

The state's obligation to guarantee a person's right of free access to justice

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Abstract

All states are obliged to guarantee a set of indispensable rights to their citizens in order to safeguard a functional society. Therefore, the state must ensure that all its citizens can benefit from economic, social or personal rights and freedoms, all of which are protected on a higher level by a set of judicial rights. In this regard, free access to justice is a primordial concern for both the state and the citizens. This fundamental right, enclosed in the European Convention of Human Rights, ensures that a person may address the national courts with any claim that person considers suitable, if one or more of that person's rights have been prejudiced. As it must be both a constitutional principle and a fundamental right of the person, the obligation of ensuring free access to justice to citizens means that the state must set in place the legal framework, consisting of judicial and administrative norms that make bringing the claims to justice possible and accessible to all the persons. The state must abstain from issuing laws that impose burdensome obligation to a person seeking to protect its rights in front of the courts to such an extent that it could make that person's right to free access to justice illusory.

Key words: State, courts, justice, free access.

Introduction

1. General considerations

The state can be defined from a juridical point of view as “a territorial and sovereign public legal person” (Debbasch, 2001, p.24 cited in D.C.Dănișor, 2007, p. 61). Also, in a sociological view, the state has been defined as “a group of humans, fixed on a determined territory and in which the social, political and juridical order, oriented towards a greater common good, and which is established and maintained by an authority with a coercive force”(Haurion, Gicquel & Gelard, 1975: 75 cited in Dănișor: 23).

These interpretations of the notion of the state reinforce the idea that it is an abstract entity more than a legal one, and this entity has the only purpose to ensure the good functioning of the society that forms it. In order to succeed in this endeavor, a special set of norms has to be put into force for the protection of the individual's fundamental rights, one of which is the right of free access to justice.

2. Free access to justice - fundamental right.

Free access to justice is a fundamental principle of a democratic justice system, being enshrined in an important set of national and international documents, especially Article 6 paragraph 1 of the European Convention for Human Rights and Article 21 of the Romanian Constitution, Article 10 of the Universal Declaration of Human Rights as well as Article 14 pt. 1 of the International Pact on Civil and Political Rights. Although, in principle, the Convention regulates the rights with a "substantial" material content, which can be directly invoked in the internal order of the Contracting States, there are two procedural rights that are concretized in guarantees relating to the applicability of rights and freedoms of the person which are recognized in front of national and international courts. Thus, Article 13 of the Convention recognizes the right holders the “right to an effective remedy (appeal)” in front of national courts in the case of breach by the state's authorities of any of these rights. The states have the obligation to regulate such a juridical possibility for the enhancement of this right to an "effective remedy" (Bîrsan, 2010: 356).

In turn, Article 6 of the Convention establishes a right of procedural nature that guarantees the protection of personal and

patrimonial rights of the justiciable in the national law order, which will be achieved by a process that must comply to the coordinates of a fair trial. Although Article 6 does not expressly provide for the right to bring an appeal, this is applicable where national law provides the express right to bring an appeal (ECHR, *Delcourt c. Belgium*, 17th January 1970, para. 25). Obviously, the Strasbourg Court leaves to the appreciation of the states the possibility to limit this right, including setting deadlines for declaring appeals, citing the necessity to ensure a good administration of justice, but examining the proportionality of the limitation imposed by the requirements of legal security in order not to obstruct the justice seekers to rely on an available appeal (ECHR, *Diaz Ochoa c. Spain*, 423/03, 22nd June 2006).

3. Situations in which the violation of the right of free access to justice is considered.

Also, the legal restriction set by the state that impose fees to be paid by the claimant in every civil trial ale limitations to the right of free access to justice. The question that remains to be answered is whether the limitation is completely contrary to Article 6 para. 1 of the European Convention of Human Rights, or if a proportionality test must be applied in every circumstance as to decide if the measure is proportional with the intended purpose. In the national law, the obligation is imposed based on different categories of civil actions.

to submit legal claims, as well as to declare appeals against the rulings of the courts, thus ensuring the efficiency of the right of free access to justice, established by art. 6 pct. 1 of the European Convention of Human Rights, as well as art. 21 of the Romanian Constitution. Nevertheless, the effectiveness of ensuring free access to justice consists of setting resonable procedural delays in which the civil claims can be submittes, or the appeals can be declared in civil and criminal cases.

In such situations, one has to analyze the proportionality between setting a certain procedural delay, especially if that is shorter than the regular ones provided by the rules of procedure, and the scope of the measure. The justice seeker must be granted a legal framework in which he can effectively express his legal will, without unreasonable time barriers being set for exercissing an appeal or for performing certain acts of procedure.

4. Protection of the right of free access to justice

Ensuring the effective exercise of the right to address the courts for protection or recognition of individual rights is a component of the principle of ensuring the preemption of law in a democratic society by creating the auspices for a fair trial (Birsan, 2010: 357). A fair trial is an important guarantee in a democratic state, as every person has to be ensured that in the event of his rights being breached either by another person or the state itself in both criminal and civil cases. The lack of granting one person the right to a fair trial raises a major sign of disbelief in the state's ability to satisfy the requirements needed to guarantee even the safety of the person living among its sovereignty.

The rights of an individual are not always constituted, or, even if they are constituted they are not recognized *de facto* by other subjects of civil relations, which determines the need for intervention of the juridical power to restore the power of the order of law. Of course, courts can not promote disputes or cases "by default" in the interest of every individual who considers himself subject to damages, but the latter should be able to get the recognition of their legal rights and make them enforceable against others, in order to establish and maintain legal certainty.

In a society dominated by rules that compose its system of law, there is a need to ensure the finality of the rules of law by applying them to specific situations and the possibility to defend the patrimony of each individual. Such an action involves creating a system in which each person can start civil proceedings tending to protect or establishing a right that was endangered. The application must accommodate the abstract norm, thus the part played by the law becoming effective.

Of course that, viewed from outside, the right of free access to justice is only one of the aspects of the right to a court, which, in turn, is also a component of the right to a fair trial. The free access to justice of a person can only exist after the constitution of a framework for the exercise of it, respectively of the legal norm on which the application to the court can be based and of the court that has to determine the validity of his claims.

Access to justice guaranteed by the state should be free, unrestrained by the state power, in the sense that it may not hamper the internal mechanism by which a person addresses a court. For example formal recognition of the possibility to address the court

without being accompanied by the establishment of a legislative and juridical system that enables the possibility for the submission of the request and the participation in the litigation without barriers which can limit or even make impossible the effective exercise of the right, otherwise we are in the presence of a theoretical and illusory protection, breaching the order of Article 6 of the Convention.

The Romanian Constitution provides specifically this prohibition to paralyze the free access to justice by par. 2 of Article 21 which states that "no law may restrict the exercise of this right". So this right acquires special protection even and against other constitutional rights and freedoms, as is expressly exempted from the possibility of limiting to under Articol 53 of the Romanian Constitution. Ensuring the possibility to exercise this right at any time and under any conditions, without any possibility of legislative intervention in this regard, protects even the existence and exercise of all other rights that can acquire effectivity just by crossing judicial proceedings.

5. European Court of Human Rights and Romanian Constitutional Court

From the perspective of the right of access, another issue previously analyzed by the European Court of Human Rights was that of restrictions of a financial nature imposed to promote a civil action, respectively in the case of national law, the obligation to pay juridical taxes on the basis of the claim.

The European Court of Human Rights and national courts must determine whether such an obligation can annihilate the full exercise of the right, if it does unreasonably limit it, or if it is a measure compatible with the purposes of Article 6, necessary for the proper administration of justice, in order to protect all access to justice in general.

Being a fundamental right, free access to justice is protected on the constitutional level, through the constitutionality control exercised by the Romanian Constitutional Court on all the national law provisions (Rădulețu, 2006: 26). Such a control sets out to establish whether the law provision complies with the Constitution. Relating to the subject, the law provision must not limit in any way the free access to justice of an individual, except the case in which such a limitation is absolutely necessary in a democratic society and it is proportional with the intended purpose.

The Romanian Constitutional Court is the juridical body empowered by the state to control all the national laws in order to ensure they comply with the Constitution and respect the rights and freedoms enshrined therein (I. Deleanu, 1996, vol. II: 404). This is a measure by which the state ensures the effectiveness of the protection of the rights granted to its citizens.

Use of the fundamental rights by the individuals must be effective in the purpose intended, and the state must be the guardian that watches over the reaching of this goal.

Free access to justice for all individuals is part of a democratic system of law, a national juridical order in which all natural and legal persons are granted the possibility to defend their subjective civil rights in the case in which they were violated by another person.

The Constitutional Court case law has consistently held that "within the meaning of the constitutional principle established by Article 21 of free access to justice, exists the possibility for any person to directly and immediately address the courts to protect his rights, freedoms and legitimate interests. As a result, "the existence of any administrative impediment that has no objective or rational justification and that could eventually deny the right of the person, flagrantly violates the provisions of Article 21 para. (1) - (3) of the Constitution" (Romanian Constitutional Court, Dec. no. 953/19.12.2006, 347/03.04.2007 and 467/22.04.2008).

6. Conclusion

There is no doubt that the state has to manifest a permanent interest and to allocate financial and logistical resources in order to protect the right of free access to justice. Such involvement from the state can, *inter alia*, consist of: ensuring that no national law provision limits the possibility to present a claim to the courts to a specific category of individuals if the claim is susceptible to be promoted by all the individuals; ensuring that national law does not impose burdensome administrative obligations to the claimant, that may obstruct his possibility to promote the claim; ensuring that the promotion of the claim is not subsequent to the obligation to pay judicial taxes that are disproportionate to the eventual positive outcome obtained by the claimant.

Ensuring that national provisions comply with the requirements of protecting the fundamental laws and freedoms is a duty of every state and an obligation that considers the welfare of its citizens and

persons living within its borders. Only by establishing a responsible and logical set of law provisions can the state pass this test.

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