

The right to a fair trial and to avoid expedite justice

Assoc. Professor Emilian CIONGARU PhD.

University Hyperion Bucharest-Romania;
Associate Scientific Researcher – Romanian Academy,
Institute of Legal Research „Acad. Andrei Radulescu”
emil_ciongaru@yahoo.com

Abstract:

The expedition of the judicial process and, implicitly, of justice, is not only a theoretical advantage for the parties to trials, but rather, a huge advantage for the trust of all persons in justice and in the judge and ability thereof to sanction any breach of any right, particularly since the system of the law is a field with a social feature that governs relationships between individuals. Any legal process needs a certain timeframe within which to be performed for it to be built as appropriately as possible and the absence of such a period is sufficiently harmful to personal right safeguarding. The principle of celerity is not necessarily a quality, because a prompt justice may be an expedite justice, hence, a bad justice or a failed justice. For these reasons, any judge is bound to seek and find a balance between the need for a judgment performed based on the principle of celerity and the need for a complete, correct judgment of the de jure and de facto matters deferred for judgment.

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One of the core principles of a democratic society is the right to a fair trial, a principle that plays an essential role in the value system of any rule of law, because the establishment of the protection of fundamental rights and freedoms is to be mandatorily reinforced by the establishment of procedural safeguards appropriately ensuring the effectiveness of this protection. The right to a fair trial is a procedural guarantee in the absence of which the other rights and freedoms would significantly lose value.

The recent doctrine states that the fairness principle...imposes on the lawmaker to be moderate when developing normative acts and to maintain a state of impartiality and balance for all parties subject to the legal rule. [1]

The desideratum of creating a democratic society governed by the principle of the pre-eminence of the law may be achieved not only by preventing the breach of human rights and ensuring the sanctioning of such breaches, but also, by creating a complex of safeguards and instruments which to ensure the compensatory and sanctioning functions of the justice are exercised in a legal and operational framework, thereby eliminating the possibility for new injuries to occur during the very process of performing the act of justice. [2]

For the purposes of achieving this aim, the European Convention on Human Rights regulates two procedural rights, which materialise into safeguards for enhancing, in the courts of law, the rights recognised for people.

In this framework, the provisions of Art. 6 and Art. 13 of the Convention, relating to the right to a fair trial and the right to an effective remedy, express a general idea, according to which an effective protection of human rights cannot be ensured by the mere establishment of substantial rights, but there is the need for these rights to be accompanied by fundamental procedural safeguards, which to ensure the appropriate enhancement mechanism.

The good administration of justice imposes an appropriate response from the state on all levels, including in terms of the timeframe needed for settling a dispute. Therefore, the obligation of the State, as arising from Art. 6 of the European Convention on Human Rights, is to create an efficient legal system, capable of settling a case within a reasonable timeframe. Moreover, in addition to this obligation, Article 6 of the Convention is corroborated with Article 13, on the grounds of which, it is under the obligation to regulate as part of the internal law a 'remedy' which to allow to the concerned person to make use of the rights and freedoms established under the Convention. The 'effective' feature of this remedy is to be appraised according to the capacity thereof to provide appropriate satisfaction to the party involved, by comparison to the breach incurred.

Even though, during a first stage, the Court has reflected a different approach in regard to the correlation between the right to an effective remedy and the right to benefit from the settlement of cases within a reasonable time, the European court has subsequently reached the conclusion that also in terms of the reasonability of the timeframe needed for conducting the judicial procedures, there is need for the parties to trials to be able to obtain, at national level, the elimination of the breach of this right before acting the international protection mechanism before the European Court.

The excessive timeframe needed for the procedures is frequently invoked before the European Court of Human Rights, the main reasoning being the difficult situation of the Romanian State as a result of the many convictions ordered for the breach of this right, and also, the existence of a legislative gap in relation to the adoption of a solution

in the matter of the prevention and remedial of the excess of the reasonable timeframe of procedures.

The general procedural safeguards prescribed by Art. 6 (1) of the Convention include the 'reasonable time' during which a person has the right to be judged; therefore, the principle of the judicial procedure celerity is expressed. The right to a reasonable timeframe for the procedures is not established only by the Convention. It is expressly regulated both at the level of other international instruments, such as the International Covenant on Civil and Political Rights (Romania ratified the Covenant under Decree no. 212 of the 31st of October 1974, published in the Official Gazette no. 146 of the 20th of November 1974), and at the level of other instruments for fundamental human rights protection at domestic level, the Romanian Constitution providing, in Art. 21, the right to a judgment performed with celerity. However, it was the Court the one that realized both the importance of actual and exact application of this guarantee, and the one that provided for the first time the criteria for analysing the reasonability of the timeframe within which a dispute is judged, therefore compelling the States, by the jurisprudence thereof, especially by the Kudla Decision (this decision stating that 'the time has come to reconsider its jurisprudence taking into consideration the increasing number of applications filed before it in relation to, either exclusively or as a main claim, the lack of the obligation to settle the cases within a reasonable time, under Art. 6§1)[3], to take action to meet this interest. The excess of the reasonable timeframe for procedures is one of the most frequent claims put forward by the claimants before the European Court. The reasonable timeframe for the procedures, as prescribed in Art. 6 (1) of the European Convention applies to all persona involved in a criminal proceeding, regardless of whether they are under arrest or not and aims at protecting them against the excessive slowness of the procedures, with the aim of avoiding to extend the uncertainty regarding to the fate of the accused [4] for too long.

The reason for the existence of the law with a reasonable timeframe of the procedure is obvious. It is elegantly expressed both as part of a frequently quoted British adage – justice delayed, justice denied, and of a French maxim having similar contents – justice rétive, justice fautive. The Court has resumed this idea in a more juridical form stating that, by imposing the need for a reasonable timeframe for

procedures, the Convention emphasises the importance of the idea that justice is to be performed without any delays which to compromise the reliability and effectiveness thereof, the State being responsible for the activity of the services thereof as a whole, not only that of the legal bodies.

Furthermore, the Court has decided, on several occasions [5], that the provisions of Art. 6 (1) of the Convention 'bind' the contracting states to organise the legal system thereof so that the latter meets all the requirements of the abovementioned text, therefore, including that of settling any dispute 'within a reasonable time' taking account, among other things, of the difficulties generated by different factors that may delay the national judicial procedures (hindrances that are to be overcome by way of legislation). Another emphasis made by the European court takes also consideration of the fact that, in time, the urgency of the settlement of a case or types of cases increases and the means commonly used may prove to be temporarily insufficient. Therefore, in these cases also, the State is under the obligation to take action more effective than the usual one, in order to conform to the requirements provided by Art. 6 of the Convention.

Considering such situations, the Court has adopted tailored, balanced solutions, deciding, for example, that the temporary overloading of the role of a court of law does not give rise to the international liability of the State in such a situation if the latter promptly takes action to remedy such circumstance, in these cases appearing to be reasonable even to establish 'certain provisional orders when settling cases', grounded on the urgency and importance thereof. However, the Court has also stated that, when the loading of the court of law dockets 'has become current' does no longer justify the excessive duration of the legal procedures [6] [7] [8].

On the other hand, the trial involves a timeframe during which to be appropriately handled. The lack of such a timeframe is harmful to the safeguarding of the personal rights. Therefore, it is to be mentioned that celerity is not necessarily a quality, a quick justice may be an expedite justice, therefore, bad justice [9]. For this reason, the judge is held to find the balance between the need for a judgment performed with celerity and the need for a fair complete judgment of the matters of law and of fact subject to judgment. As long as Art. 6 § 1 of the Convention governs the right to judgment within a reasonable timeframe, a textual interpretation thereof does not limit its scope only to the

time when the proceeding is beyond normality, and the wording allows the interpretation thereof also in the sense of the establishment of a right of not being subject to expedite justice. Just as a procedure too long practically cancels the right of access to justice, a too expedite procedure threatens to have the same effect, namely, the person is deprived of actual concrete access to justice. For this reason, when a longer time is needed for a thorough consideration of the case for the good settlement thereof, a delay in giving a decision appears to be justified and it prevails over celerity and the states must not, from a desire to conform to the requirement of procedure celerity, go to the other extreme and organise their legal systems so as to produce bulk rulings from a mere desire to make quick judgements, no matter how, a fair slow justice being preferable to a quick unfair one.

The application of the law is a meticulous process, highly accurate, having social and human implications. This process is closely related to the requirements of the fair determination of the state of fact and the application of the appropriate legal rule. The application of the law is subordinated to the principle of finding out the truth and also, of the protection of the fundamental human rights and freedoms.

The expedition of justice is not only a rather theoretical advantage for the accused, but more of a huge advantage for the public trust in justice and in the capacity thereof to sanction the breaches of the law. When the public notices that, quickly, any person having breached the law becomes sanctioned, the benefits for the trust in justice and for the general prevention function are significant, and this reaction of the public is, in reality, a projection of the legal culture, which significantly influence the system of the law [10].

In criminal law, emphasis is to be made as much as possible on the need to guarantee the right of the accused, of which the latter does not usually want to take advantage, so that, when protecting thereof, the higher interests of the society are protected. For this very reason, when analysing complaints from persons putting forward the right to a judgment performed with celerity in criminal law, the Court is rather harsh when appraising the conditions for the application of the provisions of Art. 6.

The right to a reasonable timeframe of the procedure in criminal law, as a procedural guarantee for the right to a fair trial, as established by Art. 6 of the Convention, is a fundamental right, and not a freedom, because it is important not only for the person concerned, but also for the public trust in justice, therefore, for the society as a whole and beneficial for the entire society, so that the person for whom the right is recognised is able to waive the exercising thereof. Because of the role thereof in the current structure of the society, this right is certainly among the most inherent rights to the human being.

Moreover, this right is a relative one, because it can be limited, reduced or restricted by the State to the extent certain conditions, expressly provided by Art. 53 of the Constitution of Romania and by Art. 18 of the European Convention on Human Rights, are met. Therefore, this right could be limited on the assumption that a legitimate purpose out of those provided by the Constitution, is sought.

In the Romanian legal system, the general legal procedures that guarantee the principle of the judicial procedure performance within a timeframe, which may be characterised as reasonable, can be primarily found in the Constitution of Romania. Therefore, according to Art. 21 (3), the parties are entitled to the settlement of cases within a reasonable time. The regulation can also be found in Art. 10 of Law 304/2004 on judicial organisation.

The Criminal Procedure Code includes several newly-inserted legal provisions which mainly represent attempts to award more substance to the principle of the criminal trial celerity. Therefore, the setting of hearings as part of the criminal trial aims, on the one hand, at limiting the duration of trial actions (without these hearings, the privative or restrictive actions related to rights would become arbitrary) and, on another hand, they prevent the postponement of the criminal trial performance, ensuring the operation of the action required by the fair settlement of the criminal case.

The celerity indicates appraisal difficulties not only in terms of the reasonable character, but also, in terms of determining the timeframe the reasonable character of which is subject to analysis. To be able to conclude on the exigency of the reasonable time, the European Court had to determine the period required for consideration purposes, by emphasising the initial moment (*dies a quo*) and the final moment (*dies ad*

quem) and, in order to provide to the parties to trials a due materialisation of the rights and interests thereof, the timeframe between the two moments had to be as short as possible.

In order to assess the reasonable timeframe of procedures, consideration is taken of the entire procedure timeframe, however, being possible that a proceeding before a court of law is enough to lead to the conclusion on a lack of celerity (CEDO, Scopelli Decision). In fact, this procedural guarantee has a special character compared to the other provisions of the Convention, namely, the plaintiff is no longer bound to use all internal legal remedies. The solution is logical, as long as it is unnatural for the plaintiff to have to wait for the finalisation of a procedure that has already taken too long.

For this reason, it is difficult to express a figure based on which to state that the trial has taken too long. For example, in Zimmermann and Steiner [11], the Court decided that a trial having taken three and a half years does not meet the celerity requirement, while in Pretto [12], it was found that the requirements of Art. 6 (1) of the Convention, relating to a procedure having taken a similar time, have been met.

In the civil trial, the principle of the availability for the procedure performance is applicable. The Court has decided that the provisions of the Convention do not prevent the contracting states from grounding their civil procedure on this principle [13], but that it does not exempt the national judge from their duty of celerity. The interested party [14] is held, in its turn, to diligently perform the trial acts devolving upon them, not to use stalling mechanisms, make use of the possibilities provided by the internal trial rules, with the aim of reducing the time for the judgment procedure, and not to take action contrary to the accomplishment of this purpose. However, a plaintiff cannot be accused of having used, during the challenged legal procedure timeframe, all the legal remedies available under the internal law [15].

In civil law, as a rule, the term reasonable starts from the day when the court of first instance is awarded competence for dispute [16] settlement and relates to the overall procedures needed for the case, both on the substance, and in terms of rights of action, until the final settlement of the challenge on the concerned right or obligation.

Therefore, two mentions must be made: the reasonable time in civil proceedings may also include the timeframe of preliminary administrative procedures, when the

possibility of initiating a proceeding is court is mandatorily conditioned on the performance of such a proceeding [17]; the reasonable time also includes the court order implementation procedure, which is considered an integral part of the term trial [18].

If the solution of the proceeding performed before the national constitutional law influences the solution of the dispute analysed by the national jurisdictions of common law, the term reasonable also includes the duration of the constitutional proceeding [19], but the duration of preliminary question examination by the Court of Justice of the European Communities is not taken into account, because this would prejudice the system established under the provisions of the institutional treaties thereof. In this regard, the activity of an expert cannot represent a reasonable ground for the extension of a legal proceeding, because he/she conducts his/her activity under the control of the court of law, which needs to bound him/her to comply with the deadlines ordered for performing the technical works necessary for the settlement of a case [20].

In conclusion, the expediency in trial activity performance must not deprive the trial and procedural acts of quality and soundness, for the act of justice to become an expedite act of justice. For the purposes of avoiding expedite justice in the settlement of a case referred for judgment, to which organisation, handling, administration, and performance of the legal process are subordinated, the principle of celerity must not remain at the level of the doctrinal discussions and opinions, but it should be provided under rules, transposed in institutions and trial proceedings, safeguarded under deontological and conduct rules of the legal bodies, otherwise, this principle will continue to be a generous, yet utopic, ideal. The term reasonable provided under any remedy of legal proceedings involves a short time, but which does not result in an expedite justice, which may be a failed justice or a denied justice. Just as a long judicial proceeding cancels, practically speaking, the right if access to justice, in the same way, a too expeditious justice is likely to have the same effect, namely, the person being deprived of a real an actual access to justice. For this reason, in the circumstances when a longer timeframe for a thorough analysis of the case is needed for a better settling thereof, a delay in the ruling appears to be justified and it prevails over celerity and, wanting to conform to the need of the proceeding celerity, one may obtain the

opposite effect when organising the legal systems, and thus rulings may be rendered one after another, driven by a desire to make a quick judgment regardless of the manner thereof; instead, a correct, justice, in a slow pace is preferable to a quick, unfair one.

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