

Abstract:

Access to justice is the fundamental principle of organization for any democratic legal system, as enshrined in all international documents, so has important significance both for procedural and constitutional law. Every individual's right to make claims against a party according to his own appreciation, thus, implying the State's correlative obligation of adopting effective remedies through its' competent institutions of justice, means the free access to justice. Any means of restricting free access to justice is a disregard of a fundamental constitutional principle and the universal international standards, in any real democracy.

Keywords: *U.S.A., E.U., justice, freedom.*

1. Access to justice in the Member States of the European Union

Member States of the European Union, in addition to international and European standards, established by the Council of Europe, OSCE, concerning access to justice will meet a number of EU standards in the field.

Analyzing the reform initiatives in the last decades, one can say that European Union addresses the issue of access to justice, partly through access to the State guaranteed legal aid¹, considered to be a fundamental right².

Reform initiatives are conditioned to failures of ensuring access to justice for certain population groups. There are many situations in which, minorities, migrants, are least likely to have real access to justice and cannot build their defense properly³. For example, the opinion of the European Economic and Social Committee on the Prevention of Juvenile Delinquency (2006 / C 110/13) is that the reform was due to the fact that criminal justice systems for minors were very slow, inefficient and economically unviable: long waiting periods were common, and the re-offending rates among young offenders were very high. At the same time, the traditional sources of informal social control (school, family, workplace, etc.) became progressively weaker⁴.

¹ Access to Justice in Central and Eastern Europe, Country Reports: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia. - Public Interest Law Initiative/Columbia University, Interights, Bulgarian Helsinki Committee, Polish Helsinki Foundation for Human Rights: 2003, p. 6

² Commission of the European Communities. Green paper from the Commission: Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003), 19.02.2003

³ Harlow, Carol, *Access to Justice as a Human Right: The European Convention and the European Union*, p. 210

⁴ Opinion of the European Economic and Social Committee on the Prevention of juvenile delinquency. Ways of dealing with juvenile delinquency and the role of the juvenile justice system in the European Union (2006/C 110/13). - Official Journal of European Union, C 110/75, 09.05.2006.

In this context, it is often taken into consideration the increase of spending on State guaranteed legal aid system, but more often it is considered the optimization of the system by implementing alternative measures to solve causes, by supporting actions of public interest.

The fact is that people who have financial means to hire a lawyer should obtain legal assistance guaranteed by the State, at least on the following reasons: criminal cases are usually of great complexity and procedural details are known only by professionals; employees of the prosecution system, particularly police and prosecutor may create certain types of contexts disadvantageous for those who defend themselves; the effects of sentence may be decisive for the life of a person; the principle of equality means that no person, regardless of status material can not be subjected to an increased risk of being condemned.

The European Union Constitution incorporated in Part II, The rights and Fundamental Freedoms. This Act is obligatory for the EU and its Member States. Article 47 regulates the right to an effective remedy and a fair trial, based on Art. 6 and 13 of the European Convention, " Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the Court", „any person has the right to a public hearing before an independent and impartial tribunal within reasonable time, as established by law", „everyone must be able to receive legal aid, to be defended and represented in court", "Legal aid should be available for low income individuals to ensure effective access to justice". The Member States of the European Union are under the jurisdiction of the European Court of Justice, assuring the individuals' right to defense.

Provisions concerning the right of access to justice are found in the Constitutions of the Member States. For example:

- Article 15, of the Constitution of Estonia of 28 June 1992 provides that „everyone whose rights and freedoms are violated has the right of recourse to the courts”⁵;

Article 24 of the Italian Constitution provides that „everyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts”⁶;

- Article 92, of the Constitution of Latvia of 15 February 1992 provides that „everyone can protect his/her rights and legal interests in a fair court. Everyone shall be considered as not guilty until his/her guilt is recognized in accordance with the law. Everyone has the right to the assistance of a lawyer”⁷;
- Article 21, of the Constitution of Finland of 1st of March 2000 provides that „everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority”⁸.

⁵ <http://www.president.ee/en/estonia/constitution.php>

⁶ http://www.servat.unibe.ch/icl/it00000_.html

⁷ <http://www.humanrights.lv/doc/latlik/satver~1.htm>

⁸ <http://www.om.fi/21910.htm>

However, similar provisions can be found in the Constitutions of all the developed countries, for example:

- Article 24 of the Constitution of Canada provides that „anyone whose rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances⁹”;
- Article 32 of the Constitution of Japan provides that „no person shall be denied the right of access to the courts¹⁰”.

Among systems with a good reputation in terms of ensuring access to justice is highlighted the British system. In 1998 Britain adopted the Act on Human Rights (The Human Rights Act)¹¹. By this Act, the European Convention for the Protection of Human Rights and Fundamental Freedoms is considered part of the national law system¹². In 1999, Great Britain adopted the Law on Access to Justice (Access to Justice Act), in which attention is paid to legal assistance in criminal matters through telephone advice services¹³. Still, the UK civil justice system is quite complex, takes a long time, implies high costs, the number of people eligible for legal aid has diminished considerably in the year 2010, the costs for legal assistance guaranteed by the state increased.

Thus, sometimes the quality of justice is directly linked to the availability of financial resources. In spite of all the changes, the number of requests of the courts has remained relatively constant. Obviously the question arises -does this mean that the number of disputes / social conflicts remained constant, does the population find alternative ways to resolve disputes or such disputes are solved at the community level? In order to increase responsibility of judges, a questionable procedure has been launched to monitor the work of the courts. On the one hand that thing directly affects the independence of the judiciary power, on the other hand, it highlights cases in which the judge has not made maximum efforts to find an operational, costless and equitable solution for the case. The English system tried to be reformed based on the following principles:

- Access to justice is a constitutional right;
- The purpose of this law is not only a procedural but an essential justice;
- People need legal assistance in civil, criminal and sometimes administrative causes;
- Access to justice means policies that take into account the level of legal education and information;
- Legal aid programs guaranteed by the state must take into account the actual resources available. These programs should be viewed as a component (which may limit access) and not as a defining element;
- Technical innovations should be widely used.

⁹ http://laws.justice.gc.ca/en/const/9.html#anchorsc:7-bo-ga:l_I-gb:s_2

¹⁰ http://www.solon.org/Constitutions/Japan/English/english-Constitution.html#CHAPTER_III

¹¹ http://www.servat.unibe.ch/icl/uk00000_.html

¹² Spigelman. Access to Justice and Human Rights Treaties. Keynote address. - Sydney Law Review: 2000, vol. 22, p. 141.

¹³ Owers, Anne. Public provision of legal services in the United Kingdom: a new dawn? - Fordham International Law Journal, 2000-2001, vol. 24, p. 157

In France, the implementation of Law no. 91-647 of 10 July 1991 on legal aid has improved the situation on access to justice. Under this law, all legal assistance is free and partly free. About 15% of the number of beneficiaries of state-guaranteed legal assistance are those who partly pay for the costs of representation. Considering that beneficiaries are not satisfied with the quality of the services provided (the ones partially paid), a reform was initiated in order to reduce the range of options for free legal aid and partly to broaden the range of services totally free. In this context, are being reviewed the rules for determining the beneficiaries' ability to pay for greater certainty and are being promoted, together with unions in the sector, shares in public interest.¹⁴

Multiple issues related to access to justice can be found in countries which have recently obtained membership of the EU. Evaluation of the judiciary in the Eastern European states which joined the EU shows that all these systems require structural reforms. It seems that there is not enough a law reform *de jure*, infrastructural changes are required *de facto* also. Often, judges oppose to judicial reform, considering the reform itself a violation of their independence. Enhancing judiciary power must be understood multidimensional: insurance of independence and impartiality, insurance of high professional capacity (has no relevance to the independence and impartiality of judges without proper training), increasing the responsibility of judges, both to the society and the state in general, ensuring organizational effectiveness.

Autonomy in the organizational aspect of the judiciary power ensures greater efficiency than if the administration is made from outside the judiciary. Usually, there are known three models of management of the judiciary:

The independent model of administration of justice (model functionable in Canada, Hungary and Lithuania). In this case, there is an authority that bears full responsibility for the functioning of the judiciary, proposes draft budgets of the courts (the consolidated budget of the judiciary system) and is responsible for managing resources; establishes rules for administration of the courts; has power in the selection training and promotion of judges; decides on disciplinary sanctions on judges. In the same context must be taken into account that, the practice of certain fixed periods of probation for judges is threatening the independence of the judicial power, particularly in relation to the bodies that must confirm their final quality, for life.¹⁵

It is important that, this model should be transparent. The experience of countries that have adopted this model demonstrates, however, that the capacity of administrative judiciary body (National Council / The Superior Council of the Magistrate) is limited by budgetary procedures, because the executive may issue another draft budget for the judiciary system, which Parliament can take as a base project. As a result, the judiciary remains a poor funding, which directly affects the ability of the judiciary.

The intermediate / mixed model - of division of management powers of the judiciary (model functionable in Slovakia, Slovenia, Estonia, Poland, Bulgaria,

¹⁴ Rapport de la commission de reforme de l'accès au droit et à la justice. - Service de l'Information et de la Communication du Ministère de la Justice, Juin, 2001, p. 156

¹⁵ Monitoring the EU Accession Process: Judicial Capacity. - OSI/EU Accession Monitoring Program, 2002, p. 16

Romania in 2000)¹⁶. In these systems, administrative powers are divided between the judiciary Superior Council of Magistrates and other authority. The Superior Council has significant powers in regard to recruitment and promotion of judges, and supervising judges in disciplinary action, if any. The Council is involved in drafting the budget of the judiciary and drafting normative acts that regulate the judiciary activity. However, the Ministry of Justice remains the main actor in the administration of courts, both in terms of budget proposals and the management plan of the judiciary system. Sometimes, the Supreme Court takes over a series of responsibilities in regard to decisions with respect to the judiciary power (eg Slovenia). However, there are major problems regarding the delimitation of competences between the Ministry of Justice and the Superior Council. In Slovenia, the Supreme Court, together with the Superior Council of Magistrates shall draft the budget. The Superior Council of Magistrates expresses on the budget proposal. However, no representative of the judiciary is able to influence the final decision-making procedure, which is taken at government and Parliament level.

The centralized model - Executive (this was characteristic of Germany, Latvia, the Czech Republic before EU membership). In this model, the judiciary power appears as being subordinated to the Ministry of Justice. Decision-making power, representation, judicial budgeting, allocation of funds, number of judges and administrative staff, the selection of judges and disciplinary sanctions, Presidents appoint and dismissal from the courts, setting of standards for the management of files belong all to the Ministry of Justice or other executive authorities. The Ministry can not influence the Supreme Court of Justice. This model seriously violates judicial independence and is inefficient in terms of administration of justice. For example, in Latvia during the pre-accession was found that the Ministry of Justice does not have sufficient staff capacity in the administration of efficient justice.

However, in the plan of ensuring the functionality of the judiciary, there are many aspects to be reformed. The reform process starts from a number of assumptions:

- Control over the budget process directly affects the independence of the judiciary. It is natural that in a democratic state, the final decision with regard to public finances belongs to the legislature. However, it is necessary to involve the judiciary in the proposed budget for the courts.
- The practice of leaving the responsibility of the administrative duties to the President of the court proved to be ineffective. Generally, court presidents have no special training to management level, making it difficult to ensure efficiency. An effective solution is to transfer administrative tasks to someone who is a member of the judiciary. Bulgaria, Estonia, Poland and Slovenia introduced the unit of court administrative director.
- In general, the judge's time is considered to be expensive. It is not reasonable to include into the powers of a magistrate (a highly skilled person) typical administrative and economic responsibilities. Accordingly, there is no reason to grant functions of administration, if not so much in terms of resource management decisions related to the court, then particularly in terms of their execution.

¹⁶ Les, Ioan, *Sisteme judiciare comparate*, Bucuresti, Editura All Beck, 2000, p. 68

2. Access to justice and the course of justice in the U.S.A.

In addressing the issue of access to justice must be taken into account the values that a society wishes to preserve and develop. If we analyzed the values desired by the Soviet society, we could see with some degree of certainty that the justice system met the expectations inspired by political bodies and presented as desired by the society. Sometimes, even approaches to access to justice take connotations oriented towards some justifications. For example, Professor John Samuel Scott argued that during the Soviet period, both systems, the Soviet and the U.S. system had many common elements, though the American system would have taken a number of elements from the Soviet system.¹⁷

In the American doctrine sense, equal access to justice often means access to law.¹⁸ The U.S.A system appears to be one of the most democratic in the world and is often presented as an example. In analyzing this system, we start from the premise that the achievement of subjective rights doesn't mean yet effective means of achieving social justice. The U.S.A population is one of the most judgmental, because the number of appeals in court for certain categories of cases is much higher than in other states and this number is growing. U.S. citizens see the court a way to decide when it is not too clear how it should be done in one particular dispute or situation. An important issue is equal rights, irrespective of social status¹⁹.

The right of access to justice is guaranteed both by the Federal Constitution and by the constitutions of the federation states. Additionally, there was developed a normative basis in terms of legal assistance for the most diverse categories of people: poor people, migrants, children, legal assistance in challenging administrative acts, and so on. In achieving access to justice, U.S. law, as many other states, does not recognize in all civil cases the right to be assisted by a lawyer.

Although there is a variety of models of legal assistance and examples of successful people in need of representation from a qualified lawyer, there are also many examples of failure, in other words, the vast majority of poor individuals are forced to defend themselves²⁰.

A 1995 report from the Committee on the Activity of Nonlawyer American Bar Association claims that 70% - 80% or even more of people with a miserable or medium-low income are unable to receive legal assistance when needed²¹. A lawyer is available for 380 American citizens, but only one lawyer is available for 4300 poor people.²² From such considerations, although there are strict prohibitions on the practice of legal activity by nonlawyers, still, there are being searched the most diverse solutions of nonlawyers involvement in facilitating access to justice for socially

¹⁷ Scott, John Samuel, *Access to Civil Justice in the United States and the Soviet Union: a comparative analysis*. - American U. Journal of International Law and Policy, 1986, vol. I, p. 256

¹⁸ Rhode, Deborah L., *Acces to justice*, Fordham Law Review 2000-2001, vol. 69, p. 1786

¹⁹ Marden, Orison S. Equal, *Access to Justice. The Challenge and the opportunity*. - Washington and Lee Law Review, 1962, vol. 19, p. 157

²⁰ Kaye, Judith S., *Access to justice conference. September 11, 2001*, Fordham Urban Law Journal, 2001-2002, vol. 29, p. 1082.

²¹ Hurder, Alex J., *Nonlawyer legal assitance and aces to justice*, Fordham Law Review, 1998-1999, vol. 67, p. 2241.

²² Rhode, Deborah L., *Acces to justice*, Fordham Law Review 2000-2001, vol. 69, p. 1788

vulnerable individuals: the preparation of applications, complaints and reclamations, assistance in understanding some complex legal proceedings, representation in court, preparing lists of questions to be put to witnesses, and so on. In addition, private actions are promoted in the public interest. Any public campaign, based on a decision of a court in a particular case, but which is representative for many people, can produce impact at law level and in particular, at the level of everyday practices of state authorities.

The American system of judicial organization has evolved continuously. It has increased the competence of federal courts. However, federal jurisdiction requires a reform from the following reasons: increase workload of judges, federal rules promoting issues affecting jurisdiction, criminal jurisdiction expansion occurs due to public concern for crime and violence, increasing the number of complaints regarding violations of civilian rights of prisoners and other reasons. In order to improve the judiciary, various solutions were tried, such as: increasing the number of judges (which is a limited solution), redistribution of materials and territorial jurisdiction between courts of the Federation and federation states, special attention is given to alternative measures of dispute resolution such as negotiation, mediation, arbitration. These solutions have been reflected in amendments to the laws which regulates the field. It also seeks to promote information technology in facilitating access to justice.

Continental system operates with the notion of analogy of law and analogy of justice. American system, as part of the common law family, settles the equity gap situations, so that sometimes, it is argued that common law is a creation of the judge.

Following the influence of the British Crown, the American system took over the model of jury courts. Like any model, it has positive elements but also some negative factors: the judge must be free of any influence, even if it is popular (jurors influence through their behavior the intimate judge's conviction); there is often a big difference between the complexity of the circumstances considered and the knowledge of jurors; having no knowledge of the law, jurors do not always understand the instructions the judge; the judge is bound by the letter of the law, and jurors do not, sometimes the problem of uneven application of laws appearing and different decisions related to similar cases; the jury considers the case of emotion, prejudice or sympathy sometimes neglecting legal matters.

U.S. law operates with the notion of due process, considering this as a fundamental right derived from the human dignitary right. This initially meant that no one can be deprived of life, liberty or property except through an appropriate trial - for exemple in a procedure (Amendment V of 1856): an impartial tribunal; with the disclosure of the charges against the individual; the defendant is protected against unreasonable searches and seizures; in order to reinforce this rule, the state is forbidden to use evidence obtained in violation of the law; the right to present evidence, including calling witnesses for the court is guaranteed, the court's obligation being that of attaching to file the evidence presented; the right to know the evidence of the opposing party; the court must make records of court proceedings; the accused has the right to refuse to give testimony against himself; no one can be tried or punished more

than once for a violation of the law ; the decision of Grand Jury is taken only on evidence; the right to be tried by a court of jurors; the right to defense.

Court proceedings are public, being a historical tradition, a guarantee of respect for legal procedure (due process), a guarantee of the impartiality of the judge, a model of general prevention²³. In the events following 11 September 2001, a large part of the procedures have become closed, namely, the balance report between human rights - public security was inclined towards the last.

The American system is one of the most severe. No EU country has retained the death penalty, unlike some U.S. states. Also, the U.S. incarceration rate is one of the largest in the whole system of punishments.

BIBLIOGRAFIE:

1. Ayala, Thomas V., Development of the first amendment right of access to adjudicatory hearings in the first circuit: does the ongoing threat of terrorism call for a secret justice system? - Villanova Law Review, 2003, vol. 48

2. Access to Justice in Central and Eastern Europe, Country Reports: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia. - Public Interest Law Initiative/Columbia University, Interights, Bulgarian Helsinki Committee, Polish Helsinki Foundation for Human Rights: 2003

3. Commission of the European Communities. Green paper from the Commission: Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003), 19.02.2003

4. Hurder, Alex J., Nonlawyer legal assistance and access to justice, Fordham Law Review, 1998-1999, vol. 67

5. Harlow, Carol, Access to Justice as a Human Right: The European Convention and the European Union

6. Kaye, Judith S., Access to justice conference. September 11, 2001, Fordham Urban Law Journal, 2001-2002, vol. 29

7. Les, Ioan, Sisteme judiciare comparate, Bucuresti, Editura All Beck, 2000

8. Marden, Orison S. Equal, Access to Justice. The Challenge and the opportunity. - Washington and Lee Law Review, 1962, vol. 19

9. Monitoring the EU Accession Process: Judicial Capacity. - OSI/EU Accession Monitoring Program, 2002

10. Owers, Anne. Public provision of legal services in the United Kingdom: a new dawn? - Fordham International Law Journal, 2000-2001, vol. 24

11. Opinion of the European Economic and Social Committee on the Prevention of juvenile delinquency. Ways of dealing with juvenile delinquency and the role of the juvenile justice system in the European Union (2006/C 110/13). - Official Journal of European Union, C 110/75, 09.05.2006

12. Rhode, Deborah L., Access to justice, Fordham Law Review 2000-2001, vol. 69

²³ Ayala, Thomas V., *Development of the first amendment right of access to adjudicatory hearings in the first circuit: does the ongoing threat of terrorism call for a secret justice system?* - Villanova Law Review, 2003, vol. 48, p. 1307.

13. Rapport de la commission de reforme de l'accès au droit et à la justice. - Service de l'Information et de la Communication du Ministère de la Justice, Juin, 2001
14. Spigelman. Access to Justice and Human Rights Treaties. Keynote address. - Sydney Law Review: 2000, vol. 22
15. Scott, John Samuel, Access to Civil Justice in the United States and the Soviet Union: a comparative analysis. - American U. Journal of International Law and Policy, 1986, vol. 80, Deborah L., Access to justice, Fordham Law Review 2000-2001, vol. 69
16. <http://www.president.ee/en/estonia/constitution.php>
17. http://www.servat.unibe.ch/icl/it00000_.html
18. <http://www.humanrights.lv/doc/latlik/satver~1.htm>
19. <http://www.om.fi/21910.htm>
20. <http://laws.justice.gc.ca/en/const/index.html>
21. <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html>
22. http://www.servat.unibe.ch/icl/uk00000_.html