied in accordance with the Constitution, Universal

¹ Law no.30 / 1994 on ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms and additional protocols to the Convention, published in M.Of.nr.135 / 31.05.1994.

Declaration of Human Rights, with the covenants and other treaties to which Romania is a part of.

If any inconsistencies exist between the covenants and treaties on fundamental human rights to which Romania is a party, and this Code, international regulations shall prevail, unless the present code contains more favorable provisions.

The Convention for the Protection of Human Rights and Fundamental Freedoms and of additional protocols to this convention through ratification have become part of domestic law and is applicable by priority. Being an integral part of domestic law, these rules shall apply with priority are mandatory, are sources of law and applied by the Romanian courts and their decisions shall be controlled by C.E.D.O.

According to article 4 of the Civil Procedure Code, the mandatory rules of the European Union Law apply as a priority, regardless of the quality or status of the parties.

Under Art. 124 par. (2) and (3) of the Constitution provides that justice shall be one, impartial, and equal for all, and that judges are independent and subject only to the law. Also in art. 126 par. (2) shows that justice is done by High Court of Cassation and Justice and other courts established by law.

The right to a fair trial constitutes an element of the rule of law in a democratic society, not being enough that the law should recognize persons with substantial rights to the extent that they are not accompanied by fundamental safeguards of procedural issues, such as putting them in value (Boroi G, Spineanu-Matei O. 2013) .

This right is enshrined in article 6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 point 1, provides for the right of everyone to a fair trial, "Everyone has the right to have his case examined in a fair and public hearing within a reasonable term by an independent and impartial tribunal established by law, the determination of rights and obligations of a civil nature, or on the merits of any criminal charge against him. Judgment shall be pronounced publicly but the meeting room may be forbidden for the press and the public throughout the process or a part thereof, in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly required by the court when, due to special circumstances where publicity would prejudice the interests of justice ".

According to article 10 of the Universal Declaration of Human Rights¹ it is established the right to a fair trial according to which "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations or on the merits of any criminal charge against him ", and article 30 of the Declaration states that" nothing in this legislation can not be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of rights and freedoms set forth therein ", and article 14 paragraph 1 of the international Covenant on civil and political rights².

¹ Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948. Adopted and proclaimed by General Assembly resolution 217 O.N.U A (III) of 10 December 1948. Romania signed the Declaration on 14 December 1955, when the R 955 (X) of the UN General Assembly, was admitted amongst Member States.

² International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966 and entered into force on 23 March 1976 was ratified by Romania by the Decree no.212 / 10.31.1974, published in the Official Bulletin 146 / 11.20.1974.

All are equal before the courts and courts of justice. Everyone has the right to dispute which is to be examined fairly and publicly by a tribunal competent, independent and impartial body established by law, to decide either on the merits of any criminal charges against them or the appeals rights and his civil obligations. Hearing public may be excluded from all or part of its development, in the interest of morals,

Analyzing the text of the Convention shows that the right to a fair trial has several components, namely:

- Access to justice;
- examination of the case fairly, publicly and within a reasonable time;
- Examination of the case by a court that is independent, impartial, established by law;

- publicly pronouncement of judgments.

The right to a fair trial enshrined in art. 6 of the Code of Civil Procedure establishes certain guarantees conferred on individuals for there to be a fair trial and so provide the right of everyone to resolving his case fairly and within optimal and predictable time by a court that is independent, impartial and determined by law.

Free access to justice.

The right to a fair trial can not be conceived without the right of a person to go to court to hear the case vested.

Free access to justice requires access to the procedural means by which justice is carried out.

Access to justice is regulated by article 21 of the Constitution which provides that any person may apply to the courts for protection of rights, freedoms and legitimate interests. No law may restrict the exercise of this right.

Access to justice is a right that belongs to every person to go to court to protect the rights, freedoms and legitimate interests, ensuring that the exercise of this right can not be restricted by any law.

The right to go to court is provided and article 8 of the Universal Declaration of Human Rights that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights recognized by the constitution or by law.

Thus, under Article 6 of Law no.304 / 2004, any person may apply to the courts for protection of rights, freedoms and legitimate interests in the exercise of his right to a fair trial.

And according to article 6 paragraph 2 of Law no.304 / 2004, access to justice can not be restricted¹.

Furthermore these acts Code of Civil Procedure expressly stipulates in article 5 that judges have the duty to receive and resolve any request for jurisdiction of the courts according to the law.

No judge can refuse to judge on the grounds that the law does not provide, is unclear or incomplete.

If a cause can not be solved neither by law nor the custom, in the absence of the latter, or under legal provisions regarding similar situations, it will be judged on the basis of general principles of law, given all its circumstances and taking into account the requirements of fairness.

It is forbidden for the judge to lay down provisions generally binding by the decisions they delivered in the cases which are submitted to judgment.

According to art.192 of the Code of Civil Procedure, to defend its legitimate rights and interests, any person may inform the competent court of justice by an application for

public order or national security in a democratic society or when the interests of the private lives of the parties so requires, be to the extent that the court would regard this as absolutely necessary due to special circumstances where publicity would prejudice the interests of justice; however, delivery of any civil or criminal judgments will be made public except where the interest of juveniles requires you otherwise, or when the process concern matrimonial disputes or the guardianship of children.

¹ Law no.304 / 2004 on judicial organization, republished in M.Of.nr.827 / 13.09.2005.

summons. In cases specifically provided by law, court referral can be made by other persons or bodies. The process begins by filing the application with the court

According to Article 148 of the Civil Procedure Code, "any request to the courts must be made in writing ...", but thanks to modern means of communication and the law states "The request shall include, where appropriate, and address electronic or coordinates that have been indicated for this purpose by the parties, such as telephone number, fax number or the like" (Bîrsan C, 2010).

The judge is obliged to receive requests, regardless of the manner in which they were sent to the court during the hearing so alin.14 of article 104 and 15 of the Rules of Procedure provides that applications or documents filed during the hearing of judgment shall be dated, endorsed and signed by the presiding judge.

During the hearing clerk shall record in the tender Notes: file number, its position on the list of hearing oral argument during the hearing, submission of applications and documents, measures ordered by the court, and all other aspects of the trials and Article 99 of Law let.e no.303 / 2004 stipulates that it is misbehavior, unjustified refusal to accept applications, conclusions, pleadings or documents filed by the parties in the trial.

According to this right of access to justice, the Civil Procedure Code has several legal provisions of which include: the application of summons (194) meet (205) counterclaim (art.209), demand call (art.470), appeal (art.486), the appeal for annulment (art.503-508), revision (art.509-513), appeal to execution (711-719), etc ..

Likewise mention the provisions of the Code of Criminal Procedure: prior complaint (art.295-298) complaint against measures and decisions of prosecution (art.336-340) resolve the complaint by the judge for preliminary chamber (art.341 par.6 c) and paragraph 7, letter d), the appeal against the preliminary chamber judge's conclusion (art.347), call (art.412), appeals (art.425), the appeal for annulment (art.426 -432), an appeal in cassation (433-451), revision (art.452).

These procedural paths, provides stakeholders access to a court, to which the law has established jurisdiction to rule in civil or criminal.

Convention for the Protection of Human Rights and Fundamental Freedoms does not provide concrete legal means to ensure the right of access to justice but leaves Member States which have ratified this Convention, regulating these legal means.

The right of access to justice is governed by national law but it is not an absolute right to be compatible with the limitations prescribed by law but only insofar as they do not affect the actual substance of law. Right of access to justice means ensuring access of any person to a tribunal established by law and thus ensure that legal proceedings can be carried entitlement.

According to article 2 paragraph 2 of Law no.304 / 2004, justice is achieved through the following courts: High Court of Cassation and Justice; Courts of Appeal; courts; specialized courts; military courts; judges, but this does not mean that the right of access to justice gives the opportunity to address all of these instances a particular question or that benefit all appeals against the judgment. Thus, according to art.465 of the Code of Civil Procedure governing decisions are subject to appeal and art.483, which are the decisions subject to appeal. Also in this respect article 94 point 1 letter j mention provisions) of the Civil Procedure Code on the substantive jurisdiction on the criterion of value when court judge any other requests monetised value of up to 200,000 lei inclusively, regardless of quality parties, directly or indirectly through, and applications valued in money over this amount, the tribunal jurisdiction to hear it.

In this sense we mention decision no.1 / 1994 of the Constitutional Court finding that the legislature may set in consideration of special circumstances, special rules of procedure, as the manner of exercise of procedural rights, the principle of free access to

justice assuming possibility Unlimited those interested in using these procedures, the forms and arrangements put in place by law.

Free access to judicial structures, and procedural means, including appeal, is done in observance rules of jurisdiction and procedure of courts established by law.

Free access to justice shall be made only in respect of equality of citizens before the law and public authorities so that any exclusion would mean violation of equal legal treatment is unconstitutional¹.

It is, moreover, a solution resulting categorically, from the provisions of Article 126 para. (2) of the Constitution, according to which "the competence of courts and court procedure are provided only to law" and Art. 129 under which "judgments, the parties concerned and the Public Ministry may exercise remedies under the law".

Consequently, the legislator may establish, by reason of special circumstances, special rules of procedure, as the manner of exercise of procedural rights, the principle of free access to justice assuming Unrestricted opportunity to those interested to use these procedures in the forms and arrangements put in place by law. Therefore, the rule art. 21 para. (2) of the Constitution that no law may restrict access to justice is significant that the legislature can not exclude the exercise of procedural rights that it has established any class or social group.

In practice of national courts, the parties often cited as affecting access to justice, the lack of free civil trial law by the obligation imposed on the parties to pay a judicial stamp duty and failure to provide free legal assistance.

Regarding legal assistance hardened 71 of Law No.51 / 1995 on the organization and the legal profession, which provides that, in cases provided by law, the Bar provides legal assistance in the following forms:

a) in criminal cases, the defense is mandatory under the provisions of the Criminal Procedure Code;

b) in any other cases than criminal, as a way to grant legal aid under the law;

c) Legal Assistance attorney granted at the request of local government bodies.

In exceptional cases, if the rights of the indigent would be prejudiced by delay Bar Association may approve granting free legal assistance specialist.

And Article 72 provides that where, according to GEO no.51 / 2008 on legal aid in civil matters, was nodded legal aid application form of assistance by a lawyer, the request along with concluding declaration must be sent once the bar Association in that district courts.

The Dean's Bar or lawyer of whom the dean has delegated this authority shall appoint, within three days, a lawyer registered in the register of legal aid, which shall forward with the notice of designation, concluding declaration. Bar Association has an obligation to communicate to the beneficiary designated legal aid attorney's name. Legal aid beneficiary may request designation of a particular lawyer himself, with his consent under the law.

Regarding payment of court fees, we consider that there is a restriction on actual right of access to justice because changing the legal framework for the conduct of civil proceedings by adopting the Code of Civil Procedure and the implementation of new institutions adopted by civil code, it was necessary to be changed and the regulatory framework regarding judicial stamp duties. Because the charging system to reflect the new structure and dynamics of the civil trial, new procedural guarantees afforded to parties to ensure a fair trial, as well as additional costs for infrastructure development and for providing logistics required to implement the new legal provisions, taking into account,

¹ Decision No. 1/1994 of the Constitutional Court Plenum, published in M.Of.nr.69.16.03.1994.

thus the need to ensure, on the one hand, a proper balance between budgetary efforts of providing a public service quality and duty of the citizen who uses this service to help support costs, and, on the other hand, transparency application rules involving a clear record of all operations involved in the tolling system¹.

Judicial stamp duties are payable by all natural and legal persons and represent payment for services rendered by the courts and the Ministry of Justice and Prosecutor's Office High Court of Cassation and Justice.

In cases specifically provided by law, the actions and claims brought before the courts and requests to the Ministry of Justice and the Prosecution Office attached to High Court of Cassation and Justice are exempt from court fees.

According to article 42 of GEO no.80 / 2013, individuals may qualify for exemptions, reductions, rescheduling or delays to pay court fees, according to the GEO no.51 / 2008 on legal aid in civil matters².

The court grants legal persons, upon request, in the form of discounts, facilities, rescheduling or delays to pay court fees payable for actions and applications made to the courts.

Payment of court fees does not hinder the principle of free justice and access to justice because "the losing process will be required, at the request of the winning party, to pay its costs" Costs are regulated in art.451 -455 of the Code of civil procedure.

Compared to the national provisions laid , the lack of gratuitousness of the civil trial could not be successfully relied on as a violation of free access to justice within the meaning of Article 6 paragraph 1 of the Convention.

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¹ GEO no.80 / 2013 on judicial stamp duties, published in M.Of.nr.392 / 06.29.2013, amended by Law no.138 / 2014 published in M.Of.nr.753 / 16.10.2014.

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