

THE RIGHT TO A FAIR PROCESS IN VIEW OF NEW CHANGES OF CIVIL PROCEDURE CODE OF RM

*Lecturer Gheorghe POSTOLACHI**
Academy of Economic Studies of Moldova

Abstract

Democratic societies aspire unanimously to a fair trial and tend to create norms concerning the treatment of individuals involved in a criminal or civil trial that could be applied universally. The right to a fair trial is stipulated in the European Convention of the Protection of Human Rights and Fundamental Freedoms (ECHR) and in the legislation of many democratic countries.

Keywords : fair trial, guarantee of the right, equality of parties

The word "fair" is defined by DEX as "founded on justice, on truth, just, impartial".

Thus, the Article 6 of the Convention mentioned above guarantees the "right of every individual to a fair trial" as applicable to both criminal and civil procedures.

As indicated in the legal sources, the Article 6 of the European Convention of Human Rights is one of the longest and most complex of the Convention. As the provisions of the Convention are of great importance for the tribunals and legal units, we will realize a synthesis on this topic that concerns the right of an individual to a fair trial at an independent and impartial tribunal that shall be solved in a reasonable period and with respect to all legal procedures¹.

In the contemporary society, the right to a fair trial plays an extremely important and essential role. "The restrictive interpretation of paragraph 1 of Art. 6 and Art. 6 altogether, would not meet the overall purpose and scope of these provisions"².

Therefore, it was decided that the provisions of paragraph 1 of Art. 6 of the Convention shall be applied even in the cases of legal actions with patrimonial character that involve the infringement of civil and non-property rights (in a broad sense) or in cases when the settlement of a civil action is determined by rights and obligations of private character³.

Regarding the concept of "civil rights and obligations", the European Court specifies it by adopting a broad interpretation of this concept, considering that it shall be applied not only in legal relations of civil law itself, but also in 'legal relations between individuals or private legal entities and state authorities, which may arise the rights and obligations of civil law, to which provisions of line 1 of Art. 6 of the Convention are applicable too".

* marianalex@mail.ru

¹ Pătulea Vasil commented fair trial jurisprudence of the European Court of Human Rights. Romanian Institute for Human Rights , Bucharest 2007.

² Voicu M. , "Protection of Human Rights . Theory and jurisprudence " Lumina Lex , Bucharest, 2001 , p 94.

³ See ECHR , judgment of 25 November 1994 , in the Ortenberg v. Austria , Series A no. 259 -B , paragr . 28.

In this report, the Court claimed "with a principle value" that paragraph 1 of Art. 6 of the Convention envisages not only "appeal" (court action) relating to individual rights which regulate the private domain, but these rights can also be questioned (may be subject to legal action), both in the context of private litigation and in disputes between individuals and the state, to the extent that the State acts within the private legal relations and not as a public authority (*jure imperii*)⁴.

In the Moldovan legislation there can be found the vast majority of guarantees to a fair trial. Certainly, most of the provisions relating to ensure a fair trial cover the provisions of the two procedural codes (civil and criminal). Although it is impossible to list exhaustively all provisions, we will reserve the right to mention the most important ones:

- independence and impartiality of the judges,
- court proceedings are public,
- guarantee of the right to defense,
- equality of parties in court is guaranteed by law,
- binding motivation decisions,
- reasonable observance of the trial period.

However, in this study we will refer to some of the guarantees of a fair trial provided by the examination of civil cases established by the Code of Civil Procedure of the Republic of Moldova⁵ which in recent years has been changed thus ensuring guarantees of fair trial.

On the other hand, some provisions of this code are declarative and not implemented for objective reasons such as unwillingness of the courts and the involved parties to realize them.

In compliance with law nr. 155 dated on 5 July 2012 there were introduced some significant changes to the Code of Civil Procedure. These amendments entered into force on 1 December 2012

One of these amendments is defined in art. 18 by paragraph (1¹), which states: "To exercise the procedural rights and obligations the participants in the process can make the audio recording of the hearing."

According to the amendments, the parties of the process and representatives shall have the right to audio record the discussions at hearings without prior consent of the presiding judge or the president of the court.

We believe that this right is a part of the principle of the public nature of court proceedings, and it permits the parties to document certain facts and testimonies expressed by the participants in the process and can serve as evidence in case of divergence between them and the content of the minutes of the hearing.

We consider that the drawback is that it is forbidden to make video record of court hearings, without any prior consent. Such amendment would be very helpful in the future and would contribute significantly to the promotion of transparency in court.

The Law 155 of 05.07.12 contains significant provisions fostering the right to a fair process in terms of unconstitutionality settlement in civil cases.

⁴ See ECtHR judgment of July 16, 1971, *Ringeisen v. Austria* concerned, Series A, art. 13, paragr. 94.

⁵ Code of Civil Procedure of the Republic of Moldova no. 225 of 30.05.2003 // Official Gazette no. 111-115 of 12.06.2003.

If in the judgment of the case it appears that the law provision, that shall to be applied or has already been applied, is inconsistent with the Constitution of the Republic of Moldova, and the constitutionality of the normative act is for the Constitutional Court, the court makes a referral to the Constitutional Court which is stated through the Supreme Court.

This provision would guarantee the application of present regulations sometimes outdated in strict conformity with the Constitution of the Republic of Moldova.

By filling in Art 236 with a new paragraph, there were made attempts to ensure the process with a fair but painful essential element of justice in Moldova, namely motivating court decisions. The amendment provides that the court is liable to pronounce decision without stating the motivation.

The court will be required to prepare full judgment expressly indicated only in cases, when trial participants within 30 days insistently request this, or when the appeal has been filed within 30 days since decision was pronounced or judgment will be enforced in another country.

Therefore, if a party files an appeal, the court will be required to prepare a motivated judgment, even without a specific request in this regard.

Although the law requires all decisions to be reasoned, the inadequate motivation of judgments still is a serious shortcoming of the Moldovan justice.

Frequently judges reproduce text of the law in the judgment, without explaining how this legal provision shall be applied to a definite situation. Also, many judges are not compelled to motivate essential argument put forward by one of the parties, creating the impression that the argument has been totally ignored. The lack of the judgments motivations in the Republic of Moldova was mentioned by the ECtHR in 2005⁶.

The publication of judgments on the website increased their quality. However, motivating a large number of judgments still has a long way to become satisfactory.

The faulty motivation of the judgments is caused by past practices of superficial judgments motivation, large number of examined cases, traditional focus on the promptitude encouraged by the SCM (Superior Council of Magistrates of Republic of Moldova) to examination of cases, toleration of unmotivated decisions by supreme courts, contradictory practices of the SC (Supreme Court of the Republic of Moldova) and lack of rigorous control upon unification of jurisprudence. One of the basic principles in the operation of the courts is to reasonably respect the period of case examination. That directly insures the right of citizens to exercise the right of effective satisfaction of the courts. Generally, Moldova has never got chronic problems regarding the time examination of cases by the courts. The long examination of the cases is more an exception than a rule. Thus, in both civil and criminal cases the first meeting takes place within 6 weeks after notification of the court⁷.

Though there are some cases with a dose of complexity and inefficient administration by the court or participants that are examined for several years with passing several times through all levels of courts.

⁶ See judgments of the ECtHR in cases Becciev v. Moldova and Sarban both the October 4, 2011.

⁷ .Gribincea Vladislav Hriptievschi hope, Access to justice, the right to a fair trial and the presumption of innocence.

The delay is caused by several reasons: excessive postponement of hearings, complexity of the dispute; abuse in lodging appeals by the parties in the process, performing acts of expertise for extended periods etc.

That drawback was eliminated by Law no. 87 of 21.04.2011, which created a cure for the defense of the right to trial within reasonable case and the right to enforcement of the judgment within a reasonable time.

Thus, if it is proved that the right to trial within reasonable time or within a reasonable right to enforcement of the judgment has been violated, the court will decide on the compensation of moral and material damage as well as litigation costs from the state budget. It is important to use all possible legal leverage for the realization of the right to examine the case within a reasonable time.

Although the civil procedure of Moldova apparently contains legal provisions ensuring the right of the parties to a fair trial, in reality there are still many deficiencies that cause discontent in society and distrust in the judiciary system. To guarantee the efficiency of this right it is necessary to introduce rules that would increase personal responsibility of courts and judges.

BIBLIOGRAPHY

- Code of Civil Procedure of the Republic of Moldova no. 225 of 30.05.2003 // Official Gazette no. 111-115 of 12.06.2003

- Law on the State compensation for damage caused by the infringement of trial within reasonable time or within a reasonable right to enforcement of the judgment no. 87 of 21.04.2011 // Official Gazette . 107-109 of 01.07.2011

- See ECHR , judgment of 25 November 1994 , in the Ortenberg v. Austria , Series A no. 259 -B , paragr . 28

- See judgments of the ECtHR in cases Becciev v. Moldova and Sarban both the October 4, 2011

- See ECtHR judgment of July 16, 1971 , Ringeisen v. Austria concerned , Series A, art . 13 , paragr . 94 ;

- Gribincea Vladislav Hriptievschi hope. , Access to justice , the right to a fair trial and the presumption of innocence

- Pătulea Basil commented fair trial jurisprudence of the European Court of Human Rights. Romanian Institute for Human Rights , Bucharest 2007

- Voicu M. , "Protection of Human Rights . Theory and jurisprudence", Lumina Lex, Bucharest, 2001 , p 94.