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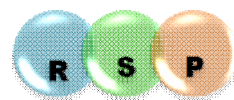

ORIGINAL PAPER

Jurisprudence Regarding Free Access to Justice in the Democratic Society

Mihaela Cătălina Scafeş (Opran)[1]

Abstract:
Starting from the purpose of establishing justice within the state constructions, the concept of free access to justice must be understood as a right attributed to the person. Continuing the reasoning, the law is a fundamental one, because it arises from the need to protect the essence of the legal character of the person. First, the European Convention on Human Rights, as well as other international instruments of protection, either earlier or later, recognized this right as requiring greater protection, especially in relation to material rights. Therefore, art. 6 paragraph 1 of the Convention refers to the right of the person to the trial of his case, which implies the possibility to bring his claims before a court. As a result of this, most European constitutions and national laws guarantee a person's right of free access to justice. Second, the international and national courts have been called upon to protect an individual's right of free access to justice both in civil and in criminal proceedings.
The national and international jurisprudence is the instrument through which the additional framework of protection of the right of free access to justice is created, being situations in which the pronounced decisions rule on new interpretations in relation to this fundamental right.

Keywords: *free access to justice; ECHR; jurisprudence; fundamental right; fair trial.*

[1] Ph.D., Faculty of Law of the University of Craiova and Postdoctoral researcher at the University of Craiova; Lawyer, part of the Dolj Bar; Email: opran.mihaela@yahoo.com.

The need to open justice to all legal subjects arises from the guarantor of its social order, namely the arbitrator who decides to whom the legal relationship inclines in order to protect the social position of each person. Thus, the existence of a social order as a component of the modern state is ensured (Dănișor, 2007:46-61). Moreover, the foreign authors have identified in the composition of the common good two components: a static one, respectively the social order and a dynamic one, respectively the justice, which are complementary and support each other (Burdeau, 1980:103 and Dănișor, 2007:48). So, on the one hand, the social order is sustained through justice, while the latter is desired precisely by the people who seek to maintain the social order.

We consider that the most important function of the state in order to materialize social order is developed of justice, which has the obligation first of all to ensure the establishment of the social order, and secondly that of guaranteeing its existence through the measures in favor of that subject of law that justifies the protection of its subjective civil rights within the legal relationships in which it is engaged.

Justice is thus a public power (Dănișor, 2007: 424-448) created by persons for persons, in the sense that its legitimacy results primarily from the confidence offered by the population through the different forms in which its will is manifested in the formation of the powers and institutions of the state, and the purpose of its establishment is precisely the protection of the people and their rights. Thus it can be stated that justice performs a service of public interest, because even if in each case particular factual situations are analyzed, this analysis is done on the basis of general principles of law and accepted by the society as being established for the common good of its components.

However, there should be no confusion between the protection of the social order and the protection of the state's interest. Justice must ensure that the legal framework for conducting the current activities of persons within the state is protected, but on this occasion it must not unjustifiably incline the balance of its judgments in the interests of the state. There is no equivalence between the notions of state interest and public interest or between those of state interest and social order. We appreciate that although, in general, the state interest should subordinate to the public one and the social order, a rule should not be established in this respect, and the justice should censure the state skids that lead to the violation of the rights and freedoms of the people in an unfounded way. Precisely because the role of justice is so important, it must be generally accessible to all legal subjects to whom it is addressed. Justice is not limited to a certain category of persons unless fully justified and with the certainty that there is the possibility of the other categories to address an equivalent court.

Free access to justice is therefore a fundamental right applicable to all persons, both under active aspect, respectively for those persons who have the initiative to formulate legal actions for the protection of their rights and passively, for those persons who are called in justice and thus have the opportunity to defend themselves effectively. It was previously stated that free access to justice is an individual freedom (Chiriță, 2007:261).

The right of free access to justice is therefore part of the category of fundamental rights, as recognized by international protection mechanisms, such as the European Convention on Human Rights or the European Charter of Human Rights, but also by national laws. Free access to justice is analyzed in relation to the fundamental right to a fair trial, since we cannot discuss the fairness of a judicial procedure when the subject of law does not have access to such a procedure. In these conditions, in order to

enjoy all the procedural guarantees of national law, the person must have the effective possibility to invoke the violation or the protection of his rights.

As previously established in both doctrine and jurisprudence, rights, as well as fundamental freedoms, are not absolute, but may impose certain limitations based both on the necessity of their coexistence, but also on attaining other objectives of the state (Rădulețu, 2006:43).

The state is the authority that has to ensure the protection of fundamental rights and freedoms by framing in appropriate legal norms (Dănișor, 2007: 542) but also by creating a judicial system that allows the analysis of potential violations. The obligation of the state to guarantee the protection of fundamental rights is also realized to guarantee the existence of the rule of law, respectively a concept that expresses the modern state, a state to which the law is indispensable, and, also, to the law the state is indispensable (Deleanu, 1996:103).

It has been shown that the impossibility of the judicial system to repair any possible damage caused by violations of fundamental rights has been covered by international courts, such as the European Court of Human Rights, through judgments of states that have failed to achieve such a mechanism. From the point of view of the jurisprudence regarding the protection of the right of free access to justice, we propose to analyze the following decisions which subject the legal examination to some situations considered defining for the affirmation of the protection of the right of free access to justice as part of the right to a fair trial.

1. ECHR, Kudla v. Poland - Case no. 30210/96, judgment on 26th October 2000

The European Court of Human Rights has considered in the judgment of the *Kudla* case the need to establish an effective remedy in the event of a breach of the reasonable time limit for resolving the case.

The Court took into consideration the potential breach or articles 6 and 13 of the European Convention on Human Rights. Article 6 provides: "*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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;(b) to have adequate time and facilities for the preparation of his defence;(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court"* (Article 6 of the European Convention on Human Rights). Article 13 provides: *"Everyone whose rights and freedoms as set*

forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity" (Article 13 of the European Convention on Human Rights).

Thus, in this case the applicant had been arrested in August 1991, being accused of committing several offenses, the procedure for judging the remedy of the appeal being still before the court at the date when the judgment of the Court was pronounced. The Court considered that the duration of the procedure had been up to nine years, of which more than seven years after the date on which Poland had ratified the provisions of the Convention. It was thus considered that such a period cannot be considered to be reasonable and justified in relation to the concrete circumstances of the case. From the point of view of the legal basis, the Court had already ruled in previous judgments that it is no longer necessary to examine an end of claim by which the violation of Art. 13 of the Convention if there is a violation of Art. 6, considering that there can be no legal interest that justifies the review of the same question of law from the perspective of less strict protection of Art. 13. However, between the two texts of the Convention there is no relation of overlap or absorption, the best example being the one in the case in which, the violation of the provisions of Art. 6 regarding the length of the procedure is different from the fact that there is an effective remedy in national law by which it can be denounced. Although in its previous jurisprudence the Court refused to rule on that end of claim by which the violation of Art. 13 under the conditions of an infringement of Art. 6, it decided that a reversal of its legal approach was necessary, given that a considerable number of applications were registered for its role in breach of the speed of the procedure.

The court started from the idea that Art. 13 and 35 of the Convention represent a subsidiary protection mechanism, the first of the articles explicitly stating that there is an obligation of the state to protect all fundamental rights and freedoms, especially in its own system of law. In these conditions, as regard to the duration of a judicial procedure, there is the obligation of the states to create and effectively manage a legal system by which the sanction of the state's obligation can be requested. Although at the time of the decision, none of the European signatory states of the Convention had implemented such a system, examples have been found that have shown the possibility of creating these internal remedies and their actual functioning. The Court concludes that for a correct interpretation of Art. 13 it must be taken into account that the purpose of the rule is to guarantee the existence of an effective remedy in the order of national law by which the person who considers himself injured by a violation of his right to solve the procedure in which he is involved within a reasonable time, can obtain the sanction state.

Thus, the Court found that in the Polish law system, the applicant did not benefit from such a legal instrument and could not obtain on the domestic basis the recognition that the judicial procedure had been carried out in an excessive period or that the damage thus caused would be repaired, conditions in which there was a violation of Art. 13. Also, we may add that these is a clear limitation of the right of free access to justice, as the applicant had no internal procedure in which to state his claim on the breach of his fundamental rights.

The Court therefore establishes, by analyzing two elements within the right to a fair trial, that in case of violation of the requirement of the reasonable term by the unjustified delay of the procedure, the party considered prejudiced must have the opportunity to file an appeal seeking to sanction the attitude the state to violate this guarantee of the fair trial.

At the time of the ruling, in the year 2000, the Court noted that there are no such sanctioning systems in the law of the Contracting States, but considers that they could work successfully. Therefore, the conclusions of the Court have a real legislative proposal for all the signatory states, which subsequently chose to legislate in this regard.

The effects of the *Kudla* ruling impose an additional obligation on states to guarantee in favor of all persons the possibility of filing a separate application, before another court, as part of the right of free access to justice, by which they can obtain the sanction of unjustified delay of the trial in a file in which it is involved.

2. ECHR, Langborger v. Sweden, Case no. 11179/84, judgment on 22nd June 1989

Mr. Langborger was a Swedish national born in 1922. He was a consultant engineer and resided at Solna, a town in the immediate vicinity of Stockholm. On 1 October 1982 he rented an apartment. The lease contained a "negotiation clause" that stated that during the running of the lease the parties undertake to accept, without prior termination of the lease, the rent and other conditions agreed upon on the basis of the negotiation agreement in force between, on the one hand, a landlords' union affiliated to the Swedish Federation of Property Owners and a landlord, who with his property is affiliated to such a union, and, on the other hand, a tenants' union affiliated to the National Tenants' Union. Because Mr. Langborger was dissatisfied with both the amount of rent and with the fact that he was represented by the Tenants' Union of the Greater Stockholm Area he gave notice of his intention to terminate the lease and he proposed to the landlord the conclusion of a new agreement with a fixed rent and no negotiation clause. The landlord rejected his offer, and thus the applicant he brought the dispute before the Rent Review Board for Stockholm County. In accordance with the legislation in force, the section of the Rent Review Board which examined the case was composed of a chairman and two lay assessors. At the time of his appointment, the chairman of the Board held a non-permanent judicial appointment as an associate judge in the Court of Appeal. The two assessors, who were nominated respectively by the Swedish Federation of Property Owners and the National Tenants' Union. Mr. Langborger challenged the two lay assessors stating that they had been nominated by a landlords' association and a tenants' organization and thus they could not be objective and impartial because the Tenants' Union depended for its existence on the sums paid to it for conducting the rent negotiations and the Landlords' Union also derived a major part of its purpose from its participation in these negotiations (ECHR, Langborger v. Sweden, Case no. 11179/84, judgment on 22nd June 1989, para. 8-10).

The Rent Review Board dismissed both Mr. Langborger's challenge of lack of impartiality and objectivity of the members of the Court as well as his full claim. According to Swedish legislation this decision could be challenged at the Housing and Tenancy Court, which rejected Mr. Langborger's appeal without a public hearing and with no public pronouncement of the its decision. In these conditions, Mr. Langborger filed an application to the European Court of Human Rights for violation of Art. 6 of the ECHR as there was no public hearing and the Housing and Tenancy Court was not an independent and impartial tribunal.

The European Court of Human Rights stated that in order to establish whether a judicial body can be considered independent, we should look into the manner of appointment of its members as well as their term of office. Also, it is importance to observe the existence of guarantees against outside pressures and to the question

whether the body presents an appearance of independence. To this extent, the Court ruled that "as regards their objective impartiality and the question whether they presented an appearance of independence, however, the Court notes that they had been nominated by, and had close links with, two associations which both had an interest in the continued existence of the negotiation clause. As the applicant sought the deletion from the lease of this clause, he could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim" (ECHR, Langborger v. Sweden, Case no. 11179/84, judgment on 22nd June 1989, para. 35) and for this reason there has been a violation of Art. 6 para. 1 of the ECHR.

In order to analyze the independence of the courts, we must refer to several elements (Bîrsan, 2010:471), respectively: the way in which the magistrates are appointed and their term of office, the protection of the courts against the external protections and the possibility of verifying an appearance of independence. These conditions were also stated by the Court in the *Cooper* Case (ECHR, Cooper v. United Kingdom, Case no. 48843/99, judgment on 16th December 2003).

Of course, the independence of the courts must be related to the actors of the political and social life as they influence the environment in which they operate and determine the emergence of the litigious situations. Therefore, it is important that the courts do not work for the realization of the interests of the state power, of the international bodies or of the components of the civil society. In other words, independence must be total in order to achieve the objectivity of the presented logical-legal reasoning and the final decision.

Independence implies the absence of any subordination links with any of the litigating parties or any relations of interests with one of them. The courts must be able to render the judgments they consider in accordance with international laws and conventions, without pursuing the satisfaction of the interest of a particular party and without fear of reprisals or any other negative effects on the part of the party for which the solution is unfavorable.

Free access to justice cannot be effective, inter alia, unless it is made to an independent court, because the purpose pursued through the initiation of the judicial procedure is precisely to obtain a decision that expresses the legal provisions in the matter, and therefore an objective one. The premise that there is a relationship of subordination to the other party in the trial will undermine the will of the person to promote the desired action and thus limit the free access to justice.

The European Court of Human Rights considered that independence represents the effective manifestation of the jurisdictional function of the courts, namely to be the arbitrator of the litigation brought before it, for which it will rule on a solution under the applicable legal provisions (ECHR, Stojakovic v. Austria, Case no. 30003/02, judgment on 9th November 2006).

3. ECHR, Weissman and Others v. Romania, Case no. 63945/00, judgment on 4th May 2006

In this case, by the request made, the applicants claimed, as heirs and old owners, the restitution of a building and related land located in Bucharest, occupied at that time by the Embassy of the German Federal Republic. The court granted the applicants' request and ordered the restitution of the building and the related land.

Subsequently, the plaintiffs filed a new action requesting the reimbursement of the amount of 30,609,289 euros as compensation, resulting from the rents received for the respective building by the state for the entire period until the restitution to the plaintiffs. The court established that in this case the applicants must pay the amount of 5,333,215,000 lei (the equivalent of 323,264 euros). Failure to comply with the obligation to pay the tax caused the application to be annulled, according to the national legislation.

ECHR ruled in favor of the applicants, because the main criterion that needs to be analyzed in determining the limitation of free access is the amount of the sum constituted as a judicial fee. The mere provision of a payment obligation, as long as it is in a fixed amount, which represents the value of the procedural costs and for the support of the court compartments, would be a fair restriction, proportional to the purpose pursued, precisely to guarantee the good administration of the court. justice.

In the situation where the amount that is required to be paid as a judiciary tax is excessive, compared to the situation of an ordinary justice in the respective state, to the type of action, as well as to the national socio-economic situation, it means that the aim pursued is no longer that of good administration of justice but a hidden one of obtaining funds for the national budget or of unjustified inhibition of the free access to justice.

As other authors state, "the amount of the tax, assessed in the light of the particular circumstances of a case, including the applicant's solvency and the procedural phase in which the restriction is imposed, are factors that must be considered to determine if the claimant has benefited from the right to access to justice" (Bogdan, 2009:46).

In conclusion, the proportionality test of the measure does not apply to the obligation itself, but to the extent of the obligation. The amount of the tax owed must be established in an amount commensurate both with the material possibilities of an ordinary person in the respective state but also with regard to the procedural phase and the type of application made. Free access to justice must effectively guarantee the possibility of a person to achieve his right without unjustified limitation aimed to discourage him from promoting the action, because in this case we were in the situation of illusory protection and ineffective.

4. ECHR, Bacev v. former Yugoslav Republic of Macedonia, Case no. 13299/02, judgment on 14th February 2006

In a lawsuit against the plaintiff, the first court delivered a judgment on November 28, which was communicated on March 2. The term for the appeal was 15 days after the communication. The applicant's appeal was dismissed as tardy, the courts considering that he had filed it on March 23. However, both before the domestic courts and before the Court, the plaintiff had submitted a copy of the appeal on which the stamp of receipt of the court was dated March 15, that is to say, but the courts took into account the data entered in the court's entry register and another stamp appearing on the plaintiff's appeal indicating the date of entry, March 23.

In this case, the ECHR has shown that the 15-day deadline for filing the appeal was aimed at the legitimate purpose of good administration of justice, but that does not mean that the courts can ignore the examination of the merits of the appeal only on the basis of the records in the court register, not even indicating a sufficient reason for which the copy dated March 15 was not accepted, the applicant having thus been infringed the right of access to justice.

As for the term to file an appeal, there are not many issues raised, the Court ruling in various cases that the applicant's situation of filing an appeal with the postage stamp, thus demonstrating that he filed the appeal within time, it is a proof that the deadline has been respected, and the domestic courts cannot invoke the delay of the request only on the basis of the court records.

5. EHCR, Golder v. United Kingdom, Case no. 4451/70, judgment on 21st February 1975

Summarizing the factual situation, petitioner Golder was a prisoner who had sought assistance from a lawyer to prosecute a slander case against one of the guards at the detention facility where he was incarcerated. Mr. Golder asked the Minister of the Interior to be allowed to consult a lawyer in order to file a civil action against the guard, in order to apologize for the accusations made by the latter, from his position as guardian, on 25.10.1969, which caused to him adverse consequences whose effects had not been removed until 20.03.1970. The alleged civil action involved an incident inside the prison, during which the applicant was in detention and was directed against an employee of the penitentiary who had made an accusation against the applicant during the exercise of his function and who was subordinated to the Ministry of the Interior. The old Commission, predecessor to the Court, unanimously held that there is a violation of Art. 6 point 1 of the ECHR under the aspect of free access to justice, analyzing in particular the limitations that can be brought to it.

Mr. Golder's request for a lawyer to consult and draft the complaint to the court is a legitimate one. It was found by the Court that the Minister of the Interior could not legitimately be able to assess the chances of winning the potential action, since its solution was exclusively within the jurisdiction of the courts. By the refusal given to the applicant in the sense that he is not allowed the right to consult a lawyer, Mr. Golder’s right to address the courts was affected, under the conditions of Art. 6 par. 1 of the Convention.

The judgment of the Court is particularly important, because it establishes with a principle value that there should be no institutional obstacle to the possibility of the person to address the courts. In other words, the decision of the person to address the justice cannot be the subject of decisions of administrative bodies, such as the Ministry of Interior. Specifically, the decision to address justice must be exclusively of the respective person, and cannot be subject to the approval of another institution. The connection between the person and the justice is thus direct.

The interference with the fundamental law was particularly serious, because a category of persons, the detainees, could be prohibited access to justice even by the state institutions, in this case the Ministry of Interior, through an unjustified analysis of the chances of winning in the complaint. However, only the court can rule on the merits of a claim, this being the attribute of the jurisdictional power, in no case the representative of another power.

Last but not least, even if the petitioner could be opposed, the idea that there is no guarantee that he would have filed the civil action after consulting the lawyer he had asked for, is not an aspect of the control of an institution without jurisdictional powers. Thus, access to justice also implies the right to legal aid in order to promote applications, all the more so since national law prohibits its formulation without consulting the lawyer, which in itself represents another unjustified limitation of the law.

6. ECHR, Airey v. Ireland, Case no. 6289/73, judgment on 9th October 1979

Mrs Airey, from a modest family, wanted to separate from her husband for reasons of physical and mental cruelty. In Ireland, the divorce was not recognized by the Constitution, but spouses can still be authorized to cohabit either by an act concluded by them in this regard, or by a separation decision in fact which can only be pronounced by the High Court. Ms. Airey tried for more than eight years to obtain the separation agreement from her husband, but he refused. Following the second possible way, she tried to obtain a decision to confirm the separation in fact, for the reasons indicated. She tried to persuade more lawyers to provide her representation but did not find anyone to accept because in Ireland public legal aid is not regulated for this category of separation actions in fact, and Mrs Airey did not have the necessary amounts of money to cover the costs of the procedure.

In the decision, the ECHR refers to the imperative character of the establishment of a system of functional judicial public aid, which would allow all persons to address all national courts, with any type of action provided by law, with the real possibility of obtaining the effective analysis, without those costs of the procedure which may prove burdensome to become so excessive. As a legal obstacle may violate the provisions of the Convention, so can the factual one, and the obligations assumed by the Convention require positive measures of the state for the effective protection of rights (Berger, 1997:131).

Lack of the financial resources necessary for access to judicial procedures, representing the lawyer's fees, court fees, costs of administering the evidence, etc. is an impediment to a factual circumstance, which must be taken into account by law in order to eliminate those natural discriminations which, however, affect the equality of persons.

Therefore, states have a positive obligation to establish a set of rules to protect the rights of persons without material possibilities to address the courts, because justice is performed equally for all persons, and otherwise it would become a pressure instrument of enriched social classes. People without material possibilities have the same rights as any other person, so for reasons of equity the state must intervene and eliminate these initial impediments, to guarantee that their rights can be recognized through the courts. Also, legal assistance should extend to all categories of actions, without limitations, because partial protection would not be effective and would also give rise to discrimination and a violation by the state of the provisions of art. 6 point 1 of the Convention.

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