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THE RIGHT TO AN INDEPENDENT AND IMPARTIAL COURT

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Abstract: *The right to an independent and impartial court is established only implicitly in our national legislation, which, in article 21, paragraph (1) from the Romanian Constitution regulates the right of any person to "go to law" for the protection of his/her rights and of his/her legitimate interests. The right to have access to a court of law represents an essential reference point in the jurisprudence of the European Court regarding to the "right to a court of law", being a "guarantee right".*

Key words: *court, right, jurisprudence, European Court, Constitution.*

1. Introduction

This right is established only implicitly in our national legislation, which, in article 21, paragraph (1) from the Romanian Constitution regulates the right of any person to "go to law" for the protection of his/her rights and of his/her legitimate interests.

Analyzing the article in the Constitution, we are compelled to make a few observations regarding the defining elements of the right to go to law.

First of all, it is to keep in mind that the text uses the word "people", so both the natural person and the legal one are taken into consideration, either Romanian citizens or foreign ones or those who are stateless.

Here, we can refer to article 18, paragraph (1) from the Constitution, which specifies that foreign citizens and the stateless ones who live in Romania enjoy the general protection of people and assets guaranteed by the Constitution and other laws.

Among the protection measures to be found here, we find the right to go to law. At the same time, it is necessary to point out that the constitutional text which regulates this right mentions that no law can restrict exercising the right to go to law. It follows that the right of the person to go to law is a fundamental right, guaranteed by the Constitution, which has the correlative obligation of the court to solve the claim which it has been addressed.

This right is not especially regulated, not even at European level, but this is an autonomous and distinct right, established in a Praetorian way [1], through the founding interpretation of the provisions of article 6, paragraph (1) from the European

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Convention of Human Rights and relates to the person's right to have access to "an independent and impartial court of law, established by the law to request a solution for his/her legal case regarding the existence and extent of the civil rights-obligations and regarding a criminal charge.

It is inevitable that this right is established, even if only in intendment in order to ensure the effectiveness and efficiency of the other rights of the parties in the lawsuit and which are especially regulated.

The right to have access to a court of law represents an essential reference point in the jurisprudence of the European Court regarding to the "right to a court of law"[2] being a "guarantee right".

As professor Ion Deleanu mentioned [1], in a restricted interpretation this right can be considered as being a procedural law, which becomes one with the court proceedings or even with the writ of summons.

Approached from the perspective of the positive obligations assumed by the signatory state, this right appears to be a "subjective right", a right-claim in relation to the state.

Therefore, the exercise of this right necessarily implies the right to a court of law, the right to have access to a statutory resort.

Like any other right, the right to a court of law is prone to limitations, either implicit or explicit because, by its very nature, it requires regulation from the state. But the state also has the obligation – positive and having a result – to regulate the right to go to law so as to ensure the effectiveness of this right and, through the eventual conditions, not to change the substance of this right itself.

The European Court, exercising the control over this right, controls if the limitations brought through the internal regulations have a legitimate purpose, if they are proportional to the intended purpose and if the means used are reasonable in relation to the same purpose [3].

In this sense, it is required that the national regulation of this right be clear, accessible, concrete and predictable [4] in order to grant the person the actual right [5] to address the court.

The concept of court of law has been shaped and determined through the material and structural interpretation included in the jurisprudence of the European court.

Thus, the definition of the notion comprises the following criteria: independent, impartial body, established by the law and which reaches decisions.

These criteria have been also taken over in the national regulation, namely in article 10 of Law no. 304/2004, republished. At the same time, the court must be legitimate, namely established by the law, which implies defining its competence. Therefore, the court invested with the settlement of a writ of summons must have the necessary competence in order to adopt a "jurisdictional solution" in this litigation.

Also, the European Court invoked their own criteria, likely to guarantee the judge's mission [2], namely the independence, impartiality and the determination through law of the judge's competence. In what concerns the judge's independence, the jurisprudence of the European law court has decided the ways of determining this criterion, namely the

method of appointment, which must not be compliant to the Executive; the tenure and/or the irremovability on tenure; the existence of certain guarantees against external pressures; the dissipation of the appearance of "nonindependence." [6].

In order to ensure an effective protection of the litigant in front of a court of law, the European court has settled some of the "conditions-rights" respectively: rights regarding the quality of the court of jurisdiction in order to consolidate the confidence in justice and the carrying out of efficient justice, among which publicity and expedience; proper rights for the litigants in order for their rights and interests to be effectively protected, among which the right to a fair trial, the right to know the grounds of the judicial order, the right to the execution of a court order.

In this respect, the notion of equity in the legal context of the syntagm "fair trial" signifies a genuine "procedural democracy", being established for the first time through the provisions of article 10 in the Universal Declaration of Human Rights, when it acquired legal value.

Afterwards it was included in the rights guaranteed by the European Convention, namely in article 6, paragraph (1), being then included in article 47 in the Charter of the Fundamental Rights of the Union in 2000.

In our national legislation, the right to a fair trial is regulated both by the Constitution [article 21, paragraph (3)] and at an infra-constitutional level (article 10 in Law no.304/2004)].

The legal character of this right is related to the fundamental and substantial right, as well as the procedural-synthesis one [1], which comprises and articulates all the procedural guarantees comprised in article 6 from the European Convention.

Therefore, ensuring the efficiency of this right is achieved through a constitutionality review and, at European level, through a formality control.

From a structural point of view, this law points at the following elements: access to justice, good management of justice and effective enforcement of a court decision [7].

The aspects which verify the observance of the "equity" of the lawsuit are among others the equality of arms, the right to defense and its effective preparation; the contradictoriality in debates and a motivation of the decision, which is included in the category of "guarantee-rights" for a fair lawsuit.

It comes into prominence that the excessive duration of the procedure or the non-enforcement of the court decision implicitly lead to the uselessness of the guarantees included in the provisions of article 6, paragraph (1) in the European Convention. In what concerns monitoring the efficiency of the obligation to motivate, we can include three possible situations, namely: the lack of motivation, which consists in an implicit motivation but which restricts itself to simply taking over the motivation of the lower court [8] or the lack of a "specific and explicit" answer from the court to the means, objections, arguments and proofs offered by the parties [9]; the absence of an adequate motivation or the unfulfillment of the explanatory function of motivation [10]; the manifest error in the assessment made by the court [11].

In order to assess the fair character of a lawsuit, the jurisprudence of the European court has established two rules,

respectively *apreciere in globo*, which means that in order to conclude regarding the fact that the flaw in a certain phase of the procedure has not been rectified in other phases imposes assessing the procedure of the lawsuit on the whole and *apreciere în concreto*, which relates to the concrete circumstances of the cause.

Being a synthesis right, the right to a fair lawsuit results from the sum of procedural rights acknowledged and guaranteed to the justice seekers through the civil procedure rules.

Of course, all the procedural guarantees provided by the national law and by article 6, paragraph (1) from the European Convention can be inscribed in the context of the requirements of a fair trial.

It is necessary to state that the fair trial must not be mistaken for the hypothesis of "settling a litigation in a fair way" by the arbitral tribunal, as it is possible that such a way of settling the litigation concerns only the substance of the litigation".

In the same vein, the equality of arms and means is a specific and autonomous category established by the jurisprudence of the European court, but which is not especially regulated in the conventional legislation (we refer to the European Convention) or in the internal rules.

From the point of view of the definitions brought by the European court, the equality of arms is a fundamental element of the right to a fair trial but, formally and substantially, this represents an autonomous, European concept which must be appreciated both in *globo*, and in *concreto*.

Therefore, the principle of the equality of arms implies that "every party is guaranteed the reasonable possibility to plead his/her cause in conditions which do not put him/her at a disadvantage in relation to the counterparty [12]."

2. Conclusions

As mentioned above, there is no specific regulation of this right in the national legislation, but we come round to professor Deleanu's opinion [1], who considers "the equality between parties" may be considered one of the "specific manifestations *in re* or *ex usu* of the equality of rights among citizens, established by article 16 in the Constitution and article 7 in Law no.304/2003."

This right is applicable to any procedure, legal or gracious, including to the procedures taking place before an administrative-jurisdictional authority [13], and, at the same time, to all the people interested in the process (claimer, culprit, voluntary or constrained intervener), including the state in tax matters [14], as well as to those who, in a strictly procedural sense, are not "parties" in a lawsuit as the prosecutor is [15].

Adopting a new regulation with a retroactive effect or regarding the legal issues related to the lawsuit has been appreciated as an active interference of the state, especially when the state is a party in the process and as a passive interference when the state supports a loophole.

This right is not absolute and it is to be appreciated *in concreto* by reference to the circumstances of the cause and will target keeping "a rightful balance" between the parties by referring to "the procedure on the whole." [16].

In the jurisprudence of our Constitutional Court, analyzing the observance of the equality of arms right, this emphasized the

"identity of means" [17], which seems to be impossible by reference to the procedural position of the parties.

However, more recently, the Constitutional Court has made a proper application of this right by assessing the unconstitutionality of the provisions of article 612, paragraph (4) from the Civil Procedure Code in force at the time of delivery as the fact that "the interrogation cannot be required in order to prove the reasons for divorce" because the spouse who is the claimer is at an obvious disadvantage compared to the spouse who is the culprit, who can request an interrogation in order to rebute the reasons of divorce.

References

1. Deleanu, I.: *The fundamental rights of the parties in the civil lawsuit.* Bucharest. Universul Juridic Publishing House, 2008, pag.131.
2. Milano, L. : *Le droit â un tribunal au sens de la Convention européenne des droits de L'Homme.* Dalloz, 2006, p. 74.
3. *The Decision of the European Court from 28th May 1985, in the case Ashingdane vs. the United Kingdom; Decision of the European Court from 10th May 2001, in the case T.P and KM vs. the United Kingdom; Decision of the European Court from 10th May 2001, in the case Z. a.o. vs. the United Kingdom.*
4. *Decision of the European Court from 16th December 1992, in the case Geouffre de la Pradelle vs. France, parag. 34; Decision of the European Court from 4th December 1995, in the case Bellet vs. France, parag. 36-37; Decision of the European Court from 26th October 2000, in the case Leonic vs. Italy, parag, 23.*
5. *Decision of the European Court from 9th October1979, in the case Airey vs Eire, parag. 24.*
6. *Decision of the European Court from 4th October 2007, in the case Forum Maritim S.A c. Romania, parag. 115; Decision of the European Court from 22nd June 1989, in the case Langhorger vs. Sweden, parag. 32.*
7. *Decision of the European Court from 20th December 2007, in the case Kocsic c.of Romania, parag. 109; Decision of the European Court from 20th December 2007, in the case Midiei vs. Romania, parag. 45.*
8. *Decision of the European Court from 11th January 2000, in the case Quadreiii vs. Italy, parag. 34.*
9. *Decision of the European Court from 16th January 2006, in the case Dima c. of Romania, parag. 40; Decision of the European Court from 15th March 2007, in the case Gheorghe vs. Romania, parag. 43-44.*
10. *Decision of the European Court from 30th June 1987, in the case H, c. of Romania, parag. 53.*
11. *Decision of the European Court from 21st March 2000, in the case Dalaurans vs. France, parag, 33-39.*
12. *Decision of the European Court from 18th February 1997, in the case Niderost-Hubber c. of Switzerland, parag.23 ; Decision of the European Court from 27th October 1993,in the case Dombo Behher B.V. vs. the Netherlands.*
13. *Decision of the European Court from 7th June 2001, in the case Kress vs. France, parag.73.*

14. *Decision of the European Court from 22nd September 1994, in the case Hentrich vs. France, parag.45 and following.*
15. *Decision of the European Court from 31st March 1998, in the case Reinhard-Slimane Kaid vs. France, parag.53 and following.*
16. *Decision of the European Court from 29th May 1986, in the case Feldbrugge vs. Netherlands, parag.44.*
17. *Decision of the Constitutional Court, nr. 371/2007 (M. Of. Nr. 321/ 14 mai 2007).*