

THE RIGHT TO A FAIR TRIAL

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Abstract

Among the general rights of the citizen one finds the free access to justice, the rights to defense and the right to legal security. The jurisprudence based on principles of law and on international treaties, caused the appearance, along the constitutional protection provided by default by a lawyer, of the need of fair and equitable procedures to ensure a balance in the rights of the parties.

Today the right to a fair trial is a fundamental right most frequently invoked in front of Romanian courts, as in complaints to the European Court of Human Rights.

This study is intended as a guide of the most important solutions that have been promoted to ensure the protection of the right to a fair trial with all the guarantees that are involved, starting with the right of access to justice and ending with the right to adversarial proceedings.

Keywords: *fundamental Rights, fair trial, access to justice, the European Court of Human Rights, the fundamental principle.*

Introduction

In modern law, the possibility for citizens to appeal to the court, in order to achieve their legitimate rights and interests is the establishment of rights - guarantees.

The present study deals with the fundamental principle of criminal law issues, namely the principle of fair trial rights.

Such reference is made to all persons involved in legal work: judges, who must ensure the rights of parties to proceedings; lawyers, which have to represent and defend their clients, the justice seekers, who must be aware of their rights of the in judicial proceedings.

This article is intended to represent a theoretical study of the fundamental human right to a fair trial, it is dotted with a number of examples of judicial practice - criminal of the European Court of Human Rights or of national courts.

To achieve the paper we analyzed a series of books and magazines appeared in the doctrine of specialists in our country and abroad, and will concur or not the views expressed within them.

With one subject exhaustively analyzed, in competence by renowned authors in treaties and magazines, trying to move something from what has been said so far or to add something to the already accumulated scientific heritage in the field, it might seem daring. It is no less an exciting scientific experience which we do not understand to evade from.

Procedural guarantees field is practically infinite, so that comprehensive coverage is a work far beyond the ambitions of this study, that, as I indicated from the beginning, proposed to present in a rather general way, the most important issues involved by the European Convention on human Rights in material procedural guarantees in criminal procedural law in our country.

In our opinion, despite the unanimous belief, the Roman legal system suffers, in terms of guaranteeing the right to a fair trial, a lack of regulation. There are many institutions in which those regulations are either nonexistent or insufficient, or set at a level too general, without involving specific provisions regarding the incidence of general provisions.

Such an issue we meet in the matter of the right to silence which is treated in such a manner by the legal text that is difficult to enforce the judicial bodies to give them due importance².

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² Damaschin, Mircea, *The right to a fair trial in criminal matters*, (Ed. Universul Juridic, 2009)

We must not forget that the presumption of innocence is hardly regulated, our law lacking any reference to the sanction for non-compliance or the need for the respect of the presumption by all state bodies, especially in their relations with the press. Also essential principles of due process related to a person's right to attend his own trial, procedural equality of arms, etc.. benefit only by rules with absolute general nature, lacking any reference to the remedies against such conditions or warranties visible to ensure compliance of principles that seem thrown somewhere in the first articles of the constitution or procedure codes.

Also, taking advantage in a good measure of the lack of regulations, not even practical application, at the courts or the prosecution, of the existing rules of procedure doesn't seem to be, with the necessary exceptions, to required quality standards. I Remind you that we had several convictions at Strasbourg for lack of motivation of court orders or refusing to enforce court orders, situations that tend to become endemic in our judicial system. In addition, the feeling that I had many times on the solutions offered by the courts, including those rendered by appeals on points of law, is that the judges seem rather inclined to do anything possible to not judge a cause , looking incredibly excited when succeeding to reject a case as inadmissible, forgetting that access to justice is an essential element of a democratic state.

The Universal Declaration of Human Rights is one of the sources of the current Romanian law and an important source of information for the Constitutional Court who must rule on the conformity of law with the Constitution, the Declaration, treaties, covenants and conventions Romania is part to.

The base of freedom, justice and peace in the world is recognizing the inherent dignity of all human family members and their equal and inalienable rights.

The principle of "equality of arms" means equal treatment of parties throughout the proceedings in the courts, without any of them to be advantaged relative to other party or parties in the process. This principle, in fact, is only one element of the broader concept of "fair", one of the guarantees relating to the proper conduct of the judicial process which aims to strike a balance between litigants.

Article 6 of the Convention does not require a specific form of how the accused must be informed of the nature and causes of the accusation against him.

Specialized legal literature emphasized that the right of defense has two meanings: one material, which comprises the whole complex of rights and procedural guarantees that ensure parties can defend their rights, and other formal providing parties with the right to benefit by a defender.

The Article 6, paragraph 3, letter. c of the Convention guarantees any "accused" can defend the charge they face in three ways: the accused can defend himself, may be assisted by a lawyer of his choice or may have the free assistance of a defender .

The right of the accused to defend himself should not be confused with his personal presence in court.³ As underlined by the European Court, even if not expressly mentioned in art. 6 of the Convention, the right to take part personally in the proceedings of his trial results from the object of this text: right to a fair trial. Thus, if the defendant has the opportunity and the case is not part of the very serious cases that require a legal representative, they may represent themselves About the right of the accused to be assisted by a lawyer of his choice, the Court held that it is a key element of a fair trial.

According to the provisions of the Convention, the right of defendants to free legal assistance occurs when the accused can not defend themselves or is not entitled to pay a lawyer. Thus, the Convention recognizes the right to free legal assistance, assistance that will be provided by an appointed lawyer when the interests of good administration of justice requires the presence of counsel. Also, according to the European Convention, longer guarantees of a fair trial are the right

³ Renucci Jean Francois, *Treaty of European human rights law*, (Ed. Hamangiu, Bucuresti, 2009)

not to be tried or punished twice for the same offense, and the right not to be punished for an act that was not an offense when committed

Irregularities in the conduct and settlement of the case always must be punished and always who suffered should be entitled to compensation.

Article no. 6, paragraph 1 of European Convention on Human Rights established the elements of a fair trial which is "good guarantees justice". Thus the publicity is required as a separate provision of a fair trial, : every person is entitled to it publicly.

In this respect the European Convention on Human Rights is a guide for courts in Romania in their obligation to respect the principle of publicity that is found in the Code of Civil Procedure, art. 121 and the Code of Criminal Procedure Art. 290.

According to Article 121 of the Code of Civil Procedure, "the meetings are public, except for cases when the law provides otherwise. The court may order that discussions take place in camera, if public discussion could harm public order or morality or in parts. The parties may be accompanied, in addition to their defenders, by maximum two people designated by them. Judgment is always delivered in public. "Article no. 290 of the Criminal Procedure Code provides that "the hearing is public. Minors under 16 may not attend the hearing. If the judgement in open court could harm state interests, morals, dignity or private life of a person, the court, at the prosecutor's, the parties request or ex officio, declare the secret meeting for all or for a specific part of the trial case.

In open court after hearing the parties and the prosecutor, when it participates in court, the judge can declare that it is public session.

When the meeting is secret none other than the parties, their representatives, advocates and other persons called by the court in the interest of the case are allowed in the courtroom . "

According to The European Convention on Human Rights, the principle of public proceedings is not absolute, national authorities are allowed to take into account the imperatives of efficiency and economy.⁴

On court orders, the 6th article provides that they must be pronounced publicly. Judicial practice of the courts of Romania is firm in that the failure of this rule expressly contained in the Article 121, paragraph 3, C.proc.civ. art.310 and the Code of Criminal Procedure., is a violation of the principle of publicity and is punishable by revocation.

Article no. 290, para. 4 provides that "during the time the meeting is secret, none other are permitted in the courtroom but the parties, their representatives, advocates and other persons called by the court in the interest of the case."

According to art.328 Code of Criminal Procedure "when the secret meeting was arranged all throughout the process, each witness, after being heard, will be asked to leave the room, but remain near to the court room."

According to the article no. 6 of the Convention the courts have to motivate their decisions, but this obligation should not be understood as meaning that they must respond in detail to process each argument of the parties.

Analysing the provisions of Article 6 of European Convention on Human Rights, which envisage a fair trial, it is clear that they relate to certain requirements without which the process is not fair⁵. Thus, free access to an independent and impartial tribunal, both in the trial and settlement of criminal law and taking any coercive action on the rights and freedoms is required. The first requirement is provided during our criminal process, because only a court is entitled to jurisdiction, to apply the punishment to offenders. Also in Romania, there is a separation between the the prosecution function, exercised by a prosecutor who brings the suspect before the court and the office

⁴ Galea R., *Regulation of remedies for excessive length of judicial proceedings - paper presented at the Conference of 10 years anniversary of the entry into force of the European Convention on Human Rights in Romania*, (Bucuresti, 2008);

⁵ Chirita, Radu, *The right to a fair trial*, (Ed. Universul Juridic, 2008).

of jurisdiction exercised by the court, who judgez and finally resolves the conflict of criminal law, the punishment can be applied only by the court.

In connection with the requirements referred to in Article 6 paragraph 1 of the Convention, the European Court of Human Rights has a well crystallized and constant practice, which offers a full array of legal situations, which can be checked by the domestic courts in about each of the three elements that make up the structure of the Convention requirement expressed in this regard, namely: i) the tribunal established by law, ii) independent tribunal, iii) impartial tribunal.

Heads of claim of action have to be considered , but also the reasons formulated throughout remedies exercised by the parties, the differences between Contracting States concerning the sources of law, differences relating to the presentation and drafting judgments. Judges should always indicate with sufficient clarity the reasons underlying its decision because it is the only way, for example, a defendant may exercise remedies under domestic law.

The purpose of a Criminal trial is to help to defend the rule of law⁶, the person, defending their rights and freedoms, but also to educate people in the spirit of compliance, it is necessary that the penalty imposed to offenders intervene as close to the date of the offense. It is how the general interest of society is satisfied - the immediate criminal repression as a means of general prevention, but also prevent criminals to continue criminal activity, on the other hand, the private interest of the victim and the defendants to know as soon as possible the outcome of the process; any extension of the process over a reasonable period, even if the correct solution would be adopted, and I loses its repressive educational role that it should have.

Conclusions

We started this study in the introductory part from the idea that the existence of procedural guarantees is the trunk the whole scaffolding that supports the rule of law institutions stands on. The good Function of the procedural guarantees such as the respect of the right to a fair trial, the existence of a real justice is what characterizes a state built on the model of Western democracy⁷, as Romania is proclaimed by the very art. 1 of its Constitution. At the end of the study the question whether Romania is a state of law.

We present, therefore, in the lines below, in very general, the most important findings of our study mainly related to the current situation in Romanian law, followed by an opinion on the compliance of rules of a due process in Romania.

We believe that in light of all stated throughout this study, Romania is not a state of law, but the road there seems very long

Perhaps this conclusion may seem harsh, but it is the answer to several questions which, naturally, would not even be able to be made in early 2008, in a Romania which stands as a European country: why Romania the nation with the most complaints brought before the Court, after Russia? Why Romania is by far the state with the largest number of complaints per capita introduced in court? Why Romania is in select company of Russia, Ukraine and Moldova, among the States in which there is a constant denial of public institutions, established by the Court to enforce final judgment? Why Romania is the only state in Eastern Europe that has huge waves of complaints in relation to the issue of nationalized houses? Why Romania is, along with Turkey, Bulgaria and Russia, the State that begins to have increasingly more problems in court regarding the lack of effective investigation? Why Romania is a European Union country where confidence in justice is the lowest, according to reliable barometer made by the Community institutions in November 2007? Why is the Romanian state constantly threatened by the clause of safeguard on the problems of justice ? Why did the last flags of integration aim at independence of the judiciary? Why Roman judgments do not benefit from automatic recognition in other EU countries?

⁶ G. Theodoru, *Criminal Procedure Law Treaty*, ediția a 2-a, (Ed. Hamangiu, București, 2008);

⁷ Stanciu Roxana, *The enforcement and the right to a fair trial in ECHR jurisprudence*, Ed. (Hamangiu, 2011)

Questions are obviously rhetorical. In fact, in our opinion, despite the bombastic affirmation of the need to protect fundamental rights, neither state institutions nor the executive nor the legislative, nor the court, appear to put too much value on compliance. Beyond the fault represented by activity - rather, the lack of activity - the legislative and executive bodies, I think a lot of responsibility for this situation belongs to the Romanian judicial system, despite the lack of regulations that others would have had to provide the magistrate, the court system is that who, after all, refuses to grant the necessary protection rights and fundamental freedoms, respecting the procedural guarantees that accompany these rights.

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