

THE VIRTUES OF AN ACCELERATORY REMEDY IN THE FIGHT AGAINST THE EXCESSIVE LENGTH OF JUDICIAL PROCEEDINGS

CATRINEL BRUMAR*

Abstract:

*According to the established case-law of the European Court of Human Rights, the Contracting Parties the Convention for the Protection of Human Rights and Fundamental Freedoms have the obligation to provide an effective remedy to the person that pretends that his right to a fair trial has been violated. Such a remedy must include a compensatory component; the European Court, in its judgments relating to Italian Pinto Law, underlined the essential character of the compensation in cases of excessive length of proceedings; still, the same Court encouraged States Parties not only to compensate, but also to offer an acceleratory remedy, in order to reduce the length of the procedures, as well as the amount of the compensation once the proceedings have been finalized. Following several major judgments pronounced by the European Court, some European States reacted by implementing such remedies: most solutions combine elements of acceleration with elements of compensation. The experience of such countries allows the institutionalization of a form of remedy that could be implemented also in Romania where, although there are some legal provisions stipulating some form of redress, we cannot talk of an authentic effective remedy. The present paper will focus on the acceleratory remedy, seen not only as a demarche at the disposal of the individual, but also as an interesting measure allowing for the reduction of length of procedures and thus limiting the effect of a violation of the right to a fair trial. ***

Keywords: *acceleratory, remedy, excessive, length of procedures.*

Introduction

In 2001, overwhelmed by the number of cases enrolled on the docket of the European Court of Human Rights (herein the Court), alleging the violation of the right to a fair trial within a reasonable time, recognized in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (herein the Convention), Italy adopted the famous now *Pinto Law*. The piece of legislation was intended to offer to those complaining about the length of the judicial proceedings a domestic remedy allowing for compensation, thus reducing the number of complaints before the Court and alleviating its docket. The redress was welcomed by the European jurisdiction, which underlined the importance of a national compensatory recourse. Still, five years later, in a series of Great Chamber judgments on the question of the effective character of the Pinto remedy in cases of unreasonable length of judicial proceedings, although the Court maintained the important nature of a compensatory redress, it underlined the essential need for prevention and remarked: "The best solution in absolute terms is indisputably, as in many spheres, prevention. (...) Where the judicial system is deficient in this respect, **a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution.** Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy of the type provided for under Italian law, for example."¹

* Lecturer, Ph.D. candidate, Faculty of Law, "Nicolae Titulescu" University, (e-mail: catrinelbrumar@univnt.ro).

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¹ *Cocchiarella v. Italy*, judgment of 26 March 2006, par. 74 .

This remark of the European Court on one hand encouraged the efforts already made by some States like Poland and Slovenia towards the implementation of a preventive domestic remedy but also draw other States attention (including Italy) on the fact that a compensatory redress was not going to be sufficient in the future in order to fight the excessive length of judicial procedures.

Although the subject was present in the preoccupation of the European Court from the beginning of the 2000, and Romania started in 2003 to see the judicial procedures before the domestic courts challenged before the international jurisdiction in term of unreasonable length, it was only in 2009, with the release of the *Abramiuc* judgment², that the need for a national remedy at the disposal of those alleging the violation of the right to a fair trial within a reasonable time was expressly affirmed by the European Court.

Still, two years later, such a remedy is not yet in place and the law on the Small Reform does not introduce such a redress at the disposal of individuals and entities discontented with the duration of the judicial proceedings they were involved in.

In the search of a pattern for such a remedy, which is necessary and will be requested in the case-law of the European Court against Romania, we will research the past experiences of other countries; their reaction to the excessive length of judicial procedures in term of prevention will be studied only as it refers to domestic remedies. Although the systemic reforms are the best solutions, from the European Court perspective, only national recourses can be evaluated in terms of exhaustion of domestic remedies.

Given the technical nature of the subject, our references will mainly consist of the case-law of the Court. It serves both to identify the problem and to evaluate the solutions found by different States.

The goal of this research is to sketch a possible acceleratory remedy that could be implemented in Romanian legal order, to combat, from the individual perspective, the unreasonable length of judicial procedures.

Past experiences: lessons learned?

Several States were confronted with the need to implement a domestic acceleratory remedy in order to avoid future complaints before the European Court challenging the length of national judicial procedures. The paper will only focus on five such experiences, as some countries like Italy still appreciate the compensatory redress as being not only effective but also sufficient to fight unreasonable duration. The presentation of States legislation will limit itself to acceleratory remedies or elements. It is to be noted that all five countries accompany the acceleratory remedy with the compensatory one.

The judgment that marked the begging of Polish quests for such a remedy is the one pronounced in *Kudla* case³. This case, concerning among other alleged violation the length of a criminal procedure already in place for 9 years at the moment the Court examined the complaint, offered the European jurisdiction the perfect occasion to draw States attention on their obligation to create in their respective national legal systems a remedy designed for hypothesis of excessive length of procedures.

The reaction of Poland, although delayed some four years, consisted in the adoption of legislation creating such a remedy; any party in a judicial procedure (including the enforcement ones or the preparatory criminal proceedings) unsatisfied with the speed of settlement of the affair was entitled to file a complaint, seeking ascertainment of the fact that the proceedings were pending longer than needed to establish the facts and resolve the case. The complaint was lodged before the superior court of the tribunal examining the main proceedings and was examined in the light of the Court's case-law.

² *Abramiuc v. Romania*, judgment of 24 February 2009.

³ *Kudla v. Poland*, judgment of 26 October 2000.

The proceedings examining such a complaint were considered as incidental ones and the superior court had to deliver its evaluation in two months from the date of lodging the complaint. As to the outcome of the proceeding, in the situation where the conclusion was affirmative and the reasonable time was exceeded, the superior court may give recommendations to the court conducting the main proceedings on appropriate measures to be carried out in a fixed time-limit. Accompanying such recommendations, the national tribunal could grant satisfaction to the author of the complaint. The allowance of such a partial compensation did not deprive the interested party of his or her right to seek further compensation after the closing of the main proceedings.

In its case-law after the adoption of this remedy, the European Court expressed its confidence in the potential of the redress; *Charzynski*⁴ and *Figiel*⁵ judgments applauded the demarche of Polish authorities, although some aspects relating to the actual implementation of the legislation did not permit the access of all interested individuals and entities to the new remedy or offers only limited satisfaction.

The Czech Republic was first confronted with a conclusion regarding the inexistence of a remedy to allow the allegation of a violation of the right to a fair trial within a reasonable time to be examined before the domestic courts in *Hartman*⁶ case. The European Court in that case examined two potential acceleratory remedies against the excessive length of judicial proceeding put forward by the Czech Government: the first one indicated was a hierarchical recourse lodged before the superior court to the one conducting the main proceedings. It was rejected by the European jurisdiction as it did not recognize an individual right to seek and obtain the cooperation of state organs in the enforcement of the conclusion, but a mere right to be informed on the potential conclusions and recommendations made to the national tribunal. The second remedy invoked by the Government concerned a complaint before the Constitutional Court, which could indicate to the national judicial organ the measures to be adopted in order to stop the violation of the right to a fair trial. Still, the European Court found itself unsatisfied by the fact that the recommendations of the Constitutional jurisdiction could not be enforced if ignored by the national tribunal and by the fact that no compensation was granted to the interested party.

In reaction to the *Hartman* judgment, the Czech Republic reformed its legislation in order to introduce an acceleratory remedy, consisting in a complaint to be lodged before the president of the court examining the main proceedings. The president has one month to decide on the merits of the complaint; if the complaint is well-founded, he or she will indicate some measures to be carried out by the court. Still, the president could not decide on the re-allocation of the file, fix strict time limit for the court to complete procedural acts or put the file on the docket of priorities. Thus, the European Court refused to consider this remedy more than an extension of the hierarchical remedy already considered inadequate and in a later decision in *Vokurka*⁷ case the Court suggested that the examination of the complaint be made by the superior court to the court involved in the main proceedings. Despite such a recommendation, the amendments brought in 2009 to the law on the judicial system transfers to the very instance dealing with the main proceedings the competence to examine the complaint.

Croatia developed the most rich and adaptable acceleratory remedy; after the first judgment on the infringement of the reasonable length of judicial proceedings⁸, The Constitutional Court reacted and through case-law and reform in legislation, developed an acceleratory remedy offer the constitutional jurisdiction the competence to determine a time-limit within which the competent court shall decide the case on the merits. Still, the growing number of constitutional complaints attracted

⁴ *Charzynski v. Poland*, judgment of 1 March 2005.

⁵ *Figiel v. Poland*, judgment of 16 September 2008.

⁶ *Hartman v. Czech Republic*, judgment of 10 July 2003.

⁷ *Vokurka v. Czech Republic*, decision of 16 September 2007.

⁸ *Rajak v. Croatia*, judgment of 28 June 2001.

delays in their examination, jeopardizing the reasonable time for the decision in a certain case and, more worrying, some decision of the Constitutional Court were not respected by the national tribunal, raising questions on the enforcement of constitutional decisions.

The latest reform adopted by the Croatian authorities introduced essential changes in the competence of the Constitutional Court; from that point forward, the complaints about the length of judicial proceedings would be examined by the superior court of the tribunal conducting the main proceedings. The justification of the reform underlined the need to respect the urgency of the procedure. The court thus requested can indicate a time-limit for the adoption of a decision on the merits, the procedure is very speedy. The decision on the incidental complaint can be appeal only by the party, but not by the Attorney's office.

After the *Lukenda*⁹ judgment, Slovenian authorities adopted at their turn a legislation to address the question of effective acceleratory remedies. The Act on the Protection of the right to a trial without undue delay of 2006 opens for the interested party two possibilities of action: the supervisory appeal before the president of the court examining the case and the motion to set a deadline.

The supervisory appeal allows the president of the court, after requesting a report from the judge of the case, to indicate a time-limit not exceeding six month for the performance of certain procedural acts, to put the case on the priority list or to reallocate the file.

The motion to set a deadline can only be lodged after the exhaustion of the supervisory appeal, before the president of the court competent to exercise appellate jurisdiction over the court conducting the main proceedings. The president of the appellate court can also set a deadline or decide to put the case of the priority list.

The new legislation has already been examined by the European Court in its *Grzincic* judgment of 3 May 2007. The Court favorably noted the celerity of the incidental proceedings and the measures at the disposal of the judicial authority in cases of undue delay.

He last experience that it is worth mentioning is the Slovakian one; after a total vide in legislation concerning a domestic remedy against unreasonable length of judicial proceedings, noticed by the European Court in its *Havala* decision of 13 September 2001, amendments were brought to the Constitution and the Law on Constitutional Court, to introduce the possibility of lodging constitutional complaints against the alleged violation of the right to a fair trial without undue delay. The Constitutional court, in well-founded cases, would order the court conducting the main proceedings to speed up the examination of the case or to perform specific procedural acts. The Constitutional jurisdiction could also offer satisfaction for the violation of the reasonable length requirement. The new amendments were already in 2002 evaluated by the European Court that expressed satisfaction for their adoption and appreciated their effective character¹⁰.

The possible model of an acceleratory remedy

After reviewing the experiences of countries challenged with the need to identify and implement a remedy for cases of excessive length of judicial proceedings, certain conclusions can be drawn.

The first that comes to mind, in light of Court's case-law, refers to the fact that any acceleratory remedy must be accompanied by a compensatory one. It is the legislator's choice were in the economy of the remedial complex it places the compensation element – a partial one going hand in hand with the acceleratory procedure or a final compensatory redress after the closure of judicial proceedings – but it must exist to complete and provide full effectiveness to the acceleratory elements. This conclusion is logical if we take into account the fact that the mere recognition of the

⁹ *Lukenda v. Slovenia*, judgment of 6 October 2005.

¹⁰ *Andrasik v Slovakia*, decision of 22 October 2002.

violation of the right to a fair trial, not followed by just satisfaction, does not lift the victim status to the individual or the entity affected by the unreasonable length of proceedings.

This paper only follows the characteristics and benefits of the acceleratory remedy, but does not lose sight of the whole economy of the right to an effective remedy, that the Convention proclaims in article 13 and that requests both recognition of the violation but also granting of just satisfaction.

The first limitation of the acceleratory remedy is given by its scope: it can only be used if a procedure is still pending. Once the main proceedings are closed, only a compensatory request could be lodged. However, in order for the remedy to be in line with the conclusions already stated by the European Court, it should be applicable to all stages of proceedings, including the administrative preliminary stage or the criminal investigations, as well as the enforcement stage of a civil procedure.

If the scope is large, the sphere of beneficiaries should be constructed in a manner to allow for a full protection of the right to a fair trial without invoking the acceleratory remedy against the individual or the entity whose right is affected. The Croatian provision forbidding the attorney to use the complaint for undue delay was the consequence of such a practice, where the attorney challenged all the decisions concluded on the violation of the right to a fair trial.

As far the competent court or authority are concerned, the possible solutions adopted by different States do not suggest a certain pattern; it is true that most of the practices seem to support the complaint lodged before the hierarchically superior court (or its president) the most important issue is the functional one: if the president of the main court can adopt effective measures, e.g. reassignment of files, placement on the list of priorities, mandatory time-limit, then the choice of such a incidental procedure is favorably appreciated by the European Court.

Still, within the domestic system, accurate attention must be paid to situations where the measures adopted in the framework of the acceleratory remedy are misused; for example, the reallocation of files is a measure that theoretically is beneficial to the interested party, but can also be a way for over-loaded judges to see their docket alleviating. Another problem could be the inadequate balance between the boldness of measures that could be indicated and the enforcement options or the inexistence of alternatives in case the main court is ignoring or unable to perform the procedural acts or to reach a solution on the merits in the fixed time-limit. In this light, the solution put forward by the Slovenian legislator seems to be the most balanced, although in other cases, like Slovakian one, the fact that the decision of the Constitutional Court are followed by the main court is also a positive sign.

To complete the functional criterion, the above exposed experience indicated that this procedure should imply with necessity, at least at a later stage, the access to a judicial form of control; the complaint before the president of the main court, although effective, in order to be more than an hierarchical supervision, must be doubled by the possibility to present a complaint to the appellate court (or at least its president).

Irrespective of the choice made as to the competent court or authority, the incidental procedure must be a speedy one, offering an evaluation and a decision in a maximum four month. The evaluation should always follow the Court's case-law, the criteria the Court developed regarding the behavior of the individual or entity invoking the violation of the right, the behavior of competent authorities, the complexity of the case, the moment in the procedure when the complaint is being lodged.

Where does Romanian domestic legal order stand?

As stated in the introductory section, in 2009 Romania faced the need to introduce in the domestic legal order an effective remedy in cases of alleged violation of a right to a fair trial within a reasonable time. Still, two years from the *Abramiuc* judgment, the only legislative remedy existing is to be found in the new Code of Civil Procedure, that was adopted in 2010 and is still to enter into force.

The acceleratory remedy can be lodged by any party to the main proceedings, including the prosecutor participating in the case, with the goal of requesting a decision on measures to be taken in order to eliminate such a situation of disrespect for the right to a fair trial, but only they consider to find themselves in one of the following situations: the time-limit stipulated by law for the performance of a certain procedural act, for the delivery of a judgment or of its considerations elapsed without the compliance to the legal requirement; the court has indicated a time-limit for a participant in the main proceedings to perform a procedural act, to present a document or certain information and the indication was ignored, but still the court did not adopted the measures provided by law, or when the court disregarded its obligation to solve the case in a predictable optimal time-limit.

According to the new legislation, the complaint will be examined and decided upon within 5 days, by the judges conducting the main proceedings. If they consider the complaint to be well-founded, the court will immediately take all the necessary measures to eliminate the situation that cause the undue delay and notify the measures adopted to the author of the complaint. The decision admitting the complaint can not be appealed; the decision rejecting the complaint can be appealed in 3 days from the notification. The decision on the appeal must be taken within 10 days from the receipt of the file. In case of well-founded appeal, the court will decide on the measures to be taken by the main court and, when appropriate, it will also fix a time-limit for the performance of the procedural acts or legal measures. The whole procedure is taking place without notification of the parties.

Some preliminary remarks on this acceleratory remedy, in the light of the abovementioned experiences of several States, as evaluated by the European Court, will cast more shadows than light on it.

We should begin by mentioning that the provisions are part of the Civil Code thus inapplicable to criminal proceedings. Or, an effective remedy must also be offered for those complaining about the length of this kind of proceedings.

As far as the substance of the mechanism is concerned, we deplore the fact that the same court conducting the main proceedings, in fact the same judges, will examine the acceleratory complaint. As justice must not only be done, but must be seen to be done, this element will affect the perception on the impartiality of the decision. It is a good point the fact that an appeal is provided in case the complaint is rejected. Still, an acceleratory remedy before the appellate court, without an appeal of the decision would have offered a more impartial appearance of the mechanism. But, even when the same judges reach the conclusion of an undue delay, they will indicate themselves the measures to be taken. Or, given the active role of the judge, it would seem to us that they already are aware of the measures to be adopted in order to assure a reasonable length of proceedings.

The third remark is targeting the grounds for lodging such a complaint: in great part, the disrespect of legal and judicial deadlines. The criteria enshrined in the case-law of the Court would become useless and still with the respect of all legal and judicial time-limits sometimes the proceedings are excessively long, as the provisions are permissive or the disrespect is not accompanied by sanctions.

Another remark concerns the absence of any compensatory element; furthermore, penalties are provided in case of abuse of the right to complaint. Taking into account the fact that the examination of the complaint does not have a suspensive effect and the short time –limit for the adoption of a decision, the sanctions imposed have a discouraging effect on the interested party.

Conclusions

The acceleratory remedy, as part of the effective remedy stipulated in article 13 of the Convention, is essential as it offers the possibility to reduce the already length of a judicial proceeding. It is also a fact that its preventive role is limited: in fact, it can and should be used an

instrument to evaluate on a regular basis the length of a given proceeding, in order not to extend the reasonable requirement. Still, its regulation and its functioning suggest that it intervenes at a stage where already there are some signs of undue delay. In this hypothesis, it is too late to prevent the excessive length, but still it can play a useful role in limiting its unreasonable character.

If we were to create a sketch of a theoretical acceleratory remedy, we would support an acceleratory remedy that be lodged before the appellate court (for cases of criminal investigation, the court competent to deliver the judgment on the merits in first instance or the court in which jurisdiction the enforcement procedure is taking place). The court should, in well-founded cases, fix a certain time-limit or decide to place the case on the priority list. It is true that a possible measure is thus being left aside: the reassignment of the case. Still, we expressed already certain doubts on the implications of such a measure and we consider that the gain of the involvement of the superior or appellate court is more consistent than the loss brought to the picture by the renunciation to this measure. In our view, the involvement of the appellate court would eliminate the perception, although unsubstantiated, that the main court is judge in its own case.

It is in the advantage of celerity that the procedure be a non-contentious and mainly written one; some measures preliminary to the examination of the case could be useful, such as the request of a report from the judge of the case, the request of the file or of a copy of the file, the notification to the other parties to the main proceedings on the lodging of an acceleratory complaint.

A deadline must be set for the adoption of the decision in the incidental proceedings, and this deadline should not exceed four month. In the evaluation of the well-founded character of the complaint, the criteria already enshrined in the case-law of the European Court should serve as guidance to the instance: the whole length of the proceedings, the time elapsed since the past acceleratory complaint, the complexity of the case, the nature of the case requesting special diligence from the part of the authorities, the behaviour of the interested party as well as the behaviour of the authorities and also the repercussions of the case on the personal situation of the interested party.

In case where the well-founded character of the complaint is established, the measures directed to accelerate the procedures could imply, *inter alia*: fixing a time-limit for the performance of certain procedural acts, placing the case on the priority list, eventually the reallocation of the case to a different court or taking over the case by the appellate court. Although possible in theory, the last measure is not very recommendable, as it deprived the individual or the entity of an appeal. In any event, the appellate court will not offer any indication on the factual elements of the case nor suggest any solution to be endorsed by the main court.

Once the length of the proceedings evaluated as excessive, the main court should benefit of a limited time to perform required procedural acts and to deliver a decision on the merits. For this reason, a new acceleratory complaint should only be admissible after a certain period; a six to twelve month term is in our view a reasonable and allows for the proper decision to be adopted in the main proceedings. The actual prohibition limit should be established by the appellate court, after due consideration of elements like the whole length of the proceedings, the stage of the proceedings in the moment of the evaluation and the realistic chances of a solution.

For the sake of celerity, the points of a possible appeal to a decision in acceleratory proceedings should be strictly listed by the legislation. This would avoid a "process about the process"; moreover, the appeal in the acceleratory proceedings, given the other elements, would not justify on the grounds of guaranteeing impartiality.

In our view, this is the model that should be followed by the Romanian authorities. The specific provisions concerning the partial of final compensation, the source of this compensation are the legislator's choice. Still, the Romanian legislator needs to make a choice, in order to provide the effective remedy and avoid complaints before the European Court. Complaints that, in the end, will only lead to the same requirement: the creation in the domestic legal order of an effective remedy, combining elements of acceleratory and compensatory nature.

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