

The right to a fair trial - distinct interpretation from the sense outlined by the art. 6 of the European Convention on Human Rights

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Abstract:

The right to a fair trial in the sense of art. 6 of the European Convention on Human Rights aims at fulfilling all of the following elements: access to justice; case consideration fairly, publicly and within a reasonable time; case examination by an independent court, impartial, established by law; public pronouncement of judgments. Principle of the right to a fair trial is fully reflected in the mediation process, with the certainty that through mediation, the parties will have at least the same procedural safeguards as in Court.

Keywords: *European Convention on Human Rights, mediation, right to a fair trial*

European Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights, “was ratified by the quasi-totality of the member states of the Council of Europe and represents one of the newest constructions of the international institutional system [1]”. By Law no. 30/05.11.1994 [2], Romania ratified European Convention for the Protection of Human Rights and Fundamental Freedoms and the additional protocols to this convention, i.e. protocols no. 1, 4, 6, 7, 9 and 10. In this way, the Convention and its additional protocols became an integral part of the national law and consequently a mandatory source of national law, so as mentioned under art. 11 and 20 of the Constitution [3]. The consequences of this fact at national level are represented by the immediate application of the Convention and of its protocols by the Romanian courts and at international level by the acceptance of the control provided by the Strasbourg court over the national judgments.

1. Concept of a fair trial in the sense of art. 6 of ECHR

As a guarantee of the respect of human rights, the Convention provides under art. 6, point 1 the right of any person to a fair trial:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The above text leads us to the conclusion that in the sense of the Convention, the right to a fair trial consists in the concurrent existence of the following elements: free access to justice, fair, public and reasonable term public hearing; hearing by an independent, impartial tribunal established by law; public rendering of judgments.

2. Brief presentation of the elements of the right to a fair trial

2.1. Free access to justice

Free access to justice is stipulated, at international level, by art. 6, point 1 of the Convention, by art. 10 of the Universal Declaration of Human Rights [4] and by art. 14, point 1 of the International Covenant on Civil and Political Rights [5] and, at national level, by art. 21 of the Constitution. Free access to justice encompasses the possibility of any person to initiate an action in court. This possibility involves the obligation of the state to settle the action in court, so that, per a contrario, any limitation of the free access to justice would be equivalent to a breach of the national and international legislation.

2.2. Fair and public hearing within a reasonable term

The principle of fair hearing means that the fundamental principles of any trial are observed: adversariality principle, principle of the right of defence, principle of equality between parties in a trial.

Adversariality represents a fundamental principle of the civil procedural law, meaning that “in line with the rules established by the civil procedural law the parties may submit requests, propose and produce evidence, as well as submit arguments on all the de facto and de iure aspects relevant for the correct settlement of the case.” [6] In relation with this right/principle, for its observance, the court has the obligation to submit

to parties' debate all the de facto and de iure aspects occurred during the trial, defence actions, motions, de facto and de iure aspects circumstances based on which the litigation will be settled, the judges grounding their decision only on the de iure and de facto aspects that were subject to parties' debate. Adversariality principle prevails over the principle of active role, the court not being able to decide on issues without listening to the parties' position [7].

The principle of the right of defence imposes the rule according to which the right of defence is guaranteed during the entire duration of the trial, this obligation of the state being fulfilled through the organization of the courts, through procedural laws and by the legal assistance.

The right of defence is guaranteed, so as stipulated under art. 24 of the Constitution, republished version, and under art. 15 of Law no. 304/2004 on the organization of the courts [8], with the subsequent amendments and completions. In the same time, in civil trials the parties have the possibility to be assisted by a lawyer, chosen by the parties or appointed ex officio, and in criminal cases the legal assistance is mandatory. Sanctioning this principle by law is aimed at ensuring that judgments express the truth and are grounded on the in force legislation.

The principle of equality between parties in a trial establishes the rule that stipulates the equality of parties in their relationships with the court, existence of the same concurrent judicial rights and, in the same time, existence of the same obligations according to the quality of each party in the trial.

The principle of public hearing regards the publicity of the debates, which is ensured both by the participation of the parties to the trial sessions and by the access to the debates of any other persons.

The reasonable term for the hearing has to be determined for each specific case, taking into account several aspects: object of the case, complexity of the dispute, length of the procedure, number of pending cases, as well as the possibility to challenge the decisions.

2.3. *Hearing of the case by an independent and impartial tribunal established by law*

In this context, the independence encompasses the following two aspects: independence of the courts and independence of the magistrate.

Independence of the courts has in view the fact that the court system is not a part of and is not subordinated to the executive and/or legislative powers. The principle of independence of judges represents the rule according to which in their activity, the judges are subjected only to the law that they have to observe. Romanian Constitution, republished version, stated this principle by art. 124, paragraph (3) that stipulates that judges are subjected only to the law and Law no. 303/2004 on the statute of judges and prosecutors [9], republished version, provides under art. 2, paragraph (3) that judges are independent, subjected only to the law and that they have to be impartial. Another guarantee offered to magistrates that insures their independence is given by irremovability – the rule according to which judges can be moved to another court or promoted only based on their consent; in the same time, judges can be suspended or removed from office only under the conditions provided by law.

Impartiality of the courts is a very important aspect of the judicial act. As a principle, the Strasbourg court stated, with respect to the case *Padovani vs Italy* [10] (February 26th 1993, paragraph 27) that it is essential for a tribunal in a democratic society to inspire trust to the parties, art. 6 paragraph 1 of the Convention imposing the obligation of impartiality for any court (paragraphs 35 -38).

Impartiality can be analysed from different angles, one of which consists in a subjective approach that tries to determine the inner thinking of the judge in a specific case, while another one consists in an objective approach meant to determine whether the judge offered sufficient guarantees to eliminate any legitimate doubt about himself (*Piersack vs Belgium* [11], October 1st, 1982, paragraph 30 and *Grievs vs United Kingdom* [12] [MC], December 16th, 2003, no. 57067/00, paragraph 69).

Establishment of a tribunal by law refers to the general competence, i.e. the subject-matter or geographic area of competence, the legislation including clear provisions regarding these types of court competences.

2.4. Publicity of judgements rendering

This principle allows the parties to become aware of the judgement immediately after the deliberation of the court.

3. Other meanings of the concept of fair trial

In his address to annual address to the American Bar Association's winter convention, Los Vegas (February 12, 1984), Warren Earl Burger, Chief Justice of the United States from 1969 to 1986 said that "the entire legal profession - lawyers, judges, law teachers - has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers - healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence, because they are perceived as healers."

During the same address, Chief Justice Warren E. Burger added "For some disputes, trials will be the only means, but for many claims, trial by adversarial contest must go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, and too inefficient for a truly civilized people."

After 1970s, a general concern was expressed by many people in United States of America, that the traditional method for resolving disputes by conventional litigation becomes more expensive, slower and more painful. Moreover, a high caseload was registered in the court dockets, as more time was needed for many lawsuits in order to be processed through the judicial system.

This concern contributed to the creation of the need for new processes, alternatives to litigation, which could be used by the parties in order to resolve their disputes quicker, more privately, without wasting resources, in short, more effectively. These alternative dispute resolution (ADR [13]) methods or processes were created to improve by complementation the judicial system in a constructively and not to replace the traditional litigation. For example, the parties can use ADR before and during litigation in order to prevent a lawsuit or to prevent a decision that will not be accepted by one party, at least.

Between 1994 and 1996, Lord Wolf [14] reviewed the civil courts' rules and procedures in England and Wales. At the bottom of this review there were similar concerns like limited access to justice due to high costs of litigation, too complex and traditional terminology, unnecessary distinctions of practice and procedure. In the final report that was published in 1996 [15], Lord Wolf considered that for particular areas of litigation, the civil justice system was not meeting the needs of litigants. The fundamental issues identified in the Report were cost, delay and complexity. The Report

included recommendations “as to the adoption of pre-litigation protocols to encourage a more co-operative approach to dispute resolution, to promote fair settlements and to avoid litigation wherever possible”.

The National Alternative Dispute Resolution Advisory Council (NADRAC), Australia, an independent non-statutory body was established in October 1995 in order to provide policy advice to the Attorney-General on the promotion of use and development of mediation and ADR.

On 23 April 2008, the European Parliament formally approved, without amendments, the Council's position on the new Mediation Directive. Following its signature by the President of the European Parliament and by the President of the Council, the DIRECTIVE 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters was published in the Official Journal of the European Union. As stated above, the purpose of the Directive is to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings.

All of the above are examples of how the global culture of dispute resolution can be enriched by new approaches, meant to enhance the judicial system's capacity to fulfil the people's needs in the best way possible. These approaches are as various as people and their needs and for any given situation, a continuum of ADR processes can stay at the bottom of any robust strategy for addressing conflict effectively, non-violently and constructively. All these examples show implication from the states in the direction of citizens' self-determination, in the pursuit of consensus based decisions in as many cases as possible.

3.1. Overview of the most known ADR processes

Alternative Dispute Resolution is a system of methods and processes that can be used to resolve disputes. Some definitions of ADR refer to processes that are alternatives to litigation. The ADR processes develop a spectrum, called ADR continuum, defined by the level of intervention, resources invested and control of outcome criteria. Therefore, the ADR spectrum starts with minimal level of intervention, minimal resources invested and maximal control over outcome, i.e. negotiation. The last

stages of the ADR spectrum involve a maximal level of intervention, maximal resources invested and minimal control over outcome (i.e. litigation).

Created as an acronym for Alternative Dispute Resolution, A.D.R. gained different meanings in time. One of them, Appropriate Dispute Resolution, refers to the fact that based on thorough analysis, at a certain moment, a certain method of dispute resolution offers the best prospects of effective resolution, therefore is more appropriate than the others in that particular moment. For example, this is the case with litigation that in some cases may be the most appropriate to be tried first, while in other cases, other ADR processes may be the most appropriate to be used first.

We'll describe further a selection of Alternative Dispute Resolution processes. Out of them, negotiation, mediation and arbitration are probably the most known and used by the parties worldwide and in the European Union.

3.1.1 Negotiation

The negotiation process was approached from many perspectives. According to one of them, negotiation is a communication process between two or more parties that are looking for solutions to common problems. Henry Kissinger [16] defined negotiation as, "a process of combining conflicting positions into a common position, under a decision rule of unanimity". Negotiation was also defined [17] as „Back-and-forth communication designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different. Negotiation is an intrinsic part of any kind of joint action, problem solving, and dispute resolution, and may be verbal, nonverbal, explicit, implicit, direct, or through intermediaries."

3.1.2 Mediation

According to article 3, let. A of the EU Directive 2008/52/CE, "mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State".

The Romanian mediation law (Article 1, Law 192/2006) defines mediation as following: "Mediation represents a way of amicable settlement of conflicts, with the support of a third party specialized as a mediator, in terms of neutrality, impartiality, confidentiality and with the free consent of the parties." Mediation can be also defined [18] as a negotiation process facilitated by a trusted neutral person having no power of decision.

3.1.3 Conciliation

Conciliation is a facilitation of communication process meant to lower tensions and improve the relationship of two or more disputants, by a third party, called conciliator. Conciliation is the least formal of ADR processes and can pave the way for a later mediation process. Sometimes, the conciliation can result in a settlement.

3.1.4 Arbitration

Arbitration is the most traditional form of private dispute resolution. Arbitration is a binding procedure. It is often "administered" by a private organization that maintains lists of available arbitrators and provides rules under which the arbitration will be conducted [19]. Parties choose arbitration over litigation because of the additional flexibility, process neutrality (arbitration can take place in a country, other than the ones of the parties), possibility to select the arbitrators, time and costs, confidentiality, binding decisions and recognition and enforcement of the awards.

3.2. Presentation of the right to a fair trial's components from the mediation's perspective

From all the ADR methods, mediation is the most used consensus based one, that is based on the intervention of a neutral and impartial person (the mediator). The principles that govern the mediation process are the legality of the documents developed during the mediation process, parties' self-determination, mediator's neutrality and impartiality, process' confidentiality and its voluntary character.

The mediation benefits include efficient use of resources for the purpose of effective solutions, efficient management of risk to continue the misunderstandings and potential for reconstruction of the social relation that was affected by the conflict. From the judiciary's perspective, benefits include a better quality of the justice act,

unburdening of the courts' high caseload, parties' better satisfaction with the court's decisions and efficient management of public funds.

We will further analyse the way that mediation ensures the right for a fair trial of the parties' that choose this procedure to bring their dispute to a resolution by analysing each component of the right for a fair trial from the mediation's perspective.

If by access to justice one can understand access to the hearing process of his case in the court of law, justice can be also accomplished through mechanisms like institutions from the field of human rights, European Ombudsman [20] or other alternative dispute resolution methods. Actually even the Romanian Constitutional Court stated in 1994 that "free access to justice requires access to procedural means by which justice is carried out" [21]. Also, to decide whether a judicial-administrative procedure constitutes a violation of free access to justice or have the effect of limiting such access, the Court held that "it is the exclusive competence of the legislature to institute such proceedings generally directed to ensure faster resolution of certain categories of disputes, decongestion of courts cases that can be solved in this way, avoiding court fees". Incidentally, these are also benefits provided by the mediation process, that is, equally, a means of justice.

The second component of the right to a fair trial which is "fairly consider the case, publicly and within a reasonable time" is met if we consider mediation, as each party has the right to express their own point of view concerning the conflict, the right to talk to the other party on the dispute face to bring all the arguments that it considers necessary to try to resolve the conflict amicably and negotiate directly and correctly the other party to adopt the solution which it considers most appropriate (win-win solution). The condition regarding reasonable time, we mention that this is also satisfied since the mediation law stipulates that the mediator has the obligation to take all necessary for the parties to arrive at a mutually convenient, within a reasonable time. The principle of hearings in public is reflected in mediation, mediation in terms of the possibility of participation of both the conflicting parties and other persons related to the case. But unlike classic judicial process, people who have nothing to do with the cause cannot attend mediation sessions without the agreement of both parties, this procedure is an identical judicial processes are those judged in the council chamber. Confidentiality is of

the essence of mediation, this principle is set out as such in the mediation law. Also, the right of defence of parties is ensured in the mediation, whereas in the mediation in civil matter, parties have the right to be assisted by a lawyer, chosen or appointed and in criminal mediation, legal assistance is compulsory.

„The examination of the case by an independent court, impartial, established by law" principle is revealed for mediation in the sense that mediators are neutral and impartial, persons who have special training in the field, being authorized by the Mediation Council in Romania.

„The public pronouncement of judgments" principle is extrapolated in the case of mediation since the parties know the contents of the mediation agreement after completion of mediation.

4. Considerations on the free access to court, according to the Decision of the Romanian Constitutional Court no. 226/2014

According to art. 601 of Mediation Law [22], in cases that can be settled by mediation or by another alternative dispute resolution method, parties and/or the interested party are obliged to prove that they participated to an informative session on the advantages of mediation, in the subject matters provided by this text of law.

In case of breaching the legal obligation on information about the advantages of mediation, the law initially provided the sanction of rejection of the court action if the parties (i.e. the claimant) did not prove to the court that they participated to informative session. This sanction came into force on August 1st, 2013. Later on, the Constitutional Court delivered a Decision on the unconstitutionality of art. 200 of the Civil Procedure Code, as well as of art. 2 paragraph (1) and (1²) and of art. 60¹ of Law 192/2006. [23] In this Decision, the Court considered that the limitation of the free access to justice “irrespective of how insignificant it might be, has to be thoroughly justified, being necessary to analyse if the created disadvantages do not outweigh the possible advantages. (...). Consequently, access to justice has to be ensured in an effective and efficient manner [24]. For these reasons, the Court believes that the mandatory preliminary procedure regarding the information on the advantages of mediation is an impediment in the exercise by the citizens of their judicial rights. Moreover, a procedure that consists in information on the existence of a law is a restriction of the right of free

access to justice, the subject of this right having an inopportune burden since the preliminary session is not meant to settle the dispute but provide information on mediation. Practically, participation of the parties to the mediation session in front of the mediator has a formal character.”

The reasons for judgment and the judgment show that only art. 2 paragraph (1) and art. (12) of Law no. 192/2006 was considered as unconstitutional – texts that stipulated the sanction of rejecting the court case if the preliminary procedure on information on the advantages of mediation had not been carried out – and art. 601 of the mediation law became optional. In other words, even if the judge does not advise the parties to accomplish the information procedure in that particular case, the judge has no coercion mean to oblige the party to obtain information from the mediator on the advantages of mediation.

5. Conclusions

As a result of the fact that the demographic, social and technological evolution of the humanity has seen exponential growth in recent years, the concepts of "justice" and "due process" processes are undergoing major changes designed to adapt and harmonize the existing mechanisms to current fundamental values. In conclusion, in the context of the constant changes that occur, we consider that the mediation process confer the same procedural safeguards as a trial, so that the parties have guaranteed respect for legality and correctness of the procedure itself applicable and of the documents that are prepared during the mediation process. These aspects do not diminish the advantages offered by the judicial process (especially if we take into account the binding character of judgments and the possibility to be immediately enforced, within a very short period of time) or the advantages offered by other ADR methods, so that the parties have the possibility to decide on the most suitable modality – at the right time – for the settlement of the dispute in which they are involved.

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