

ASPECTS REGARDING THE LIMITATION OF THE RIGHT OF ACCESS TO JUSTICE, BY THE INSTITUTION OF CERTAIN SUSPENDED JUDICIAL STAMP DUTIES

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Abstract: *In a democratic society, having a solid economy, legal relationships according to substantive law are usually achieved without the intervention of public authorities, justice being resorted to only when the parties cannot amiably solve their differences.*

One of the principles lying at the foundation of justice organization in Romania constitutes free access to justice, regulated by art. 21 of the Constitution and by certain international documents.

The State must regulate the right of access to justice so that it corresponds to the requirements imposed by art. 6 point 1 of the European Convention on Human Rights.

Free access to justice can first be assured by instituting reasonable judicial stamp duties, as the establishment of exaggerated stamp duties, inaccessible to litigants, leads to the limitation of free access to justice and implicitly to the violation of the provisions of art. 6 point 1 of the European Convention on Human Rights.

Key words: *free access to justice, judicial stamp duties, right to a fair trial.*

1. Terminological preliminaries regarding free access to justice

Usually, in a democratic society with a stable economy, legal relationships according to substantive law (civil law, labour law, family law etc.) are achieved without the intervention of public authorities.

There are, however, situations when subjective rights are not taken into account, they are violated. The differences arisen concerning the achievement of legal relationships can however be solved by the parties in an amiable manner. Sometimes, the parties to the legal relationship, for different reasons, do not have the necessary patience, or wisdom, to solve the arisen differences in an amiable manner, and they resort to justice.

In modern states, “justice is a fundamental function of the state, and its administration represents one of the essential attributes of the sovereign power”¹. One of the principles lying at the foundation of the organization of justice is that of free access to justice.

In Romania, free access to justice is provisioned by art. 21 of the Constitution, which regulates, as part of the common provisions regarding fundamental rights, liberties, and duties, free access to justice as a fundamental right. According to the provisions of the above-mentioned article, “any person can address justice for the protection of their rights, liberties, and legitimate interests.” No law can limit the exertion of this right.

From the quoted constitutional provisions it results that the fundamental law establishes every citizen’s fundamental right to address justice in the event that their legitimate rights and interests have been violated, the exertion of this right not being limitable by any law. The right of access to justice is also established by certain international documents.

Thus, free access to justice is also established by article 10 of the Universal Declaration of Human Rights adopted on December 10, 1948, by the General Assembly of the United Nations, as

¹ Ioan Leș. *Principii și instituții de drept procesual civil (Principles and Institutions of Civil Procedure)*. Editura Lumina Lex, 1998, p.9;

well as by art. 14 point 1 of the International Pact of Civil and Political Rights adopted on December 16, 1966, by the General Assembly of the U.N.²

The right of access to justice is also regulated by art. 6 point 1 of the European Convention on Human Rights (ECHR), further referred to as the Convention.

Romania ratified the Convention and its additional protocols no. 1, 4, 6, 7, 9, 10 by Law no. 30 of May 18, 1994, published in the Official Gazette of Romania, Part I, no. 135 of May 31, 1994, in force since 20.06.1994.

The procedural means that Romanian citizens may use in order to access justice are provisioned in the Code of Civil Procedure and in the Penal Procedure Code. Thus, the code of civil procedure comprises clear regulations regarding the request to call to justice (art. 109-114) and extraordinary ways of bringing action against court orders, the appeal (art. 282-298), the supervisory appeal (art. 299-316), the appeal for annulments (art. 317-321), the revision (art. 322-328).

The procedural means provisioned by the code of civil procedure and by the penal procedure code provide access to justice to those who are interested, whose competences are mentioned according to the provisions of paragraph 2 of article 126 of the revised Constitution, only by law. Article 6 of the Convention does not expressly provision for the procedural means of access to justice, which means that they can be established by member states. As a guarantee of the observance of human rights, the Convention regulates in art. 6 point 1 every person's right to an equitable trial.

According to the provisions of this article "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 by the press and public may be excluded from all or part 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 the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The quoted provisions entail that the right to an equitable trial has the following components:

- free access to justice;
- the examination of the case by an independent and impartial court established by law;
- the examination of the case within a reasonable time;
- the examination of the case in a public manner, which also involves the publicity of the pronouncement of the court order.

As we have already emphasized, every member state has the freedom to establish the manner in which it understands to perform its duty to guarantee free access to justice, which cannot be an absolute right, as it can be subject to certain limitations that do not go against the provisions of art. 6 of the Convention, if they are reasonable and proportional to the pursued goal.

2. The free-of-charge character of justice

The free-of-charge character of justice constitutes one of the principles governing civil trial and it consists of the fact that the parties to the court litigation do not have the obligation of assuring the payment for the judges solving the case, nor for the district attorneys, assistant magistrates, or court clerks.

These persons service justice, which constitutes a public service of the state, being paid wages by it. Money given by the litigants to these persons constitutes the competence of penal law. Although justice is provided free of charge in the above-mentioned sense, the solving of civil cases also entails certain expenses that the parties in the legal relationship subjected to judgment must

² Romania signed the International Pact of Civil and Political Rights, as well as the Pact on Economic, Social, and Cultural Rights, known as the Human Rights Pacts on June 27, 1968, and ratified them by State Council Decree no. 212/1974;

have: judicial stamp duties, lawyer and expert fees, travel expenses to tribunals and expenses necessary to the administration of evidence etc.

One issue that has generated discussions was that regarding the establishment of reasonable judicial stamp duties, in order to maintain free access to justice unrestrained, as it is a known fact that the establishment of large judicial stamp duties place those with small material income, and so much more those with no income, in the impossibility of resorting to justice.

As such, judicial stamp duties should not be established in an exaggerated quantum, because otherwise access to justice no longer holds practical applicability, being merely a theoretical right.

Next we will succinctly refer to the mode of regulating judicial stamp duties in Romania and to possible limitations of the right of access to justice by the establishment of those duties.

3. Considerations regarding the assurance of free access to justice as a consequence of the modification of judicial stamp duties by Law no. 276/2009

The modifications brought to Law no. 146/1997 regarding judicial stamp duties by Law no. 276/2009³ regarding the approval of Government Emergency Ordinance no. 212/2008 for the modification and completion of Law no. 146/1997 generated certain discussions regarding the effect produced by the raise of the rate of these duties⁴.

By means of Law no. 276/2009, the lawmaker provisioned new tax thresholds for actions and petitions that can be evaluated in currency. The normative document established the following duties for the mentioned actions:

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| a) | with a value of up to 50 lei | - 6 lei; |
| b) | between 51 lei and 500 lei | - 6 lei +10% for the amount exceeding 50 lei; |
| c) | between 501 lei and 5.000 lei | - 51 lei + 8% for the amount exceeding 500 lei; |
| d) | between 5.001 lei and 25.000 lei | - 411 lei + 6% for the amount exceeding 5.000 lei; |
| e) | between 25.001 lei and 50.000 lei | - 1611 lei + 4% for the amount exceeding 25.000 lei; |
| f) | between 50.001 lei and 250.000 lei | - 2611 lei + 2% for the amount exceeding 50.000 lei; |
| g) | over 250.000 lei | - 6.611 lei + 1% for the amount exceeding 250.000 lei. |

These provisions are applied correspondingly also to petitions regarding the nullity, annulment, resolution, or termination of a patrimonial legal document, as well as to petitions regarding the determination of the existence or non-existence of a patrimonial right. Up to the time of its modification by means of the quoted normative document, Law no. 146/1997 provisioned smaller duties for the petitions and actions assessable in currency introduced at court orders, which assured free access to justice for litigants with small income. By law no. 276/2009 judicial stamp duties for heirs have been increased substantially (in our belief). Thus:

- for the establishment of the quality of an heir – 50 lei/ heir;
- for the establishment of the bequest – 3% of the value of the bequest;
- for petitions for reports – 3% of the value of the goods on which a report is being requested;
- for petitions of reduction on the freely disposable portions of the estate – 3% of the value of the reserve to be completed by reduction on the freely disposable portions of the estate;
- for partition requests – 3% of the value of the sharable estate.

Apart from this duty, in the case that the parties dispute the goods to be shared, their value, or rights or the dimension of the rights of the co-owners in the context of the above-mentioned requests, judicial stamp duty is due by the applicant for the disputed value.

Law no. 276/2009 also provisions a facility for the litigant, stipulating at point 9 that “in the event that before the first day of hearing the parties conclude the transaction or waive judgment, the amount paid as judicial stamp duty is fully resituated, and in the case that the transaction or the

³ Published in the Official Gazette of Romania, Part I no. 482/13.07.2009;

⁴ An ample analysis of these effects was performed by attorney Floriana Marin Vlădulescu and attorney Elena Monica Livescu in the article “Violations of the right of access to justice and of the right to property by Law no. 276/2009 modifying judicial stamp duties” (“Încălțări aduse dreptului de acces la justiție și dreptului de proprietate prin Legea nr. 276/2009 de modificare a taxelor judiciare de timbru”), presented at the Symposium organized on October 3, 2009, by the Vâlcea Bar Association at Băile Olănești;

waiver to judgment intervenes subsequent to the first day of hearing, up to half of it is resituated, taking into account the court actions already fulfilled.”

We believe that this facility is welcome, but it is not able to facilitate free access to justice for the litigants, as they must pay in advance the judicial stamp duty, according to the legal provisions on this issue, and given that the interested person does not dispose of the necessary amounts for the payment of the duty in advance, they will not be able to place a claim at the tribunal, even if their legitimate rights or interests were harmed. Furthermore, for the restitution of the duty other petitions must be formulated, whose solving is lasting.

As a consequence, we appreciate that through its provisions regarding the establishment of the rate of judicial stamp duties, Law no. 246/2007 limits free access to justice, and in an economic crisis situation, such as the present one, the increase in duties, irrespective of their nature, does not constitute a solution.

The duties established prior to the modification regarding inheritance by Law 146/1997 were reasonable, being accessible to any litigant, due to their reduced value, being set by the lawmaker at a fixed duty of 19 lei and a judicial stamp of 5 lei. The cases were applied stamp duties according to the disputed value only in the event that such a dispute existed.

In the exposition of reasons that justify the need for the adoption of Law 276/2009, the following arguments are brought, among other things:

- the grant of facilities for the payment of judicial stamp duties not only to physical persons, but also to legal persons ;
- the adoption of measures adequate to the mode of payment of judicial stamp duties;
- the existence of a non-uniform practice regarding the modality for establishing the stamp duty for certain types of actions;

The need for the increase of the rate of these duties is however not justified. The issue under discussion is whether the modification of legislation referring to the judicial stamp duty (by increasing duties) infringes on the right of access to justice provisioned by art. 21 paragraph 1 of the Constitution and by art. 6 point 1 of the Convention, considering that according to art. 20 paragraph 1 of Law no. 146/1997, “judicial stamp duties are paid in advance” and, according to paragraph 3 of the same article, “not fulfilling this obligation of payment up to the set due date is sanctioned by the annulment of the action or petition”.

The provisions of the law establishing judicial stamp duties imply that these are calculated as a percentage of the value of the object of the trial. We appreciate that, in establishing these duties, note should however be taken of the economic reality and of the plaintiff’s income, so that the right of access to justice is not affected by the imposition of taxes that exceed their material availabilities.

By Decision no. 87 of January 20, 2009, published in the Official Gazette no. 86 of February 12, 2009, and Decision no. 808 of May 19, 2009, published in the Official Gazette no. 428 of June 23, 2009, the Constitutional Court understood that “free access to justice established by article 21 of the Constitution is not free of charge. There is no constitutional provision that prohibits the establishment of stamp duties, being a justifiable fact that the person addressing the legal authority should contribute to the coverage of expenses caused by the achievement of the action in court.

The claims of the Constitutional Court are justified, but, as we have already emphasized, the rate of the judicial duty to be paid should not be exaggerated, as many litigants cannot access justice.

It could be upheld that the establishment of high duties is aimed at diminishing the number of requests for abusive calling to judgment, as well as at fund raising for the budget of the department of justice. We believe that the establishment of high judicial stamp duties does not automatically limit the number of abusive petitions addressed to tribunals, but it first of all leads to the decrease of the rate of collected duties, as it is natural that the litigant who does not have material possibilities does not address justice.

We emphasize that according to art. 19 of Law 146/1997, judicial stamp duties are paid into the account of the local budget of the administrative-territorial unit in whose area the litigant has

their residence or, as the case may be, the registered office, and as a consequence, these duties do not become a part the budget of the department of justice.

We must however also mention the fact that the state must observe its obligation to regulate the right of access to justice in a manner that corresponds to the requirements provisioned by art. 6 point 1 of the Convention, and by instituting exaggerated duties the right to an equitable trial is violated. As a consequence, free access to justice can only be assured by establishing reasonable duties, accessible to all litigants.

In ECHR practice it has been settled that if the rate of the duty is very high, the right of access to justice is violated. In this respect, of particular relevance are the decisions given in the cases: Weissman vs. Romania of 24.05.2006, Iosif et al. vs. Romania of 20.12.2007.⁵

4. CONCLUSIONS

Taking into account the income rates in Romania, where the minimum wage amounts to 600 lei, as well as the present economic situation, in the majority of cases the litigants find themselves in the situation where they cannot pay in advance judicial stamp duties, as the lawmaker establishes, which entails the annulment of the action or of the petition addressed to the court.

The measures decided by means of Government Emergency Ordinance no. 51/2008⁶ regarding public judicial assistance in civil matters does not constitute sufficient guarantee for the assurance of access to justice, as they are left to the appreciation of the court. Moreover, the facilities provisioned by this normative document are only awardable, according to the provisions of art. 8 of the ordinance, to those whose monthly average income per family member over the two months immediately prior to the formulation of the petition is situated below 500 lei, the amounts that constitute public assistance being advanced by the state.

In the case of those whose income is situated below 800 lei per family member, the values are advanced by the state to a proportion of 50%. As a consequence, these facilities are not available to persons who achieve higher incomes, but who do not assure the payment of suspended duties.

The lawmaker leaves unregulated those situations in which the litigant achieves income above 800 lei per family member, and the judicial stamp duty that they must pay exceeds their material availabilities.

Also emphasis should be placed on the fact that by formulating petitions for the granting of the judicial public assistance, law courts are made even busier and the duration for solving cases is prolonged, so that they can no longer be judged within a reasonable term, as is provided by art. 6 point 1 of the Convention.

As a consequence of the matters discussed, we believe that judicial stamp duties established by Law no. 276/2009 are much too high in comparison with the income achieved by the Romanian litigant, which entails that they do not have the possibility to capitalize their claims or to prove the lack of firmness concerning the opponent's claims within a trial.

As such, we believe that the law under discussion limits free access to discussion, it violates the provisions of art. 6 paragraph 2 of the Constitution and art. 6 of the Convention, so that a recalculation of these duties is imposed, according to the present economic situation of the country, also considering the minimum income and the gross average income within the economy in establishing the duty.

⁵ The Official Gazette No. 561 of 24.07.2008; See also the case Larco et al. vs. Romania of October 11, 2007, The Official Gazette no. 546/2009

⁶ Published in the Official Gazette of Romania, Part I no. 327 of Aril 25, 2008

BIBLIOGRAPHY:

1. Bîrsan Corneliu, *Convenția Europeană a Drepturilor Omului, comentarii pe articole (The European Convention on Human Rights, comments on articles)*, vol.1- rights and liberties. Bucharest: Ed. C. H. Beck, 2005;
2. Ciobanu Mihai Viorel, *Tratat teoretic și practic de procedura civilă (Theoretical and Practical Civil Procedure Treaty)*. Bucharest: Editura National, 1996;
3. Deleanu Ion, *Procedura Civilă (Civil Procedure)*, vol. 1. Arad: Editura Servo-sat, 1998;
4. Les Ioan, *Principii și instituții de drept procesual civil (Principles and Institutions of Civil Procedure)*. Editura Lumina Lex, 1998;
5. Măgureanu Florea, Măgureanu Proptean George. *Organizarea Sistemului Judiciar (The Organization of the Judicial System)*, 6th edition, revised and completed. Bucharest: Universul Juridic, 2009;
6. Law no. 146/1997, regarding judicial stamp duties;
7. Law no. 276/2009, regarding the approval of Emergency Government Ordinance No. 212/2008 for the modification and completion of Law no. 146/1997;
8. Emergency Government Ordinance No. 51/2008 regarding public civil judicial assistance.