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ART. 6 OF ECHR: GUARANTEES IN RESPECT OF THE RIGHT OF ACCESS TO COURT EXPERIENCE OF REPUBLIC OF MOLDOVA IN IMPLEMENTATION*

I. Introduction

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

(Golder v. The United Kingdom Judgment, 21 February 1975, § 35)

The access to a court is what people in 47 member states of the Council of Europe feel that corresponds with their aspirations for a way of settling their disputes. On the background of the significant number of cases submitted to the European Court of Human Rights concerning the infringement of the essential elements of the right of access to court - the improvement of the quality, fairness and efficiency of justice for the sake of citizens became one of concerns of the Council of Europe, being part of its general policy.

In this context, several Council of Europe bodies were designed to create a well functioning justice system, based on defining concrete ways and providing assistance to Member States through proposing the fields where it would be desirable to elaborate new legal instruments or to change the practice of their implementation. Together with the Court jurisprudence, the Council of Europe recommendation documents are establishing ways for the Member States in ensuring the right of access to court.

In order to understand the human rights values promoted in the Council of Europe framework on access to court, as well as to asses the impact of Council of Europe recommendations and European Court jurisprudence on the enforcement of fair trial standards in our country, our team started the preparation of this paper by conducting a brief research of the Council of Europe activity in the field.

For our own research purposes we adopted a thematic division of the documents provided within the Council of Europe, presenting an overview study of the main principles concerning the right to access to court and we made an assessment of the main elements on issues identified by the European Court as essential to Member States to achieve the effective observance of the right of access to court. Basing our research on the work made by our team, we continued with the determination of the problems faced by the Republic of Moldova in ensuring the observance of the right of access to court and we came up with some recommendations to solve the problems revealed by our research.

The 1st January 2009, the European Court delivered 130 judgments on the merits of Moldovan applications. Many of these judgments concern systemic problems of the Moldovan society, such as the failure to enforce court decisions, several of them concern also the issues raised by the state system of the cost of court procedures. Taking into consideration this situation, through our work we aimed to contribute, as future legal professionals – judges and prosecutors, to the understanding of the legal dilemmas and breaches of the right of access to court in our country and in strengthening the practice of direct application of the Convention when it is necessary to ensure compliance with guarantees of the right of access to court.

II. Council of Europe recommendation documents with respect to the right of access to court - an overview

* ***Articolul 6 CEDO: garanții privind dreptul de acces la instanță. Experiența Republicii Moldova în aplicare*** (Lucrare prezentată de echipa INJ la Concursul Internațional THEMIS, 23 octombrie, 2009, Lisabona).

- **Committee of Ministers' Recommendations and Resolutions on measures facilitating access to court**

A recommendation with a relatively strong impact in Council of Europe states is the ***Recommendation No. R (81) 7 on measures facilitating access to justice***[2]. It refers to several issues with a view to making judicial proceedings related to civil, commercial, administrative, social or fiscal matters simple, speedy and inexpensive. From the perspective of our research on the right of access to court this Recommendation is important because it has a particular regard on adjusting the cost of court procedures related to the nature of the case and the individual situation of the party.

Under the terms of this document the Member States should take all necessary measures in order to abolish or to reduce the cost of court proceedings in all appropriate cases, with a view to facilitating access to justice for private individuals in an economically or socially week position. Particular attention should be given to the fees for lawyers, experts, translators and interpreters as they constitute an obstacle to access the court. States should also set up mechanisms which would assure the simplification of the system of court fees that establish conditions for commencing proceedings in the court.

With a similar importance is the ***Recommendation No. R (93)1 on effective access to the law and to justice for the very poor***[3]. It shows that the effective enjoyment of the right to access the justice must be secured for the very poor people without distinction in accordance with the art. 14 of the European Convention on Human Rights. Being particularly deprived, marginalized or excluded from the society in economic and in social terms these people need a comprehensive and coherent state policy aimed at facilitating their effective access to the courts. In connection with this situation the Committee of Ministers recommended the Member States to extend legal aid to very poor people in any event where they are habitually resident in the territory of the member states in which the civil procedures are to be conducted. In this respect States should also endeavor to take the necessary measures to limit the circumstances in which legal aid may be refused by competent authorities and to simplify the procedures of granting legal aid.

Third important document issued by the Committee of Ministers that is intended to eliminate economic obstacles to legal proceedings is the ***Resolution (78) 8 on legal aid and advice***[4]. Criminal matters fall outside the scope of the resolution. It invites the governments of Member States to take measures for granting of legal aid to the individual applicant's situation without any distinction made between nationals and foreigners: their financial position and the cost of the contemplated proceedings. "*The financial conditions should not be so rigorous as to require an applicant to sell his home or mortgage his income for years ahead, and so have to live in poverty simply so as to obtain access to the courts. This does not mean that it is unreasonable to require some applicants to borrow the sum required or part of it on reasonable security, if to do so would not cause undue hardship."* The resolution principles emphasize that legal aid should not be limited only to persons who fall below the poverty line and also that it may be provided at any stage of the court proceedings. The resolution says that legal aid should cover the payment of all court costs and other costs connected with court proceedings (fees, taxes, "bailiffs'" costs, costs relating to witnesses and experts, translations, etc). It is also desirable that legal aid should include payment of the assisted person's costs in attending a hearing in person (travelling expenses and possibly loss of earnings) whenever his presence at the hearing is deemed necessary. The fundamental principle is that the legally aided person should be entitled to the assistance of a person having the same qualification as the person normally chosen in the same circumstances by a party not in need of legal aid. The lawyer appointed should receive adequate remuneration for the work done on behalf of the assisted person.

At the same time the resolution requires to keep the limits of financial eligibility for legal aid constantly under review in order to ensure that the financial eligibility is not eroded and that the proportion of the population who may benefit from legal aid is not reduced for this reason. In the same context the Committee of Ministers in Resolution (76) 5 on legal aid in civil, commercial and administrative matters[5] resumes the principle of granting legal aid irrespective of the amount, equally to nationals of other member states, as well as to all persons having their habitual residence in its territory and to its nationals.

- **Committee of Ministers' Recommendations on measures facilitating enforcement of the court decisions**

As mentioned in the jurisprudence of the Court the right of access to court also includes the right of a final determination of the disputes.[6] The right of access to court "*would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It*

[2] Adopted by the Committee of Ministers on 14 May 1981 at its 68th Session

[3] Adopted by the Committee of Ministers on 8 January 1993 at the 484 ter meeting of the Ministers' Deputies

[4] Adopted by the Committee of Ministers on 2 March 1978 at the 284th meeting of the Ministers' Deputies

[5] Adopted by the Committee of Ministers on 18 February 1976 at the 254th meeting of the Ministers' Deputies

[6] Such is in the case Burdov v Russia or in the case Jasiuniene v. Lithuania

would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention".[7]

On the subject of court decision enforcement a special attention was granted in the framework of the Council of Europe by the **Committee of Ministers** that has adopted two Recommendations in this sense.

The ***Recommendation Rec(2003)17 on enforcement***[8] applies to civil matters and also to criminal matters that are not concerned with the deprivation of liberty. It says that the assurance of effectiveness and of efficiency of the enforcement procedure depends on a clear legal framework that defines in detail the rights and duties of the defendants, claimants and third parties, the enforcement agents' status role, a proper recruiting and training procedure for them, and which provides measures to deter or prevent procedural abuses. At the same time the Recommendation is setting out that enforcement fees should be reasonable and prescribed by law[9].

It is also clear from the ***Recommendation Rec(2003)16 on the execution of administrative and judicial decisions in the field of administrative law***[10] that the governments of the Member States shall ensure the effective execution of the judicial decisions in the field of the administrative law by following in their legislation and their practice the principle on provision for administrative authorities a reasonable period of time for enforcement and in case of non-implementation – ensuring of an appropriate procedure to seek the execution of such a decision through an injunction or a coercive fine, or through disciplinary civil or criminal procedures for public officials in charge of the implementation of judicial decision.

- **The documents of the European Commission for the Efficiency of Justice (CEPEJ)**

CEPEJ is an innovative body within the Council of Europe established by the Committee of Ministers Resolution Res(2002)12[11]. It is responsible for facilitating the improvement of the efficiency and functioning of justice in the member states of the Council of Europe through collecting and analysing data on judicial systems in Europe, defining instruments of measure and means of evaluation, identifying the difficulties the judiciary system met and providing assistance to Member States at their request in the fields where it would be desirable to elaborate new legal instruments. In order to carry out these different tasks CEPEJ is preparing documents on the efficiency, legitimacy and accountability of judicial systems, as well as on users' satisfaction.

In respect of the implementation of the right of access to court there are several particularly valuable CEPEJ studies. The information collected and analyzed in CEPEJ second study on "*European judicial systems. Edition 2008 (data 2006): Efficiency and Quality of Justice*"[12], as well as the report of the CEPEJ Working Group on execution *"Enforcement of court decisions in Europe*[13]" and the CEPEJ study on "*Access to justice in Europe*"[14] is helping the Council of Europe Member States to prevent violation of Art.6 of European Convention on Human Rights.

Thus, from the perspective of ensuring of the effective implementation of the right of access to court has been especially important the comparative statistical data on public budgets allocated to the legal aid system of the member states and the in depth comparative analysis on accessibility and efficiency of enforcement of court decisions included in mentioned CEPEJ reports.

Taking into account the work carried out by the various bodies of the Council of Europe in the field of the protection and promotion of human rights, it would have been particularly important to mention also the work and the achievements of two other bodies supporting the activity of the Committee of Ministers - **the European Committee on Legal Co-operation** (CDCJ) and the **Steering Committee on Human Rights** (CDDH), contributing to ensuring the continued effectiveness of the European Convention on Human Rights in the Member States of the Council of Europe.

- **The documents of the Conferences of European Ministers of Justice**

[7] Burdov v Russia, application no. 59498/00, § 34

[8] Adopted by the Committee of Ministers on 9 September 2003 at the 851th meeting of the Ministers' Deputies

[9] Having regard to the importance of information technology in improving the efficiency of the enforcement process and the relevant Council of Europe legal instruments in this field, the Recommendation Rec(2003)17 refers also to the Recommendation Rec(2003)14 on the interoperability of information systems in the justice sector and Recommendation Rec(2003)15 on the archiving of electronic documents in the legal sector.

[10] Adopted by the Committee of Ministers on 9 September 2003 at the 851th meeting of the Ministers' Deputies

[11] Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies

[12] The next evaluation cycle should result in a publication of a new report in 2010 based on figures from 2008.

[13] CEPEJ Studies No. 8

[14] CEPEJ Studies No. 9

Justice and the rule of law are two of the Council of Europe's main concerns. Over the years, the Council of Europe has dealt with these issues in various ways, through its intergovernmental activities in the legal field and its Conferences of Specialised Ministers. The Conferences of European Ministers of Justice give a regular opportunity to discuss topical issues and decide, within the responsibilities of the member states, which what lines the Council's work should follow. It would therefore be of direct importance of this study to reveal the recommendations adopted at the Conferences of the European Ministers of Justice that meet with the right of access to court. They are as follows:

- *23rd Conference of European Ministers of Justice,* 8-9 June 2000, which decided by the **Resolution No 1 "Delivering justice in the 21st century"** to take all necessary measures at a national and international level to improve the efficiency and the functioning of the judicial systems, by reducing delays, *exploring alternative ways of delivering legal advice and assistance*, as well as increasing the use of information technology (IT) systems in the administration and functioning of justice;
- *24th Conference of European Ministers of Justice,* 4-5 October 2001, by **Resolution No 3 on "General approach and means of achieving effective enforcement of judicial decisions"** come into notice the enforcement procedures of their importance;
- *28th Conference of the European Ministers of Justice,* 25-26 October 2007, by **Resolution No 1 on access to justice for migrants and asylum seekers** is recognizing that immigration is posing a major challenge for Europe and wants to facilitate and ensure the access to justice, including the provision of legal aid and assistance.

III. European Court of Human Rights case law on the right of access to court

- **Essence of the right of access to court**

The domestic court is one of the bodies responsible at the national level for enforcement of the obligations undertaken by the Contracting States of the European Convention on Human Rights (hereinafter referred to as - "Convention"). There is no express guarantee of the right of access to a court in the text of Article 6 (1). Nevertheless, the right to a court embodies from the perspective of the Court case-law **the right to access a court**, namely the right to bring any claim related to civil rights or obligations by a litigant party before a court or a tribunal.

"The Court thus reaches the conclusion, without needing to resort to "supplementary means of interpretation" as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) 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 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."[15]

- **Field of application**

The plaintiff and the defendant

Usually a violation of the right of access to court is appreciated by the Court in relation to the plaintiff because in fact the plaintiff is the one who is brings his action to the tribunal. However the Court has determined that a defendant could also invoke the violation of the right of access to court in the light of the case circumstances nature, which prejudiced his rights. In the case of *Miholapa v. Latvia*[16] the Court considered that the Zemgale District Court had not shown proof of sufficient diligence and had not done all that could be reasonably expected of it in order to summon the applicant to appear. It therefore held that there had been a violation of Article 6(1) of Convention, particularly of the right to access a court and of the principle of equality of arms.

Individuals and legal entities

The violation of the right of access to court can be raised before the Court so as by **individuals** and by **legal entities**. In the judgment of *Paykar Yev Haghtanak Ltd v. Armenia*[17], Paykar Yev Haghtanak Ltd was a private trading company in Yerevan. The case concerned, in particular, the applicant company's complaint that its cassation appeal was not examined due to its failure to pay court fees. The European Court of Human Rights held unanimously that there had been a violation of Article 6 (1) of the Convention, in that the applicant company had been denied access to a court[18].

The civil and criminal procedure

The Court has held that the content of the right of access to court is not the same in civil and in penal matters. That way, if in civil procedures this right is not raising many issues, in criminal matters we must make some specifications. The Court found that the provisions of the first paragraph of Article 6 shall not confer any rights of crime victims to start criminal proceedings against the crime author or to request representatives of special bodies to begin the penal prosecution. The only thing this rule is requiring in criminal matters is that when a finding on the existence of the guilt of a person occurs, all fair trial guarantees need to be observed by the court stating the presence of the guilt.

[15] Golder v. the United Kingdom judgment, § 35-36
[16] Miholapa v. Latvia judgment, § 23 and § 31
[17] Paykar Yev Haghtanak Ltd v. Armenia judgment
[18] See also Teltronic-CATV c. Pologne judgment

- **Relationship with other articles of the Convention**

The Court found in particular that the Contracting States shall not confound Article 6 (1) with Articles 5 (4) and Article 13 nor making these latter provisions superfluous. Article 13 speaks of an effective remedy before a "national authority" which may not be a "tribunal" or "court" within the meaning of Articles 6 (1) and 5 (4). Furthermore, the effective remedy deals with the violation of a right guaranteed by the Convention, while Articles 6 (1) and 5 (4) cover claims relating in the first case to the existence or scope of civil rights and in the second to the lawfulness of arrest or detention. What is more, the three provisions do not operate in the same field. The concept of "civil rights and obligations" (art. 6-1) is not co-extensive with that of "rights and freedoms as set forth in this Convention" (art. 13), even if there may be some overlapping. As to the "right to liberty" (art. 5), it is referring to penal procedures[19].

- **Content of the right of access to court**

The right to obtain a "determination" of the dispute by a court

The right of access to court includes not only the right to institute proceedings but also the right to obtain a "*determination*" of the dispute by a court. It would be illusory if a Contracting State's domestic legal system allowed an individual to bring a civil action before a court without ensuring that the case would be determined by a final decision in the judicial proceedings. It would be inconceivable for Article 6 (1) to describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without guaranteeing the parties that their civil disputes will be finally determined.[20]

The right of access to a court includes the right to challenge the legality of any real and serious interference in the litigant's civil rights. The challenge must be based on the principle that it is allowed to bring a civil action whenever it is not forbidden by law and it would not need a particular legal basis.

Full jurisdiction

The Court may find a violation of the right to access to court when the domestic court does not have full jurisdiction over the facts and legal issues in the case before it. It reiterated that for the determination of civil rights and obligations by a "tribunal" to satisfy Article 6 (1), the "tribunal" in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it.[21]

However, the domestic courts are not always obliged to investigate the facts of the case. If as a matter of law, there was no basis for the claim, the hearing of evidence would have been an expensive and time-consuming process which would not have provided the applicants with any remedy at its conclusion. In such a procedure the plaintiff is generally able to submit to the court the arguments supporting his or her claims on the law and the court will rule on those issues at the conclusion of an adversarial procedure.[22] There was no denial of access to court and, accordingly, no violation of Article 6 of the Convention.

The nature of the litigant

Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access "*by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals*" In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. The limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Therefore, in some cases the access to a court is granted on the base of a previous authorization. These are the cases of persons of unsound mind, minors, bankrupts and vexatious litigants[23]. Despite such Court jurisprudence there it found a violation of the right of access to court in the case versus Greece, where a civil action brought by a legal entity – a catholic church was dismissed without serious grounds.[24]

Access to court and legal aid

Both in civil proceedings and in criminal proceedings the Contracting States are required to establish **a system of free legal aid and advice** to ensure the right of access to court[25]. The Court noted that in terms of **civil procedure** the right of every person to have access to justice is completed by the state obligation to facilitate access, and sometimes states are obliged to ensure genuine social and economic rights. In the case *Airey v. Ireland* the applicant sought to obtain the separation of her husband that in Ireland is prohibited by the Constitution. The only court which has jurisdiction in this matter was the *High Court* but the applicant, since it didn't have the necessary financial means, has not found a lawyer willing to represent her. Given the complexity of the procedure and the nature of evidence to be given in all cases of separation of body all parts were repre-

[19] Golder v. United Kingdom judgment, § 33
[20] Popova v. Russia judgment, § 33, Multiplex v. Croatia judgment, , § 45; Kutić v. Croatia judgment, § 25.
[21] Terra Woningen BV v. the Netherlands judgment § 52, Vera Vasilyevna Sheidl v. Ukraina judgment § 52
[22] T.P. and K.M. V. the United Kingdom judgment, § 102
[23] Ashingdane v. United Kingdom judgment, M v. United Kingdom judgment
[24] Canea Catholic Church v. Greece
[25] Airey v. Ireland judgment, Kamasinski v. Austria judgment

sented by a lawyer. The Court decided that the presentation in front of the *High Court* without the assistance of a lawyer shall not provide any chance of success and therefore there was no access to justice for the applicant because "*a fact obstacle can lead to infringement of the Convention as much as one of law*".

However the Convention does not compel the granting of legal aid in all appeals in civil matters[26]. Such legal assistance refusal may violate Article 6 (1) in the following **conditions**: if such assistance is indispensable for effective access to court either because legal representation is mandatory (*Miroslaw Orzechowski v. Poland*), or because of complexity or type case (*Laskowska v. Poland*). There would also be imposed some **additional conditions** such as the financial situation of the applicant or chances of success in that process (*Steel and Morris v. the United Kingdom*).

The right of access to court also covers the right of detainees to institute civil proceedings before a court. The state must not interfere by legal impediments or it should not in fact prevent a detainee from accessing legal advice and legal aid for commencing a civil action.[27]

The quality of ex-officio lawyer services

The *ex-officio* lawyer services quality can, in turn, raise some signs of questions regarding the right of access to justice. First litigants are not given the right to choose the lawyer *ex officio*.[28] It is true that the state can not be held responsible for all the failures done by an *ex-officio* defense lawyer. There are particular circumstances for competent authorities in order to take steps to ensure the fact that the applicant enjoyed effectively the right he was entitled.[29]

The Court held also that the refusal of a legal aid lawyer to provide his services had to meet certain quality requirements. In this connection, the Court requires that the applicable domestic regulations specify the time-frame in which the applicant should be informed about the refusal of the *ex-officio* lawyer to defend the plaintiff's rights.[30]

Civil Procedure Court Fees

Although Article 6 (1) of the Convention does not guarantee free access to justice, sometimes high court fees may affect the right of access to court[31]. This interference can be invoked both as by individuals as by legal entities.[32] In the same time the Court held that the amount of the fees assessed in the light of the particular circumstances of a given case, including **the applicant's ability to pay them**, and **the phase of the proceedings** in which that restriction has been imposed, are factors that are material in determining whether or not a person enjoyed his right of access and had a tribunal hearing.

Complexity of proceedings

The complexity of proceedings regarding the legal nature of acts may also constitute a barrier to the effective enforcement of the right to access to court[33]. Given that right of access to a court is not absolute, the state shall be responsible to find and exclude interferences basing on the complexity of proceedings. As mentioned the Court in *De Geouffre de la Pradelle v. France* judgment the applicants are entitled to expect a coherent system that would achieve a fair balance between the authorities' interests and his own; in particular, he should have had a clear, practical and effective opportunity to challenge an administrative act that is in a direct interference with his right.

Immunities

Accordingly to the Court some of legal entities (international organizations) or large groups of people's categories are granted with an immunity of jurisdiction in civil cases.

In a case concerning the immunity of jurisdiction for a State the Court firstly examined the limitation pursued a legitimate aim. It noted in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considered that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty. It followed that measures taken by a High Contracting Party which reflected generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1[34].

However in a case on the immunity of jurisdiction for police the Court stated in the case *Osman v. United Kingdom*, that the rule excluding liability of police for alleged negligence in respect of investigation and suppression of crime pursuing the aim of effective maintenance of police service and hence prevention of disorder or crime must be considered a disproportionate interference with applicants' right of access to court.

[26] Essaadi v. France judgment, § 30
[27] Golder v. United Kingdom judgment, Cmpbell and Fll v. Uited Kngdom judgment
[28] Franquesa Freixas v. Spain judgment
[29] Artico v. Italy judgment, § 36
[30] Sialkowska v. Poland judgment, § 114
[31] Brualla Gomes de la Torre v. Spain judgment
[32] SC Marolux LLC and Jacobs v. Romania judgment
[33] De Geouffre de la Pradelle v. France judgment, § 34
[34] Al-Adsani v. United Kingdom judgment

Enforcement of court decisions

In so far the Court reiterated that, according to its established case-law, Article 6 (1) embodies the "right to a court", of which the right of access. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.[35]

Restrictive procedural requirements for the civil procedure

Sometimes the right of access to court is limited by **procedural restrictions**, which in fact constitute some common features of the legal systems of the member states, namely: time-limits governing the filing of documents or lodging of appeals or mandatory representation by a lawyer in front of the superior courts[36]. However the Court considered that there was a breach of the right of access to court due to the rejection of the plaintiff for damages compensation on the grounds of prescription rules, when the applicant had been conducting the proceedings in good faith and with sufficient diligence [37].

IV. The impact of the guarantees of the right of access to court on Moldovan domestic legal order and the practice of its implementation

• General Background

The right of access to court is guaranteed in Moldova as a fundamental right, both by Article 6 (1) of the Convention in conjunction with Article 4 "*Human rights and freedoms*" and art. 8 "*Respect for international law and international treaties*" of the Constitution, as well as by Article 10 of the Universal Declaration of Human Rights which states that "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations* (...)" and by Article 14(1) of the International Covenant on Civil and Political Rights.

This right is also expressly guaranteed in Article 20 "*Free access to justice*" of the Basic Law of the Republic of Moldova. This constitutional provision is stating that the access to court is conceived as a right of any person to be able to appeal to justice to defend his/her rights, freedoms and legitimate interests, ensuring that the exercise of this right may not be hindered by any law.

The impact of the guarantees of the right of access to court, as it is interpreted and applied by the Court is researched in this paper both in terms of its influence on the process of correlation of the legislative framework of the Republic of Moldova to the Convention standards in the years after its ratification[38], as well as from the perspective of direct Convention application by relevant state bodies. In this connection it has to be mentioned from the outset two important documents, which founded the direct application of the Convention in our country. It's about the Constitutional Court Decision no. 55 of 14 October 1999 concerning the interpretation of provisions of art. 4 of the Constitution of the Republic of Moldova and the Decision of Plenum of the Supreme Court of the Republic of Moldova no.17 of 19.06.2000 on the application in practice by the domestic courts of certain provisions of the Convention on Human Rights and Fundamental Freedoms.

The mentioned Decision of the Constitutional Court is important because it gives the interpretation of Article 4 of the Constitution, accordingly to which human rights international treaties signed and ratified by the Republic of Moldova (including Convention) has to be applied directly when there is a conflict between the international human rights provisions and domestic regulations.

Simultaneously the mentioned decision of plenum of the Supreme Court of the Republic of Moldova, which comes as a guide to help judges keeping role in ensuring respect for human rights and fundamental freedoms, recommends to the judges, which have primary task of applying the provisions of the Convention, to determine whether the national legislation comply with the ECHR, and where there is a difference, they shall apply directly the ECHR, providing the mandatory motivation in their decision.

The above documents are irrefragable but the direct application of the ECHR by the practitioners after 12 years of Convention ratification shows that they are not sufficient, which is due to multiple numbers of files per judge, an increased complexity of the cases, very frequent amendments of legislation and old mentality of legal professionals.

Both the adjustment of the domestic legislation to Convention standards as well as the accumulation of experience on direct application of the Convention is long process, implying a continuous effort from the Republic of Moldova. As considering the legislation a significant role in the adoption and amendment of domestic legislation, has to be given to the **Recommendation (2004) 5 of the Committee of Ministers on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights.**

Regarding the practice in domestic courts the individuals are addressing the authorities petitions raising the

[35] Hornsby v. Greece judgment
[36] Gillow v. United Kingdom judgment
[37] Yagtzilar v. Greece judgment
[38] Moldova ratified the ECHR in 1997

question of access to court. The complaints topics demonstrate that the judiciary has a diminished credibility among the population showing that the limited access to a quality service of ex-officio lawyers both in civil procedures, the problems rose by cost procedures, as well as by non enforcement of the court decisions create more obstacles for achievement of that credibility.

Justice is one of the most effective and important means of ensuring respect and protection of human rights and the reform of the judicial system remains a priority for Moldova. There are some significant improvements in our country in terms of practical guarantees of the right of access to court. In the same time serious problems concerning the observance of the right to access court still can be found.

- **Issue related legal assistance scheme provided by the State in civil cases**

Legal assistance guaranteed by the state is a mechanism for effective achievement of the fundamental human right of access to court and is an essential component of the proper functioning of the judiciary in a state of rule of law. In this sense, the state shall take the necessary measures to ensure a practical and effective access to court, by providing systematic and effective legal assistance.

In order to ensure effective access to court for the litigants in Moldova was adopted by Parliament on 19.07.2007 by Decision No. 174 the strategy of strengthening the judiciary. The paragraph 5 of the Strategy, entitled "*Free access to justice*" requires the implementation of European standards relating to legal assistance guaranteed by the state, improving the collection of court fees system in order to ensure effective access to justice for socially vulnerable people. Today we find that proposed objectives in the Strategy are completed only partially because of the postponed entry into force of the relevant amendments of the legislation, luck of mechanisms for their implementation and of human resources and public finance.

Until 2008 in Moldova free assistance of the lawyer in the civil trials for vulnerable persons was given by the state with great difficulty and restrictive disclaimers. The adoption of Law no. 198 of 26.07.2007 on legal assistance guaranteed by the state is a favorable prerequisite for economically disadvantaged individuals in enjoying a fair trial. The new state system includes legal advice and court representation, both in civil and criminal matters by a public lawyer. In civil cases legal assistance is provided only to the individuals whose income is below the income level set by the government for such judicial assistance.

Implementation of this law was followed by the adoption and amendment of a number of legal acts. A first step was the amendment of Civil Procedure Code (CPC) and Penal Procedure Code (PPC). Thus, it has been developed and adopted the Law No. 89-XVI of 24.04.08 amending and supplementing certain acts, which provides for amendment and supplement the Code of Civil Procedure, the Code of Criminal Procedure, the Law on the bar and the Law on Assistance in legal international criminal matters.

Quality of legal assistance guaranteed by the state is a too far issue for vulnerable people. Often the practice is certifying that this assistance is only a formal matter. At the basis of these problems is primarily the financial aspect - poor remuneration for the services of lawyers from the bar offices. According to the provisional Regulation on the amount and procedure of payment of lawyers for qualified legal assistance guaranteed by the state, the amount of remuneration is determined in correlation to the time consumed for qualified legal assistance. The mechanism of measuring this time doesn't correspond entirely to the challenges of reality. The question remains also open for free professional lawyers on which have no effect the previous mentioned regulations.

Nevertheless, adopted law already makes us feeling optimistic concerning the system of legal assistance guaranteed by the state. Even if the amendments of Civil Procedure Code related to free legal aid will enter into force on 01.01.2012 there would be time for the state to provide necessary legal instruments, human and financial resources for the effectiveness of those provisions.

A specific situation faced by national courts is the acceptance of representation of the rights and interests of a detainee by another detainee in the base of a civil mandate. National law does not provide specific provisions on such cases. Nevertheless taking into consideration the status of the convicted person, who is to expiate punishment under conditions established by the sentence, he is primarily limited of movement, so it can not provide an effective defense of the rights of other person. The access of detainees to a court pursuing a civil claim is also a matter that raises some questions under the observance of the right of access to court, being related to access to legal assistance guaranteed by the state, which can not be assured until the entry into force of new provisions mentioned above.

- **Issues related to the cost of court procedures**

The interests of good administration of justice can justify the imposition of financial restrictions for a person to access court. The analysis of the European Court cas-

es-law versus Moldova on these mattes revealed several important problems.

In the case of *Malahov v. Moldova* the Court held that the applicant complained that by refusing Chisinau Court and the Court of Appeals to consider merits of the case because of its inability to pay its court fee violated his right of access to a court guaranteed by Article 6 § 1 of the Convention. In § 31 of its judgment the Court noted that the domestic courts has not examined in detail the financial situation of the applicant. While using general phrases such as "*taking into account the financial situation of the [applicant*]," courts have not referred to any specific evidence of it. On the other hand, the applicant presented specific information about his relatively modest pension that was his unique source of income. None of the domestic court has expressed doubts concerning the amount of his pension, and the existence for Malahov of other sources of income. Moreover, while the court has found that the applicant was unable to pay court fees, it was decided that she had to pay them after rejecting her claims. Although according to national legislation concerning individuals' claims related to labor disputes, they are expressly exempted from payment of court fees and nevertheless the applicant expressly referred to this provision before the court that did not respond to its arguments. The Court concluded that domestic courts have failed to make an appropriate assessment of the ability of the applicant to pay court fees and to respond to the applicant's argument that it was entitled to an exemption taking into account the nature of its claims.

The national provision on requiring compulsory court fees from individuals appealing to Supreme Court has also been criticized by the European Court in decision given on 9 October 2007 in the case *Clionov v. Moldova*. The Court has stated that the plaintiff was denied access to a tribunal, as the Supreme Court was unable to examine the file, because it has not attached proof of payment of court fee, which, according to para. 2 of art. 437 of CPC is required for the pending cause. The Court has also stated, *inter alia,* that "*(...) Supreme Court of the Republic of Moldova has been prevented from verifying the ability of plaintiff to pay taxes through legal provisions express. Such a global ban on the granting of exemptions from payment of state contained in the article in itself call into question an issue under art. 6 par. 1 of the Convention. In light of the foregoing, the Court considers that the complainant was denied access to a tribunal. Consequently, there was a breach of art. 6 par. 1 of the Convention*".

The same issue was stated by the Court in the case no. 2 of *Istrate v. Moldova* where the Court found violations of Article. 6 § 1 of the Convention (access to justice) - refusal of the court to consider the request for appeal of the applicant on the grounds of non-payment of tax by the state, without examining ability to pay by the plaintiff.

Consequently of mentioned above two Court judgments the situation was remedied in Moldova by amending in 2008 of the provisions of Civil Procedure Code on state court fees for cassation appeals, allowing the assessment of financial situation of individuals by court at this stage of civil procedures.

Concerning legal entities national law prohibits the possibility to exempt them from court fees[39]. As a result on 4 November 2008 the European Court of Human Rights held in case of *Tudor-Commerce v. Moldova* that the national law infringes the applicant's right of access to court, because his applications submitted to the Economic Court of Appeal and the Supreme Court was rejected on the ground of non-payment of court fees.

The Court stated that the right to access court in these cases was seriously putted into question whether the fee shall be fixed in an excessive amount, especially when one who intends to pursue the claim is lacking financial resources. The Court expressly stated that the prohibition laid down by law was a violation of Article 6 § 1 of the Convention. Under these circumstances of the case the court shall apply directly to the Convention, given that domestic law was not fully compelling with the Convention.

As a result of multiple convictions by Court, although the state taxes are a component of the state budget, we believe that it is necessary to review the provisions of the Code of Civil Procedure, on conditions for lodging the appeals, which would provide legal entities with guarantees that an excessive court fee will not limit unreasonably their right to access court. Taking into account these situations the state bodies are currently examining the draft law on amendments of Civil Procedure Code.

Another case related to the issue of state taxes is the case of *Ciorap v. Moldova.* The complainant claimed that the refusal of the Supreme Court to review his complaint regarding the forced feeding, constituted a violation of his right of access to justice, which is guaranteed by Article 6 § 1 of the Convention. The Court noted that the complainant referred the complaint alleging injury to his health caused by the national authorities. In accordance with Article 85 (1) of the Code of Civil Procedure, he should be exempt from payment of state fees in light of its nature, regardless of his willingness to pay. The Court noted that plaintiff was not clearly basing on

[39] According to para 4 art.85 of the Civil Procedure Code, depending on the situation, the person may be exempted by the judge (the court) to pay a fee or pay a part of it. Meanwhile, according to art.86 on the legal person it is allowed only to postpone or staggered payment of court fee. Failure to pay court fees on the set terms having the effect of removal pending application.

this reason to be exempt from state fee. However, the Court also noted that the content of Article 85 (1) of the CPC does not make the application dependant of the existence of a formal request from the interested party. The Court considered that the national courts should have examined the request of the plaintiff to waive the state tax in light of the claim, taking into account the express reference made to it in Article 437 of CPC, and taking into account the seriousness of complaints made, revealing alleged torture. In light of the above, the Court considered that the complainant has limited access to court. Therefore, there was a breach of Article 6 of the Convention.

Taking into account the convictions of Moldova by the Court concerning the limitation of the access to court by excessive court fees it is recommendable that national courts apply directly the Court jurisprudence in any case it is subject to their assessment, ensuring the balance between state interests in the collection of state taxes and the interests of the applicants.

- **Issues related to non-enforcement of domestic court decisions**

The causes of non-enforcement of court decisions in Moldova are multiple. Otherwise the number of convictions of our country in this respect considering the total number of convictions tends to 80 percent. This is a systemic problem. The analysis of these cases permits the classification of them depending on the part of the process that has not implemented in bad faith, a final court decision.

Non-enforcement of a court decision is due to the local government

Under the circumstances of the *Prodan v. Moldova* case at an unspecified date in 1998, after having obtained the enforceable title, the applicant has requested City Council to execute the decision of March 14th, 1997. In a letter of January 14th 1999, the Municipal Council has informed the applicant that because of lack of funds to build apartments for evicted tenants, it could not executed the decision. In such circumstances the Court found that a state may not invoke the lack of funds and alternative housing space as an excuse for non- enforcement of a final judgment. By omission for several years to take the necessary measures to execute irrevocable judicial decisions in this case, Moldovan authorities have deprived the applicant of Article 6 § 1 of the Convention therefore of all the beneficial effects.[40] Regretfully, we find many friendly settlements concluded between the government and the complainants in the period 2007-2009 concerning this matter.

[40] See also Popov no. 1 v . Moldova judgment and Scutari v. Moldova judgment

Non-enforcement of a court decision is due to the central government

In *Ungureanu v. Moldova* case the plaintiff complained that his rights guaranteed by Article 6 (1) of the Convention have been violated as a result of the delayed execution of a court decision handed down in favor. The essence of the case is connected to the reinstatement in his previous job as an employer of the Ministry of Transportation. On 7th October 2001 the plaintiff was fired. He sued the ministry, appealing the legality of its dismissal. The Court has repeatedly held that the procedures for reinstatement in job return of service was a "crucial" for the plaintiffs and that, in fact, they should be examined promptly. The Court noted that the specific difficulties which the person was subjected when it was deprived unlawfully of salary, even for a short period of time, were taken into consideration by the national legislature in Article 208 of the Civil Procedure Code, which was that judicial decisions on the reinstatement in job return and payment of part of the salary to become immediately enforceable.[41]

Non-enforcement of a court decision is due to Ministry of Finance - lack of funds

In the case *Moisei v. Moldova* the plaintiffs have complained of failure by the Ministry of Finance to enforce the judgments of the courts. The Court reiterated that the authority of state can not invoke lack of funds as an excuse for non- enforcement of a final judgment. The Court noted that the Court decisions of District Rascani remained non executed during certain periods ranged from thirty-two and twenty months (until 22 April 2003, after cases have been communicated to the Government by the Court). By omission of several months to take the necessary measures to execute irrevocable decisions in this case, Moldovan authorities have violated Article 6 (1) of the Convention.[42]

In the *Oferta Plus SRL v. Moldova* case, the Court found violations of Article 6 (1) of the Convention by non-enforcement for at least 38 months of a judicial decision concerning the payment of MDL 20 000 000 from the Ministry of Finance.

Non-enforcement of a court decision is due to bailiff unprofessional conduct

In the *Vitan v. Moldova* case the Court found violations of Article 6 (1) of the Convention because of lack of measures for about 40 and 34 months from the bailiff to ensure the enforcement of two judgments on the order from QBE ASITO of second supplementary pen-

[41] See also Bitai v. Moldova judgment, Timbal v. Moldova judgment, Lungu v. Moldova judgment, Sirbu v. Moldova judgment

[42] See also Bocancea v. Moldova judgment, Croitoru v. Moldova judgment, Becciu v. Moldova judgment, Deluchin v. Moldova

sion contracts. The Court recalled in this context the positive obligation of the Contracting States to organize a system of enforcement of judgments to be effective both in law and practice and to ensure enforcement without undue delay. The Court noted that plaintiff has requested the Court to send Riscani enforceable title in May 2000. But it was sent two years later; on May 17th 2002 Government has not explained the delay. It should also be noted that after the request of the Ministry of Justice sent the Riscani Court on May 8th, 2002, the bailiff has not taken any effective measure to enforce judgments. For this reason, the final court decision of April 25th, 2000 and further decision of November 24th, 2000 remained non-enforced for nearly forty, thirty-four months.[43] Such cases show the formal attitude of judicial enforcement bodies. There are relevant cases in which, even despite the fact that the creditor presents information for bailiffs, they do not take account of this. We are understating from the Ombudsman report in 2008 that the situation has not changed lately. To redress the situation in the area is necessary to identify and implement best practices of European bailiffs' training, particularly in the view of establishing a unique practice of enforcement, tackling the deficit of human resources, financing and assistance technical measures.

A different course of action of the Court in respect of the applications lodged concerning non-enforcement and/or delayed enforcement of domestic judgments on social housing

The Court considered recently in the **case of Olaru and others v. Moldova (***28 July 2009 judgmen*t) "that the respondent State must grant adequate and sufficient redress, within one year of the date on which the judgment becomes final, to all victims of non-enforcement or unreasonably delayed enforcement by State authorities of domestic judgments concerning social housing who lodged their applications with the Court before the delivery of the *Olaru and others v. Moldova*. In the Court's view, such redress may be achieved through implementation *proprio motu* by the authorities of an effective domestic remedy in these cases or through *ad hoc* solutions such as friendly settlements with the applicants or unilateral remedial offers of redress in line with the Convention requirements. Pending the adoption of domestic remedial measures by the Moldovan authorities, the Court decided **to adjourn adversarial proceedings in all these cases for one year from the date on which this judgment becomes final.** This decision is without prejudice to the Court's power at any moment to declare inadmissible any such case or to strike it out of its list following a friendly settlement between the parties or the resolution of the matter by other means in accordance with Articles 37 or 39 of the Convention".[44]

Conclusions and recommendations for ensuring respect for the rights of access to court in Moldova

- **State Legal Assistance scheme in civil cases**

The law on legal assistance guaranteed by the state with reference to legal aid in civil cases as well as the amendments in 2008 of provisions of the Civil Procedure Code shall enter into force on January 1st, 2012.

Given the recent entry into force of other provisions of the law on legal assistance guaranteed by the state and short practice of their implementation, only preliminary conclusions can be made today. It seems that at least in terms of legislation the broadening of the types of legal assistance to civil cases should contribute to raising the observance of the rights of access to court of the poor in the country.

Legal aid system as guaranteed by the State is a new one in determining and shaping the rules of procedure. For the practical implementation of new provisions there have to be developed some guidelines or instructions for the territorial offices of the National Council for Legal Assistance Guaranteed by the State, which will decide on the requests of citizens. In fact the clarification of the eligibility criteria in civil cases is one of the most complex and difficult task in the functioning of any system of legal assistance guaranteed by the state, because the population requirements are usually in continuous growth and financial resources are limited. Thus, until the entry into force of provisions relating to qualified legal assistance for civil cases it is likely to accumulate sufficient data to determine more clearly the eligibility criteria and the implementation means of legislation in order to control the population's needs in qualified legal aid and the budget for it.

However, to ensure the quality of public lawyers' services in the National Council for Legal Assistance Guaranteed by the State was prepared already "*The concept of quality assurance mechanism of legal assistance guaranteed by the state*".

- **Court fees in civil procedure**

In its recent case-law the Court expressly held in case *LLC Tudor-Commerce v. Moldova* (*decision of 04/11/2008, final on 04/02/2009*) that the prohibition laid down by law for the national courts to exempt legal persons of state fee is itself a violation of Article 6 § 1. In its constant case law (see *Clionov v. Moldova, Teltronic-CATV v.Polonia*) the Court held that the right to access

[43] See also Grivneac v. Moldova judgment, Mizernaia v. Moldova judgment, Mazepa v. Moldova judgment

[44] See § 61 of the case of Olaru and others v. Moldova judgment

court is put seriously in question if state fee is fixed at a too high rate, especially when the person who intend to pursue the appeal has no financial resources.

Thus, up to the review of the Code of Civil Procedure from the perspective of ensuring the possibility of exemption from state fees the legal persons, the domestic courts should apply directly the European Court of Human Rights, this because the European Court decisions are binding not only on situation of the applicant in a particular case, but they have direct legal effect in the internal order of the concerned State. In this regard, the State must stop the application of those national standards that are incompatible to the Convention (case *Vermeire v. Belgium*). As a result, the domestic courts are obliged to apply directly the conclusions of the European Court in any particular case subjected to their assessment.

By derogation from Art. 85. (4) of the Civil Procedure Code the courts, in accordance with Art. 6 (1) of the Convention and European Court case law, are able to provide exemption of court fees for any person, without distinction of their status - natural or legal person. Thus, notwithstanding the rules of procedural law, the court should consider the exemption of the applicant, who has raised a difficult financial situation, of the state fee or the reduction of the fees up to a reasonable size.

Therefore, the domestic courts are obliged to carefully consider the circumstances of the case to avoid any undermining of the substance of the right to access court. (*In this sense is also the recommendation of the Supreme Court of Justice from 15/06/2009 and the in-service training curriculum on European Convention of the National Institute of Justice of Moldova)*

- **The problem of non-enforcement of court decisions**

One of the most pressing problems: non-enforcement of judicial decisions continue to be a major obstacle for ensuring human rights in Moldova and a cause for appealing to the European Court for Human Rights. This situation prejudices the confidence in the viability of the rights proclaimed in Convention, affecting the image and authority of justice, having negative consequences for social economic and political development of the state. Non-enforcement of judicial decisions is often the subject for debt collection, collection of salary debts, reinstatement to the position previously held. Generalizing the causes at this chapter allows determining the existence of objective reasons, which create obstacles to enforcement of judicial decisions, but more causes are determined by the unprofessional attitude of bailiffs concerning their procedural obligations set out in the Code for enforcement.

Enforcement of judicial decisions is directly linked to the central and local public administration bodies' competencies and of businesses entities that do not honor their obligations set up by a domestic court decision. There were cases in which ministries have not executed judicial decisions on reinstatement in previous job return to service of their employees or on payment of salary debts.

There is a need of an efficient legislation in this domain. Another solution must be on proper training and attitude of the legal executors (bailiff). As a solution of this problem shall be also the settlement of a unique judicial practice of legislation implementation for execution of court decisions, the solving of the problem of human resources deficit, of assurance of financing and of luck of proper technical assistance.

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