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ORIGINAL PAPER

Free Access to Justice in Civil matters in Post-Communist Europe

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Abstract

No person can exist in modern society without a set of personal rights and a series of obligations, either general or personal, imposed according to the category of which he belongs. Therefore, the rights of the person are circumscribed in the very essence of it and give it a legal meaning.Economic and social development leads to the emergence of new legal situations, which could not be taken into account by the legal norms at the time of their publication. Therefore, the courts are called upon to apply the general principles of law for their settlement and at the same time the need for justice increases. Therefore, of particular importance is the problem of access to a court, in the sense of making requests for obtaining decisions that can be enforced, so that the person's requests find their desired purpose. Free access to justice is part of the procedural safeguards that make up the right to a fair trial. Moreover, it is the very beginning of its manifestation, because without the possibility of promoting legal claims, we cannot discuss the process in the sense recognized by the European Convention of Human Rights.Free access to justice is analyzed in relation to other specific concepts, such as: democracy, rule of law, internal legal framework, freedom and impartiality of courts, reasonable term, procedural guarantees or limitations to them.

Keywords: *free access to justice; appeals; procedural restrictions; civil matters; deadlines.*

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Historically, justice has represented the guarantor of the existence and protection of a person's rights and thus, also, the protection of the condition of the individual in the society. Regardless of their legislative assertion, rights must be protected in their essence through a system of control of society, such as justice.

No person can exist in modern society without a set of personal rights and a series of obligations, either general or personal, imposed according to the category of which he belongs. Therefore, the rights of the person are circumscribed in the very essence of it and give it a legal meaning.

Although in most Western democracies free access to justice can no longer be considered a novelty, it must be borne in mind that the recognition of this fundamental right in Romania, and in other Central and Eastern European countries as well, was made only in the post-communist era, as an effect of attempts to recover the gap from other legal systems. Taking into consideration that the communist regimes were based on different repressions, these constituted gross violations of human rights (Gruodytė, Gervienė, 2015: 149) as we know them today. This prompted, for example, The Council of Europe to address this question 1996 stating that "[t]he key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge" (Council of Europe – Measures to dismantle the heritage of former communist totalitarian systems, Resolution 1096 (1996)).Being a post-communist state, free access to justice in Romania must be considered as a new effective fundamental right and s must be understood accordingly. The recognition of this fundamental right was fueled by the ratification of the European Convention of Human Rights (Law no. 30 from May 18th 1994 concerning the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Additional Protocols to this Convention), that states free access to justice as part of the general fundamental right to a fair trial. Currently, it is recognized with constitutional principle value through art. 21 of the Constitution, which means that from a legislative point of view, all other normative acts will have to take into account the non-restriction of the law only under the conditions expressly provided in the Constitution.

Starting from the definition given in the doctrine "free access to justice consists in the ability of any person to bring, in his free assessment, an action in justice, whether it is even unfounded, in fact or in law, implying the correlative obligation of the state as, by the competent court, to rule on this action" (Bîrsan, 2010: 357).

We thus consider that 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. This ensures the existence of a social order as a component of the modern state (Dănișor, 2007).

Because the role of justice within a democratic society 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 must be exercised by a person starting with the possibility of bringing an action for the alleged right to be infringed or the possibility of defending in a civil trial brought against him, including the possibility of making applications within the pending case and also the exercise of an appeal by which to verify the legality and soundness of the decision of the first court. Therefore, free access to justice depends more on a number of procedural requirements. The effectiveness of free access to justice should be maintained throughout the civil case and should refer to all procedural aspects

recognized by the parties. For example, in civil cases, the plaintiff must be able to bring an action before an independent and impartial court, must be able to request the presentation of evidence and must have the real possibility that the requested evidence might be admitted, must be given a decision on the subject of the case and must able to exercise the appeal or to initiate the enforcement procedure, as the case may be.

With the adoption by the European Union, through the agreement of the states, of the Charter of Fundamental Rights of the European Union, the protection of free access to justice has become internal for the European construction as well. Although previously it took over the provisions of the Convention to motivate the protection of fundamental rights, this new European instrument of protection reinforced this idea within the Union.

The jurisprudence of the Court of Justice of the European Union has borrowed many times from the directions followed by the European Court of Human Rights as a result of full recognition of the provisions of the Convention and thus of its protection mechanisms.

Lately, the Court of Justice applies those provisions specific to the European Union in relation to free access to justice in order to guarantee the other fundamental rights included in the Charter and which may be exercised contrary to public institutions in the Member States.

Although it is considered a fundamental right of the person, it must not be considered that access to justice is in all cases free or that in guaranteed in the same extend in every case. It is normal, for considerations regarding a good administration of justice and the courts, that the ability to launch a civil claim can be subject to different formal procedural requirements that must be met.

1. Financial restrictions. Fees for judicial procedures:

From the perspective of the right of access, a problem previously analyzed by the European Court of Justice was that of the financial restrictions imposed to promote a civil action, respectively in the case of the national law, the obligation to pay the stamp duty according to the object of the request.

At national level, the general rule is that all civil applications submitted to the courts are subject to stamp duties, the amount of which will be calculated separately depending on the object of the request. Also, the rule can be found in art. 197 of the Code of Civil procedure of Romania, according to which: *"If the application is stamped, the proof of payment of the taxes due is attached to the request"*. Determining the fee requested for very case is made by establishing the object of the request and, in most cases, the value of the request. The rule is that the fee for the judicial procedure is determined through the value of the claim according to its object, as stated by art. 3 of OUG no, 80/2013 regarding the fees for judicial procedures.

In France, Court fees for civil action is clear indeed, as a rule there are no charges payable to the State for acts of procedure, the clerk of Civil Courts are public. Unfortunately, this is not the case of Commercial Courts for which there is a scale of registry charges (Jean Albert – Team Leader, submitted by Isabelle Tinel – Country Expert, Country Report France, 2007).

Inside the European Union, France is regarded as an exception, but a study (implemented by DEMOLIN, BRULARD, BARTHELEMY for the European Commission, Final Report, 2008) concluded that five countries always require procedural fees, 17 countries require procedural fees in principle, meaning that they apply to most claims

but there are also exceptions,France requires them exceptionally and Luxembourgnever requires procedural fees, as the regulation adopted on 27th December 1980 abolished all kinds of proceedings fees including that which granted fees to Court clerks.

Taking into consideration that failing to pay the procedural fee is sanctioned by annulment or automatic rejection of the claim, it is clear that this obligation constitutes an obvious limitation of the right in question, which can no longer be considered as "freely exercised", the question being clarified if the limitation is justified and if it is compatible with the purpose of the norm of art. 6 of the Convention.

The European Court of Human Rights has analyzed the financial limitations in exercising the right of free access to justice, outlining the idea that such limitations should not restrict the access of the person in a way or to a degree that even touches the substance of the law (ECHR, Kreuz v. Poland, 28249/95, para. 60, Iorga v. României, 4227/02, para. 39). The court considers that such taxes are for a legitimate purpose, namely the good administration of justice and aims both to discourage the justiciable to make abusive requests but also to provide funds for the functioning of justice (Bogdan, 2009: 44).

The procedural fees are due to cover the costs of the procedure, which is the logical purpose of such a tax. Moreover, this idea results even from the formulation of the legal texts in this matter, which provide the obligation as a prerequisite for the exercise of the action.Also, the proper functioning of the justice really requires a control of the requests made by the justices, so that they are not manifestly unfounded or abusive. From this point of view, the financial restriction of the fees for judicial procedures has a preventive function in order to discourage the formulation of such claims. However, we consider that the same purpose could be achieved by establishing a procedure for filtering actions, before they reach the judges who form the units to which they were assigned.

2. Restrictions related to the form of the claim:

Another notable restriction is the form that the applications to the justice must present so that they can be valid in terms of procedural rules and can be taken into account by courts or other judicial bodies. The conditions of form impose certain obligatory characteristics for the requests addressed to the justice that they must meet.

Such a legal requirement has the role of establishing a discipline of the judicial system on the part of the justiciable, through a set of minimum rules that must be respected in order to guarantee a standard for the optimal functionality of the justice.
The doctrine has stated that *"once established by law, the way of accessing justice, the state can and must establish certain conditions of form, in which a court can be notified. Their fulfillment is a limitation of access to justice, because without their fulfillment, the person cannot bring the litigation before a court, the way in which he wants to bring the court is limited by the fulfillment of the conditions prescribed by law. In general, such conditions are reasonable and are proportionate to the intended purpose, namely the good course of justice"*(Chiriță, 2006).

In civil matters, the method of referral of the court is represented by the court application. At a national level, the right of access to a civil court is reiterated even by the Code of civil procedure through art. 192 which indicates the general scope of application of the rules to any person who seeks to defend his legitimate rights and interests. Also, art. 194 of the Civil Procedure Code, entered into force on February 1, 2013, refers to the content of the request for legal proceedings or court application and

establishes, in a legislative manner, what are the formal requirements in civil matters regarding the court's notifications. It is clear that, as stated before, the states can establish a set of procedural rules based on which the application must be made, as long as these are not unreasonable in relation to the actual possibility to satisfy them.

The form requirements set out in the national procedural rules shall include at least the identification data of the applicant and the defendant, the applicant's representative, the subject of the application, the factual and legal grounds on which the application is based, the evidence and the signature of the applicant. From this point of view, it is possible that the excessive formalism with regard to certain elements may in practice establish a real obstacle to the exercise of legal action. For example, art. 194 of the Code of Civil procedure establishes the obligation to indicate the registration number at the Trade Register Office or the defendant's unique identification code if he is a legal person, or the personal numeric code if he is a natural person, and he is known. Although by this last mention, respectively that the data should be indicated only insofar as they are known, it would seem that a far too formalistic requirement is avoided, in fact the legislative provisions are constituted in a framework that offers the premises of a true limitation of the free access to justice, taking into consideration that the claim will be annulled by the court if it is considered that all the formal data was not provided.

The same situation is also reflected in the assumption of declaring the appeals, where the national provisions impose the obligation to identify the declarant, the adverse party, as well as the elements of the contested decision.

Regarding these formal limitations, the European Court of Human Rights has previously stated that there is an excessive formalism manifested by a court, by the application of the national legislation, in a case in which the national supreme court refused to analyze an appeal declared against the decision of a lower court whose number was incorrectly mentioned in the appeal application. The refusal of the supreme court was considered by the ECHR to be unjustified, given that the material error was subsequently corrected by the appellant, and in the application form the number of the contested decision was correctly passed (ECHR, Kadlec and others – Czech Republic (Nº 49478/99), judgment on 25.05.2004; ECHR, Boulougouras v. Greece, no. 66294/01, judgment on 27.05.2004).

A similar interpretation was also given in the situation in which the court of appeal found that the last appeal declared by the plaintiff was invalid on the ground that he failed to mention the name of the respondent and his address, although he, by the appeal application, requested the modification of the judgment under appeal, in the sense of rejection of the first appeal of the respondent that he had individualized in this application. The Court considered that the applicant clearly mentioned who was respondent in the last appeal phase, which being a public authority and being individualized also by the name of the territorial administrative unit thus included a mention regarding its address (ECHR, Dimon v. Romania, judgment on 27.12.2017).

Thus, it should be considered that free access to justice includes the "right to a court" is not absolute and is subject to limitations that are implicitly admitted, especially as regards the conditions of admissibility of an application or an appeal. However, limitations may not restrict the access of a person liable insofar as his right of access to the court is impaired in its very essence and they cannot be compatible with art. 6 para. 1 of the Convention unless they serve a legitimate purpose and if there is a reasonable ratio of proportionality between the means used and the purpose pursued (ECHR, Edificaciones March Gallego S.A. v. Spain, February 19, 1998, para 34; Rodriguez

Valin v. Spain, no. 47,792 / 99, para. 22, 11 October 2001, cited in Dimon v. Romania, 27.12.2017, para. 20).

3. Restrictions related to procedural deadlines:

Regarding the deadlines established by the national legislation for the exercise of the actions, it must be examined whether their duration is likely to affect the possibility of the interested party to exercise the respective procedural act or the respective application in court. Based on its case law, the ECHR appears to be quite permissive in terms of the actual length of time limits for filing an appeal. Thus, a period of one week to appeal a criminal decision is considered short, but still sufficient to allow an appeal (ECHR, Hennings v. Germany, 16.12.1992), and in other matters (ECHR, Fetaovski v. Former Yugoslav Republic of Macedonia, 10649/03, 19.06.2008) even accepting 15-day deadlines for filing an appeal, arguing that it responds to a legitimate purpose. and respects the interests of justice.

Also, we must consider the moment from which such a deadline begins to run as the interested person can only declare an appeal after he has effectively became aware of the court decision which he wishes to challenge. It would be unreasonable to only establish the possibility to launch an appeal based on a specific date by which the person did not know the content of the court decision. ECHR held that if the calculation of the deadline would not start from the date on which the person concerned actually became aware of the contents of the court decision, the courts could delay the communication of the decisions and thus would shorten the term for declaring the appeal (ECHR, Miragall Escolano v. Spain, 38366/97 and Diaz Ochoa v. Spain, 423/03, judgment on 22.06.2006).

However, by the exception are also allowed situations when the term begins to run from the pronouncement of the decision, the measure being justified by the satisfaction of the urgent character of a certain procedure and also in cases where the communication does not mean the communication to the effective address of that person, but also other means of communication allowed by the national legislation, as long as they ensure a reasonable possibility that the content of decision reaches its recipient.

As to when to appeal, there are not many issues raised, the Court ruling in various cases that the plaintiff's situation of filing a copy of the appeal with the court 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 (ECHR, Bacev v. Former Yugoslav Republic of Macedonia, 14.02.2006). The same can be said if the appeal was sent by post within the legal deadline, the date of the post being the only relevant evidence that the legal provisions were respected (Bogdan, 2009:278).

Special consideration must be made for the case in which the entry into force of a new procedural law that shortens the time limit for introducing the appeal. Relating to this, ECHR noted that if the deadline was already running at the time the new law came into force and the appeal was dismissed as inadmissible, it was necessary to examine the calculation and application of the deadline already running to see if it could be foreseeable from the applicant's point of view (ECHR, Oksana Grygorivna Kameniska v. Ukraine, 30.08.2006, para. 31).

4. Free access to justice and the possibility to launch an appeal:

An important problem we consider is the discussion regarding the possibility of formulating appeals against the decision of the substantive court. By way of appeal, the superior court is to rule on the soundness and legality of the judgment under appeal, so that by the procedure of the appeals procedure it is recognized the right of the person to obtain the censure of a decision if with the violation or the incorrect application of the law. Thus, it must be established whether the right of free access to justice also contains the guarantee of recognizing the possibility of an appeal. It must be first stated out that article 6 of the ECHR does not guarantee the right of the person to launch of appeal (Bogdan, 2009:270) but, if the national legislation recognizes the possibility to launch an appeal, article 6 of the ECHR will be applicable to the procedural stage of the appeal, as it is part of the trial itself (ECHR, Delcourt v. Belgium, 17.01.1970, para. 25).

Ensuring the effective exercise of the right to address the courts for the protection or recognition of individual rights, is a component of the principle of ensuring the pre-emption of the right in a democratic society, by creating the auspices of a fair trial (Bîrsan, 2010:357). In this regard, it is our opinion that the right to launch an appeal must be considered as an integral part of the right of free access to justice as it is very important that the ruling of the court of first instance can be overturned if it is not in accordance with the legal provisions or if it does not correctly establish the state of affairs. It is therefore integral for a fair legal system that national procedural law recognizes the right of any person to exploit their legal claims, as well as to declare appeals against court decisions, thus ensuring the efficiency of the right of free access to justice, established by art. 6 point 1 of the ECHR.

In order to properly guarantee the right to an appeal, we must take into consideration the clarity and consistency of the regulation and its application (Bogdan, 2009:272). ECHR has repeatedly held that the violation of article 6 exists if the plaintiff did not receive sufficient procedural guarantees in order to prevent any misunderstandings relating the applicable procedure (ECHR, F.E. v. France, 30.10.1998, para 47 and Hajiyev v. Azerbaidjan 5548/03, 16.10.2006).

Another aspect to be emphasized is that the ECHR considers that the way of applying Article 6 before the courts of appeal, including the national supreme courts, depends on the specific features of those procedures (ECHR, Monnell and Morris v. United Kingdom, 02.03.1987, para. 56, cited in Bogdan, 2009:279). In these circumstances, extraordinary appeals, especially those in cassation, can be regulated more restrictively than ordinary appeals, because their purpose is to rectify some especially procedural judicial errors.

Free access to justice for all individuals is part of a democratic system of law, a national legal order in which all natural and legal persons are given the opportunity to defend their subjective civil rights if they have been violated by a another person or the state.

There is no doubt that the state must have a permanent interest and allocate financial and logistical resources, in order to protect the right of free access to justice. Such involvement by the state may, inter alia, consist in: ensuring that no provision of national law limits the possibility of filing a claim in court for a certain category of persons where the claim is likely to be promoted by all individuals; ensuring that domestic law does not impose burdensome administrative obligations on the applicant, which may prevent him from promoting the claim.

Ensuring that national provisions comply with the requirements for the protection of laws and fundamental freedoms, is a duty of each state and an obligation that takes into account the well-being of citizens and persons living within its borders. Only by establishing a logically responsible set of legislative provisions, the state can pass the requirements of this test.

Therefore, in the case of civil trials, free access to justice must be viewed in relation to the whole judicial procedure, since it to the initial action before the court, started by the request for a trial, but also to any other requests that can be made before the court and including the possibility of declaring the appeals. In this context, restrictions on free access to justice can be made without affecting its fundamental character in any way. However, the limitations must be fair, that is, to correspond to a legitimate purpose pursued by the legislator and, perhaps most importantly, to be proportionate to this purpose, meaning that a very careful analysis of this aspect must be made, and if it is reached The conclusion that the same result could be obtained by applying measures that do not imply such a limitation, means that there was an unreasonable and unjustified interference.

In conclusion, it is noteworthy that the right of free access to justice is constituted in a series of procedural safeguards through which the state facilitates the possibility of persons to address the courts. From this point of view, two sets of obligations are imposed on the states, namely a category of positive obligations and a category of negative obligations. Positive obligations refer to the actions that states must take in order to facilitate access to justice, respectively those normative provisions that guarantee the possibility of persons to address the courts with different types of applications. Negative obligations are the conduct that states must adopt in order to refrain from any legislative changes that impose restrictions that may even affect the effectiveness of free access to justice.

Thus, we consider that the main concern of states in the context of assuming compliance with the provisions of the European Convention on Human Rights must be to provide individuals with all the specific guarantees regarding the possibility to address the courts, regardless of the form in which it is done. Of course, this does not mean an absolute impossibility to establish certain additional obligations for the litigants, but they must first of all be proportionate to the purpose pursued, and secondly it may not be, directly or indirectly, impossible or Particularly burdensome is access to the courts.

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