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SEMINAR ON

"The use of international instruments for protecting individual rights, freedoms and legitimate interests through national legislation and the right to legal defence in Belarus: challenges and outlook"

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REPORT

"European Standards and the Right to Legal Defence in Civil Matters"

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Introductory remarks

The *right to a fair trial* is has, in the international and European human rights law as well as in many domestic systems, a fundamental place in a democratic society and in a State governed by the rule of law. The right to a fair trial includes necessarily *the right of access to a court*; I should mention here the reasoning developed by the European Court of Human Rights, the control organ of the Convention on the Protection of Human Rights and Fundamental Freedoms, that the right to a fair trial "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article [6 of the European Convention -n.n.] embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 par. 1 as regards both the organization and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing".[1]

This is, at present, the basic doctrine of the right to a fair hearing; the right to access to a court can be defined as the faculty of all individuals to launch an appeal before a tribunal, even if this appeal is ill-founded, legally or factually. This faculty implies the obligation of each State that a competent tribunal examines and delivers a sentence concerning the appeal.

The legal nature of the right to access to a court is that of an individual fundamental freedom, being part of the European public order. As many European Constitutions list it among the essential rights in their domestic legal order, it can be also qualified as having a constitutional value.

However, without ignoring its fundamental character, the right of access to a court *is not absolute in its exercise*; in fact, the very definition of this right implies the involvement of the State and by consequence, the regulation of its exercise by the State. In the absence of a regulation of access conditions, the exercise of this right would be chaotic. The State must determine the competent tribunals, the rules of procedure, and the formal conditions to be fulfilled in order for a person to bring actions to courts. These regulations are in fact limitations of the right of access to a court. We could say, without fear of being wrong, that the right to a fair hearing calls, by its very nature, to a regulation by the State, which may vary in time; it should also take into account the resources and the needs of a given society.

Limitations of rights are admissible in international human rights protection, especially when the rights at stake pertain to the category of those requiring a positive action of the State authorities. However, such limitations are admissible only *if they do not affect the very essence of the right*, if they pursue *a legitimate aim* and if they are *necessary, in a democratic society* in order to achieve the pursued aim, or as the Strasbourg Court often said, "if there is a reasonable relationship of proportionality between the means and the aim to be achieved". The very regulation by the State of a right's exercise could be considered as a limitation and is also to be analyzed as an action deemed to preserve the effectiveness of that right.

[1] Case of *Golder v. The United Kingdom*, judgment of 21 February 1975.

In fact, quoting a phrase that now is on everybody's lips when we talk about human rights, the international human rights treaties must always be regarded as guaranteeing *effective* rights, not theoretical ones. This means, on one hand, that every limitation imposed by States must preserve the effectiveness of the right's exercise and, on the other hand, that States should act through positive actions in order to ensure the effective character of this exercise. The positive actions could imply various measures at State's disposal in order to ensure the rights of the individuals and, in our case, the right of access to a court in an effective and realistic manner.

In *theory*, the hypothesis is *simple*: it is sufficient to proclaim that the right to justice is open to everyone, for all types of disputes and to make sure that the formal conditions required in order to bring an action to justice are publicly available. In theory and using an unfortunate presumption, which is essentially wrong but much abused by lawyers, everyone knows the rules of law, in various fields, and the interpretation and application of notions and concepts is easy. However, in the *real* life, most people ignore the technical rules of procedures (that is, the limitations to the right of access to a court) and consider the legal field as very complex, which, by the way, is quite true. For them, the complexity of a case or the burden of pleading a case by themselves, or even the emotional challenge of the case are not limitations, but *obstacles* that impede them from having effective access to a tribunal.

As a consequence, they should benefit, in certain cases, from the knowledge and experience of a lawyer who is able to clarify the facts and the points of law and to master the procedural intricacies.

As the European Court stated, "the right to a fair hearing may, in certain circumstances, oblige a State to provide legal aid if the complexity of the proceedings are such that an applicant cannot be expected to plead in person"[2] and the failure of the State to assure the recourse to such a form of assistance "may breach this provision [the right to a fair hearing – n.n.] where such assistance is indispensable for effective access to court".[3]

At this moment of my presentation, I must notice that *the right to legal aid is not stipulated in the Convention, nor deduced, by way of interpretation, from the right to a fair hearing*, by the international bodies monitoring the respect of human rights; it is only considered *as a measure* adopted in order to comfort the effective exercise of a right that is part of the right to access to a court.

It follows that *the lack of legal assistance* before the courts either because it does not exist or because it is not available to the applicant, *could amount to a breach of the right to a fair hearing*, as it could affect either the very access to a court (when the legal representation is indispensable in order to launch an action or an appeal), or the fairness of the hearing (when the lack of legal aid puts one party to the proceedings in an unfavorable position). However, in other cases, the legal assistance is *not* necessary; it follows that granting of access to legal assistance is not mandatory for the State in *all* situations and that the benefit of legal assistance should be granted following some rules and criteria. It follows that the granting of legal aid is *not an automatic right* derived from the right of access to a court, but an aspect of this right's effectiveness.

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[2] Case of A.*R.M. Chappel v. The United Kingdom*, decision of 14 March 1985

[3] Case of *P., C. and S. v. The United Kingdom*, judgment of 16 July 2002

The access to legal aid, in order to – further – have access to a court or to a fair hearing, certainly belongs to the positive measures that a State must adopt in order to comply with its international obligations. It is the State's duty to organize its legal aid system, with rules and guarantees, and also to make sure that the content of the assistance provided meets the requirement of an effective access to a court.

The legal aid system

In 1978, the Committee of Ministers of the Council of Europe adopted on 2nd of March a *resolution*, (78) 8E, *on legal aid and advice*. The resolution reaffirmed the fact that the right to justice was the essential feature of any democratic society and called on member States to adopt appropriate systems of legal aid that would contribute to the achievement of the right of access to justice especially for those in an economically weak position.

The resolution proclaimed the right of all persons to necessary legal aid in court proceedings, but, as we can see, it subordinated the benefit of legal assistance to the condition of necessity, which was to be determined by considering the financial resources and obligations of the individual and the anticipated cost of the proceedings. Also, when considering whether legal aid should be granted, the authorities must take account if it was a reasonable measure for proceedings to be taken or defended and the nature of the proceedings.

In the Committee of Ministers' vision, the legal aid should always include the assistance of a person professionally qualified to practice law.

The resolution also dealt with the procedural aspects of the legal aid system, as it mentioned the necessary review of a decision to refuse a grant of legal aid and the essential publicity of the system.

It only took the European Court one year to transpose some of the terms of this resolution in its case-law, but it took 25 years to further its developments in this field.

With the *Airey* judgment,[4] the Strasbourg organs established that in some instances before the High Court of Ireland the possibility for a person to defend himself or herself in person did not represent an effective right of access, as the practice before this supreme judiciary forum was the legal representation, as the proceedings were the least accessible of the existent domestic remedies and very complex ones. As a consequence, and taking into account the circumstances of the case, the conclusions of the Strasbourg organs found a breach of the right to access to a court. The circumstances taken into consideration were in number of 3, namely: the complexity of the procedure, the necessity to address complicated points of law or facts, and the emotional involvement of the case.

These circumstances were transformed into criteria to be applied in order to determine if an individual should be granted legal aid, and were developed in subsequent judgments.

As for *the first criterion*, *the complexity of the procedure*, the Court applies a double analysis,

[4] Case of *Airey v. Ireland*, judgment of 9 October 1979

both objective and subjective. From the *objective* point of view, a procedure is complex if it requires appearing in person before the higher courts (without being conclusive for the complexity), taking into account the burden of proving the truth of allegations, the scale of the proceedings (number and days of hearings, interlocutory applications, voluminous documentation, expert evidences, witnesses). From the *subjective* point of view, the Court considered that the proceedings should be "exceptional",[5] at least from the applicant's perspective. The education and experience of the applicant are factors to be examined in order to establish the complexity of the case. For example, in one case before the European Court[6] against UK the conclusion was that the absence of legal aid did not amount to a violation of the right to a fair trial, as the defamation proceedings in that case involved a well-educated and experienced person, which had to prove the truth of one single allegation. By contrast, in another case against the United Kingdom,[7] the complexity of the defamation proceedings came from the volume of documentation and proofs (technical expert evidences, hundreds of witnesses to hear, 313 days of hearings, interlocutory applications) and also by reference to the situation of applicants (a bar worker and an unwaged person).

The *extensive legal issues involved by the case or the necessity to address complicated points of law or facts* represent *the second criterion* applied by the European jurisdiction. The applicant's capacity to understand and to observe the legal and procedural requirements, all alone or with partial help or representation, influences decisively the conclusion on the necessity to grant legal aid to the applicant. If the applicant benefited from partial legal assistance, even if only during one or some stages of the proceedings, this circumstance offered him or her the possibility to sought advice on any aspects of the law or procedure of which he or she was unsure of. By contrast, the sporadic help, even if it was offered by a legal professional, does not represent a substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law applicable to the case.[8]

Also, other forms of legal assistance than traditional legal aid represent adequate measures taken by State in order to guarantee the effectiveness of the right of access to a court. For example, the "green formula" in British law is a form of assistance available to potential litigants with insufficient means in order to allow them to receive two hours' free legal advice from a solicitor in cases of alleged defamation. Another possibility recognized in British law to potential litigants is to enter into conditional fee agreements in respect of any type of proceedings specified in an Order made by the Lord Chancellor. "A conditional fee agreement is defined … as an agreement in writing between a solicitor and his client which provides that the solicitor's fees and expenses, or any part of them, are to be payable only in specified circumstances ... A conditional fee agreement cannot prevent an unsuccessful litigant from being potentially liable to pay all or part of his opponent's costs in connection with the proceedings."[9]

The *third criterion* with reference to the establishment of the necessary character of the legal aid

[5] *P., C. and S. v. the United Kingdom*, 16 July 2002

[6] Case of *McVicar v. The United Kingdom*, judgment of 7 August 2002

[7] Case of *Steel and Morris v. the United Kingdom*, judgment of 15 February 2005

[8] *Steel and Morris*, 15 February 2005.

[9] Case of *A. v. The United Kingdom*, judgment of 17 December 2002

is *the emotional involvement of the case*. This involvement could be determined by the nature of the dispute and by what is at stake for the applicant (for instance, family matters are more emotional) or by the media cover of the case. For example, in one case where the relationship of the applicants with their daughter was under question, the European Court considered the case to have crucial consequences on the family liaisons and concluded on the necessity of the assistance of a lawyer[10].

All these criteria apply when the access to court exists, but it is *not effective* if exercised by the applicant alone. When the legal representation is compulsory (a situation that occurs before the higher courts of several European States), the right of access to court is annulled by the non-existence or refusal of the legal aid. In these cases, the examination of the necessity of granting legal assistance is redundant, as its existence is the very essence of the effective right to a court.

A specific situation is represented by the recourse to legal remedies before a court in *discrimination* cases. In fact, from the beginning of its work, the European Committee against Racism and Intolerance (ECRI) underlined the necessity to grant legal assistance as a function of domestic bodies specialized in combating racism and intolerance and recommended that States grant legal aid to members of vulnerable groups who intended to launch contestations against a discriminatory act. Also, in its country-to-country approach, ECRI analyzed the situation of legal aid in different countries. For example, ECRI examined in 1997 the situation in the Czech Republic and mentioned this State's obligation to provide legal aid when it is necessary, in civil matters when the person concerned does not have the means to support the legal fees.

Apart from the analysis of the *necessity* of legal aid, it is important that a legal aid system be put in place by the State, in order to process the applications for legal assistance and to select, among the multitude of requests, those having reasonable prospects of success.

The legal aid system supposes the existence of appropriate legislation listing the criteria applied in order to determine if the legal aid is necessary, and if the person meets the financial conditions to benefit from legal aid, and also to stipulate the procedure to be followed in order for the interested person to submit an application for legal aid.

The case-law of the Strasbourg Court shows that any legal aid system must offer substantial guarantees to protect the applicants from arbitrariness, while enabling a selection of those cases qualifying for legal aid. These guarantees refer to the composition of the body empowered with the examination of the applications for legal aid (the fact that one or more magistrates take part in this body), the evaluation of the necessity of the legal aid (except for the situation when legal aid is compulsory), the existence of the selection of cases where legal aid is necessary and the possibility to review the decision refusing the grant of legal aid. No need to say that the fairness required by the right to a fair trial implies the presentation of the ground of refusal.

As the necessity of legal assistance was already examined earlier in this paper, I will limit myself to some considerations on the existence of a selection system among the cases where legal aid is necessary, as the necessity of legal aid does not automatically oblige the State to grant it. In fact, as the public finances are limited, the legitimate concern is that these funds should only be available for people with no or limited resources and whose appeals have a reasonable chance of success, in order to guarantee an optimal utilization of public finances.

[10] *P., C. and S. v. the United Kingdom,* 16 July 2002

This "prospect of success" test, together with the "means test", allows the State to choose the cases where legal aid is not only necessary but also an investment in the chances of the case. As a consequence, the refusal of application for legal aid (because no arguable ground of appeal was identified against the impugned judgment) is considered to be compatible with the right of access to a court.

The content of the legal aid

The mere granting of legal aid can not be considered as full accomplishment of the State obligation to assure effective access to a court. Accepting the application for legal aid does not generate effectiveness of access to a court. Effectiveness includes with necessity the concrete nomination of a lawyer and different actions the lawyer takes in order to assist the applicant.

As the first aspect is concerned, the nomination of a lawyer is indispensable to the realization of the right of access, and the lack of such nomination or the delay in nomination represent breaches of the right to a fair hearing.

In fact, as mentioned above, the legal aid supposes the representation by an experienced lawyer – professionally qualified to practice law. This reference to the legal experience shows that the representation must be not a formal one, but a concrete and competent assistance and a real implication of the lawyer in the proceedings. As a consequence, the State should watch over the way the lawyer accomplishes its legal duties and, in case of misconduct, should appoint another lawyer or oblige the existing one to fulfill his or her tasks adequately.

It is true that the European Court took caution in underlining that "there is no obligation under the Convention to make legal aid available for *all* disputes (*contestations*) in civil proceedings, as there is a clear distinction between the wording of Article 6 § 3 (c), which guarantees the right to *free* legal assistance on certain conditions in criminal proceedings, and of Article 6 § 1, which makes no reference to legal assistance".[11]

However, I can not but have in mind the conclusions of the Court on the content of the free legal assistance. In fact, the Strasbourg jurisdiction considered that the lawyer should be diligent to comply with the formal requirements of appeal and interlocutory actions he or she lodges in the act of representation, in order to guarantee a *real* legal assistance. As a principle of legal interpretation says, *ubi eadem est ratio, eadem lex esse debet*, the content of the legal aid should not differ between civil and criminal proceedings, so that the demands on the subject should be similar and, in fact, the European Court treats them as such.

[11] Case of *Del Sol v. France*, judgment of 26 February 2002