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ACCESS TO JUSTICE UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Mihai Selegea*

Sumary: 1. Introduction. 2. Field of application of the right. 3. Content of the right of access to court. 4. Conclusion

The introductory part of this paper shows how did the European Court of Human Rights (hereinafter referred to as "the Court") bring about, through its case-law, the right of access to justice starting from the wording of the article 6 of the European Convention on Human Rights (hereinafter referred to as "the Convention"), article which guarantees the right to a fair trial.

This first part is followed by a description of the field of application of the right so created by the Court, both from a material and an institutional point of view.

We shall turn then to the question of what is the content of the right of access to a judge, as it appears from the case-law of the Strasbourg organs.

1. Introduction

1. Article 6 of the Convention reads as follows:

> *"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. Judgement shall be pronounced publicly but the press and public may be excluded from all or parts of the trial in the interest 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.*
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> *2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

* Mihai Selegea é Advogado. Master of Law pela Central European University (Budapeste), chefe do Escritório da Romênia perante a Corte Européia de Direitos Humanos.

3. Everyone charged with a criminal offence has the following minimum rights:
a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b. to have adequate time and facilities for the preparation of his defence;
c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of a translator if he cannot understand or speak the language used in court."

2. As it is apparent from the text of the article, the right of access to court does not range among the rights expressly guaranteed by the founders of the Convention. Its very existence was contested for a long time by the governments of the contracting states. In order to have recognised what today seems so obvious – that there cannot be a fair trial in the absence of trial – the court needed to use *an extensive interpretation* of article 6.

First of all, the Court stressed the importance of article 6 which consecrates through the right to a fair trial "*the fundamental principle of the pre-eminence of law*"[1]. It is precisely because of the consideration of this special importance that the Court has underlined the necessity for an extensive interpretation of the text of the article:

> *"In a democratic society within the meaning of the Convention, the right to a fair trial occupies a place so important, that a restrictive interpretation of art. 6 paragraph 1 would not correspond to the object and the purpose of this provision"*[2].

3. The best opportunity to put into practice these principles was a case against United Kingdom, the *Golder* case. The court showed that:

> *"Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook (Lawless judgment of 1 July 1961, Series A no. 3, p. 52, and Delcourt judgment of 17 January 1970, Series A no. 11, pp. 14-15)".*

In the opinion of the Court, *"It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a*

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[1] ECHR, Sunday Times decision of 26th April 1979, A series nº 30, p. 34, par. 55.
[2] ECHR, Decisions *Moreira de Azevedo vs. Portugal* of 23rd October 1990, series A nº 189, par. 66, *De Cuber vs. Belgium* of 26thOct. 1984, A series, no. 86, p.16, par.30 ;*Delcourt* of 17th January 1970, A series, nº 11, p.14, par.25.

pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings"[3].

2. Field of application of the right

4. Therefore, article 6 guarantees the right of every person to have access to court. However, this right of access is limited to the field of application of the right to a fair trail, that is to the civil actions referring to the rights and obligations with civil character and to the charges in criminal matters. Moreover, its content is not the same in the civil and the criminal field.

Thus, if in civil matters the content of the right of access to court does not rise many problems, a few clarifications need to be made with regard to the criminal matters. It has been shown that, through the provision of the first paragraph of article 6, no right is given to the victim of an offence either to initiate criminal proceedings against its author, or to request to the representatives of the Public Prosecutor Office to initiate the criminal investigation. At the same time, this provision cannot be interpreted as entitling the person charged with committing an offence to request the continuation of the proceedings until a decision is pronounced by a court organised in accordance with the requirements of article 6. The only thing required by this provision, in criminal matters, is that every time a finding is made regarding the guilt of a person, this finding be made by a court offering the guarantees of a fair trial.

5. Article 6 is not the only procedural guarantee of the Convention. There are two other guarantees of the same nature – article 13 and article 5 paragraph 4. Thus, it is worth determining the field of application of the right of access to court as compared to the other procedural provisions of the Convention.

From the interpretation of the Court's and of the Commission's case-law one can infer the relationships between these provisions and their concrete way of enforcement. Thus, as regards their scope, article 13 applies every time the infringement of a right acknowledged by the Convention is invoked. But, when such a right has a civil character, article 6 will apply, since it offers the largest guarantees. There is an exception to this rule, when the right to a speedy trial is put into question. In this case alone, the state authorities have to offer to the complainant a recourse complying with the requirements of article 13. Article 5 paragraph 4 is a special norm intervening only if the lawfulness of the preventive arrest is put into question.

These norms cannot be mistaken from the point of view of the procedural guarantees they provide for either. The largest rights are offered by article 6. Article 5 submits the complaints regarding the lawfulness of the preventive arrest to the examination of a judicial body presenting some of the features of the "court" mentioned in article 6. Finally, article 13 confines itself to a "national authority" without it being necessarily a judicial body.

3. Content of the right of access to court

6. From the case-law of the Strasbourg bodies it results that the right of access to court has two fundamental features: it must be an effective right, without, however, being an

[3] ECHR, *Golder*, of 21 February 1975, series A, nº 18, p. 17-18;

absolute one. The meaning of the notion of effective right and the limitations to which it can be submitted will be presented in what follows.

3.1 – The right of access to court - an effective right

7. One cannot speak about an efficient right of access to justice if the court before which the case is brought does not enjoy *full jurisdiction*. The court must be competent to analyse both the facts and the law aspects of the case[4].

8. In certain circumstances, the right of access to court may imply the foundation by the State of a *free legal aid system* in civil cases[5] as well as in criminal ones[6].

In Airey, the Court showed that to every person's right to have access to court it corresponds the obligation of the state to facilitate the access. The consequence of this is that, in order to comply with this requirement, states must not only refrain from interfering with the exercise of this right but they sometimes have to ensure true social and economical rights. In the above-mentioned case, the complainant was trying to obtain judicial separation from her husband, since in Ireland, at the time, divorce as the dissolution of the marriage did not exist. The only court competent to grant judicial separation was The High Court, but the complainant, as she was not in a financial position to meet herself the costs involved, was not able to find a solicitor willing to take her case. On the other hand, as it stems from the data the European Court was in possession of, in the last 5 years, due to the complexity of the proceedings and to the nature of the evidence involved, in all cases of judicial separation parties have been represented by a solicitor. All the above circumstances lead the Court to the conclusion that petitioning before the High Court without the benefit of legal representation does not offer chances of success, thus neither effective access to court: "*hindrance in fact can contravene the Convention just like a legal impediment*"[7]. As the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the state has an obligation of result to ensure effective access to court. In complying with this obligation the state is free to choose the means – for example, by simplifying the proceedings or by the institution of a free legal aid system – as long as the final result – effective access to court – is ensured. As in Ireland there was no legal aid system in place for civil matters, the European Court found a violation of article 6 par. 1 of the Convention.

9. The right to benefit from an effective access to court may imply - especially in the case of the persons deprived of their freedom – *the right to get in touch and to communicate confidentially with a lawyer* with a view to preparing a legal action[8]. To the extent that the access to a lawyer is unduly forbidden or limited, this may constitute a hindrance of fact of the access to court. Or, the Court accepts limitations to the contact between a detained person and his lawyer only in exceptional situations.

10. The effective access to court implies the *right to have access to all evidence*

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[4] ECHR, *Terra Woningen B.V, vs. Holland* of 17 December 1996, *Recueil 1996-IV,* vol. 25, par. 72;
[5] ECHR, *Airey,* of 9 October 1979, A series nº 32, p. 14-15, par 26;
[6] ECHR, *Kamasinski,* of 19 December1989, A series nº 168, p. 33, par 65;
[7] ECHR, *Airey,* of 9 October 1979, A series nº 32, p. 14, par 25;
[8] ECHR, *Silver,* of 25 March 1983, A series nº 61, p. 32, par 82; ECHR, *Golder,* of 21 February 1975, A series nº 18, p. 19-20, par. 40; ECHR, *Campbell and Fell,* of 28 June 1984, A series nº 80, p. 45, par. 99;

gathered by the prosecutor[9]. In civil cases, under certain circumstances, the inadmission before a court of a decisive evidence or the impossibility of challenging such a piece of evidence already showed by the opponent party, can deprive the right of access to court of its content[10]. This problem is traditionally analysed through the viewpoint of article 6 paragraph 1 - equality of arms - or of article 6 paragraph 3 d) - the summoning and cross-examination of witnesses, but it can enter the discussion also through the viewpoint of the fundamental principle of the access to justice.

11. It has also been shown, that, although article 6 does not go as far as guaranteeing free access to justice, sometimes *the high costs of bringing proceedings* can hinder the exercise of this right. In this line of argument, a high stamp duty combined with a legal guaranty proportionate to the value of the object of the suit or with other costs disproportionate to the financial means of the claimant can have a chilling effect and rise questions under article 6 of the Convention.

12. Further on, *the complexity of the procedure* in conjunction with the ambiguities on the real nature of some administrative acts can constitute *de facto* obstacles to an effective access to justice, as it is apparent from the *De Geouffre de la Pradelle vs. France*[11] case. In this case, due to a controversy on the juridical nature of a certain administrative act affecting the property right of the petitioner, this one lost the deadline for bringing an action before justice, in order to challenge the aforementioned act. The Court showed that the claimant was entitled to expect to be notified about the adoption of the administrative decision, thus he was not supposed to follow the Official Journal for a couple of months to see whether the act has or hasn't been adopted. As a consequence, he is not responsible for not observing the deadline for bringing the action. Under the circumstances the European Court concluded there has been a violation of the right of access to a judge.

13. The *failure to put into practice a judicial decision* can, indirectly, leave without content the right of access to justice. Freedom to referring a case to the court becomes a vain formality if the competent authorities do not observe the decision of the court[12].

14. *The quality of the services provided by the ex officio lawyer* may, in its turn, raise a few questions regarding the access to justice. It is true that the State may not be held responsible for all the shortcomings of a defence made by the ex officio lawyer. However, by virtue of article 6 par. 3 c) of the Convention, the State must give "assistance" through an ex officio lawyer to the persons who cannot afford to hire one. Therefore, the mere appointment of a counsel for defence does not lead to the fulfilment of the obligation taken over by the State. This one must also watch the way the appointed lawyer fulfils its duties and to the extent that it is notified or the shortcomings of the services provided are obvious, the State must interfere and either appoint another lawyer, or oblige the one already appointed to fulfil its duties[13].

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[9] ECHR, *Edwards vs. Great Britain*, of 16 December 1992, A series nº 247-B, p. 35, par. 36;
[10] ECHR, *Feldbrugge,* of 29 May 1986, A series nº 99, p. 17-18, par 44;
[11] ECHR, *De Geouffre de la Pradelle,* of 16 December 1992, A series nº 253-B, p. 43, par 34;
[12] ECHR, *Hornsby,* of 19 Mach 1997, *Rec.* 1997-II, nº 33, p. 512, par. 45;
[13] ECHR, *Artico,* of 13 May 1980, A series nº 37, p. 16, par. 33;

3.2 – Admitted limitations to the right of access to justice

15. In the *Golder vs. Great Britain* decision, the Court has shown that: "*the right (…) by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of the individuals"*[14].

The limitations imposed this way must observe several *principles*. They must pursue a legitimate purpose and not to affect the substance itself of the law. Also, it is necessary to strike a fair balance between the aimed purpose and the means chosen[15].

16. A first category of limitations is represented by *the prior authorisation for the notification of a court.* Such limitations have been considered in accordance with the Convention in the case of mentally ill persons[16], in the case of persons proven to have abused of the right of access to court; in the case of minors[17] or in bankruptcy proceedings. The authorisation must always come from a judicial body or from a magistrate and to be given in accordance with certain pre-existent objective criteria. The necessary authorisation for lodging an appeal may be in accordance with the Convention to the extent that the necessity of this limitation is proved and the motivation of the refusal is made in accordance with objective criteria.

17. *The procedural conditions of the action to justice* represent another type of accepted restrictions. The time limits for the various acts of proceedings, the status of limitation[18] or the sanctions for their non-observance, the mandatory representation by a lawyer before the superior courts[19] represent a few examples of accepted limitations. However, in a case against the Czech Republic, the Court estimated that a 6-month period for bringing requests in order to obtain the recovering of the goods confiscated during communism was too short to ensure effective access to justice. Indeed, for a person residing outside the Czech Republic it would have been highly difficult to gather in due time all the evidence necessary for a successful claim, evidence required by the domestic law.

18. The Strasbourg authorities also tolerate *measures aimed at limiting the number of abusive appeals.* As already shown above, both the authorisation to lodge an appeal as well as the authorisation to bring a case in the first place before a first instance court may, under certain circumstances, be in compliance with the requirements of fair trial. The same holds true for the fining of those who bring vexatory and hopeless cases.

19. *Klass vs. Germany*[20] shows a case of admitted *limitation brought for reasons of national security* to the right of access to court. The discussion concerned the German law regarding the tapping of the phone conversations of persons suspected of terrorist activities. According to this law, the person subjected to phone tapping was not notified of this and as a result was unable to submit the lawfulness of the measures to court scrutiny. However, in the opinion of the European Court, the right of access to court was not violated since the person

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[14] ECHR, *Golder vs. Great Britain,* of 21 February 1975, A series nº 18, p. 19, par. 38;
[15] *idem;*
[16] ECHR, *Ashingdane*, of 28 May 1985, A series nº 93, p. 25-26, par. 58-59;
[17] ECHR, *Golder vs Great Britain,* of 21 February 1975, A series nº 18, p. 18, par. 37;
[18] ECHR, *Stubbings and others vs. Great Britain* of 22 October 1996, *Rec. 1996-IV, vol.* 18, par. 72;
[19] ECHR, *Gillow,* of 24 November 1986, A series nº 109, p. 27, par. 69;
[20] ECHR, *Klass,* of 22 September 1993, A series nº 269;

whose phone conversations were recorded was getting notified about the measure as soon as reasons pertaining to national security no longer called for the secret character of the measures.

Reasons pertaining to national security have also been invoked in the *Tinnelly & Sons Ltd and Others and McElduff and others vs. Great Britain cases*[21]. The assessment of the existence of these reasons, made by an administrative body, was mandatory for the court. Since, following this decision, the court has been totally deprived of the possibility to analyse the facts which were at the basis of the administrative decision, the European Court has decided that there was no reasonable balance of proportionality between the purpose aimed at - the protection of the national security - and the interference with the right of access to court.

20. It has also been decided that *the obligation* made for persons having identical situations and claiming same interests *to bring a case together* through one representative is a reasonable restriction aimed at saving time and financial resources[22]. However the ruling of the European Court could have been different if this restriction hadn't been followed by sufficient guarantees to ensure adequate representation.

21. *The right of access to court* can be *waved*, for example through the conclusion of an arbitration clause. However, in order for the waiving to be in compliance with the requirements of a fair trial, it has to be the result of a free choice and the arbitration court should observe at least some of the guarantees showed in article 6 of the Convention[23].

22. *The withdrawal of the legal capacity* can raise some questions under article 6 of the Convention, if it is not followed by sufficient procedural guarantees or if it is arbitrary. This principle stems from the ruling of the European Court in *The Catholic Church of Canea vs. Greece*[24] case.

23. Finally, the granting of the *jurisdictional immunity* to certain categories of persons[25] or to certain international organisations[26] is not a limitation incompatible in itself with the provisions of article 6. However, a reasonably proportionate balance must be ensured: the existence of a strong public interest to justify the granting of the immunity is necessary and, on the other hand, this immunity should not be total. For instance, it would be very difficult to justify a parliamentary immunity extending to all the acts of criminal nature and not only to the statements with political character made as a member of the Parliament.

4. Conclusion

24. The European Convention ensures two kinds of guarantees: the material rights, on the one hand, and the rights of procedural nature meant to give efficiency to the former, on the other hand. Article 6 is such a provision, its role being mainly to show how a trial should take place in the case of the civil action referring to the rights with a civil character and to the

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[21] ECHR, *Tinnelly & Sons Ltd and others and McElduff and others vs. Great Britain*, of 10 July 1998, Recueil 1998-IV, vol. 79, par. 72;
[22] ECHR, *Lithgow*, of 8 July 1986, A series nº 102, p. 71, par 195-196;
[23] European Commission of Human Rights, *Bramelid and Malmstrom*, report of 12 December 1983, D.R. nº 38, p. 18;
[24] ECHR, *The Catholic Church of Canea vs. Greece*, of 16 December 1997, A series nº 299-A, par 72;
[25] ECHR, decision of 6 February 1969, complaint no. 3374/67, *Reports* nº 29, p. 29;
[26] ECHR, *Wait and Kennedy vs. Germany, Beer and Regan vs. Germany* of 18 February 1999, A series nº 115, par. 56;

charges in criminal matters. The problem has though been aroused if article 6 does not somehow provide for a material right as well, namely the right of access to court. The Court has answered this question in the *Golder vs. United Kingdom* case. However, the Court didn't stop here. Recognising the existence of the right was just the first step. Using the principle common to its whole jurisprudence, according to which the convention does not guarantee rights that are theoretical or illusory but rights that are practical and effective, it has created a very complex content to this right, content that cannot be guessed by the mere reading of the wording of article 6 of the Convention.