
THE IMPLEMENTATION OF THE PRINCIPLE AUDI ALTERAM PARTEM IN THE COVID-19 PANDEMIC

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Annotation. The article presents the principle of *audi alteram partem* - i.e. the concept of the principle of the right to be heard. The content of this concept is revealed, international and national legal acts related to the establishment of the right to be heard in civil, criminal and administrative proceedings are analyzed in the article. Following the announcement by the World Health Organization of a pandemic for the spread of the Covid-19 virus, countries facing this dangerous disease had to make decisions that affect the management of the spread of the virus. As a result, many states have decided to declare a state of emergency, extreme situation or quarantine, and certain restrictions on individual rights have been introduced.

The organization of the courts and pre-trial dispute resolution bodies, so called quasi-courts has also changed, and in many countries, due to the unfavorable epidemic situation in Covid-19, decisions have been taken to adjourn oral proceedings or written proceedings. These decisions have been enshrined in different levels of legislation and are the subject of debate as to their legality and proportionality.

Keywords: audi alteram partem, the right to be heard, human rights, procedural rights.

INTRODUCTION

Article 30 of the Constitution of the Republic of Lithuania provides: “A person whose constitutional rights or freedoms are violated has the right to apply to a court”¹, and Article 117 provides that “Cases shall be heard in public in all courts”. Consequently, the guarantee of judicial protection is established at the constitutional level, which means the right of a person to apply to a court with a complaint, petition or statement and at the same time the duty of a court to examine such complaint (request, statement) and make a lawful, fair and reasonable decision. Legal disputes are heard in the courts in accordance with special procedural rules that ensure the administration of justice.

Article 4 of the Law on Courts of the Republic of Lithuania enshrines the right of a person to judicial protection:

¹ Constitution of the Republic of Lithuania, Lietuvos aidas, 1992-11-10, Nr. 220-0.

“1. Citizens of the Republic of Lithuania have the right to judicial protection against encroachment on their rights and freedoms enshrined in the Constitution and laws of the Republic of Lithuania and international treaties of the Republic of Lithuania. In cases provided for by law, they are entitled to state-guaranteed legal aid.

2. Aliens and stateless persons have the same rights to judicial protection as citizens of the Republic of Lithuania, unless otherwise provided by laws and international agreements of the Republic of Lithuania.

3. Companies, institutions, offices and agencies shall also have the right to judicial protection.”² Paragraph 1 of Article 34 of this Law enshrines the main principles of court proceedings:” The courts shall hear cases in accordance with the principles of equality, the right to legal aid, the right to due process, cost-effectiveness, **the right to be heard**, adversity, the presumption of innocence, impartiality, publicity, immediacy and the prohibition of abuse of rights. ”

In 2020 following the announcement by the World Health Organization of a pandemic due to the spread of the Covid-19 virus, countries facing this dangerous disease had to make decisions that affected the management of the spread of the virus. As a result, many states have decided to declare a state of emergency, a state of extreme situation or quarantine, and certain restrictions on individual rights have been introduced. The measures to stop productive activity were taken in order to slow down the spread of COVID-19.

The Government of the Republic of Lithuania in 2020 March 14 adopted a resolution³, announcing the third (full readiness) level of civil protection system readiness in the territory of the Republic of Lithuania and in the first stage from 2020 March 16 until March 30 introduced a quarantine regime in the country. Subsequently, the quarantine was extended several times by government decrees. Taking this into account and in order to ensure a fair balance between ensuring the protection of personal and public health and a person's right to go to court, the Council of Judges prepared recommendations for Lithuanian court leaders to make decisions on the organization of court work during their quarantine regime⁴. The recommendations propose to organize the teleworking of judges and court staff, to limit work

² Law on Courts of the Republic of Lithuania, Valstybės žinios, 1994-06-17, Nr. 46-851 [<https://www.e-tar.lt/portal/lt/legalAct/TAR.522B3E415B52/asr>]

³ Resolution of Government of the Republic of Lithuania 2020 March 14 No. 207 “On the Announcement of Quarantine in the Territory of the Republic of Lithuania”, TAR, 2020-03-14, Nr.5466.

⁴ Council of Judges 2020 March 16 letter No. 36P-48- (7.1.10) "Regarding the performance of judicial functions during the quarantine period", [<https://www.teismai.lt/lt/naujienos/teismu-sistemose-naujienos/del-teismu-darbo-organizavimo-karantino-laikotarpiu/7444>].

on court premises and to organize court hearings by written procedure. Many European countries have also decided to adjourn or replace oral proceedings in court with a written procedure, thus restricting a person's right to be heard during the proceedings.

The purpose of this article is to reveal the concept of the principle of *audi alteram partem* (right to be heard) and to present the possibilities and practice of restricting this principle in Lithuania and in the judicial systems of European countries.

The article analyzes international and national legislation related to the establishment of *audi alteram partem* and to the restriction of *audi alteram partem* in an extraordinary situation.

In order to reveal the content of the principle of *audi alteram partem* (right to be heard), special attention was paid to the analysis of scientific literature and jurisprudence. A comparative analysis of the legal acts and documents of the European Union countries was performed in order to determine the grounds and practice of restricting the *audi alteram partem* principle. The problem addressed in the article is very new, therefore, due to the lack of printed publications, the reports presented at the on-line 9 April 2020 conference “The Functioning of Courts in the Covid-19 pandemic” are used.

THE CONCEPT OF *AUDI ALTERAM PARTEM*

The principle *audi alteram partem* requires that the parties concerned be heard impartially in the dispute settlement process. This principle is followed in resolving various types of legal disputes (civil, labor, etc.), including administrative disputes. Its essence is that the person (the arguments of the person's self-defense) must be heard in order to make a reasonable and fair decision.

The principle of *audi alteram partem* is considered to be one of the fundamental procedural rights of the individual, based on the long-standing traditions of the European continent⁵. The English courts established centuries ago that the impartial hearing of interested parties (litigants) is one of the basic principles of due process, so that the authorities with judicial powers act lawfully only when hearing the persons in whose favor or against the decision.

⁵ Schwarze J., *European Administrative Law*. Luxembourg: Office for Official Publications of the European Communities, 2006, p.1234-1341.

The principle of the right to be heard is of paramount importance in criminal cases, which is why researchers have paid particular attention to the problems of its implementation.⁶ The European Court of Human Rights has ruled in a number of cases on the right to a fair trial and other procedural rights, as well as the right to be heard.⁷

The principle that every person should be heard in the determination of his or her rights and obligations is also enshrined in international instruments. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Lithuania in 1995, in Article 6 enshrines the right of everyone to a fair trial. Although this article deals with the requirement that every person be heard in the determination of his or her civil rights and obligations or in criminal proceedings before an impartial and independent tribunal⁸, however, the European Court of Human Rights has ruled that this rule also applies to those rights and obligations imposed by various specialized, administrative courts and independent administrative commissions, in other words quasi-judicial bodies.

Later, the principle of *audi alteram partem* was introduced not only in courts, quasi-courts, but also in public administration⁹. The Court of Justice of the European Union also applies the *audi alteram partem* requirement and states in one of its rulings that “a person whose interests are affected by a decision of a public authority must be given an opportunity to state his views”¹⁰. The principle of the right to be heard has been progressively enshrined in various instruments, such as the Charter of Fundamental Rights of the European Union, which defines the right to good administration which include “the right of every person to be heard before any individual measure adversely affects him or her”¹¹.

Thus, in the administration of justice and in the exercise of their judicial powers, the courts and quasi-courts make decisions which may adversely affect the rights or interests of individuals. For this reason, the institutions must exercise their powers in a particularly fair

⁶ Ruggeri S. , *Audi alteram partem* in Criminal Proceedings Under the European Convention on Human Rights. In: *Audi Alteram Partem in Criminal Proceedings*. Springer International Publishing, 2017; Acker J.R., Brody D.C., *Criminal Procedure: a contemporary perspective*, Jones & Bartlett Learning, 2004

⁷ Massimo Gambino, *Sphetim Hyka versus Procura della Repubblica presso il Tribunale di Bari*, 2019, C-38/18; *Keskinen, Veljekset Keskinen Oy versus Finland*, 34721/09

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6

⁹ Andrijauskaite, Agne. (2016). *Teisė būti išklaustyta – kelias geresnių administracinių procedūrų link*. [https://www.researchgate.net/publication/327075250_Teise_buti_isklausytam_-_kelias_geresniu_administraciniu_proceduru_link/citation/download]

¹⁰ *Transocean Marine Paint Association v. EC Commission* , 1974 [<https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61974CJ0017>]

¹¹ Charter of Fundamental Rights of the European Union, 2016 C, 202/02.

way, which can only be done through a fair process - due process of law. A person whose rights and obligations may be affected by a judgment or quasi-judicial act must be given an opportunity to state his views and to be heard.

The ways of realizing the hearing procedure are as follows:

- 1) oral process - hearing (the main and most common method);
- 2) acceptance of relevant evidence submitted by the party
- 3) acquaintance of the parties with the submitted evidence
- 4) examination of witnesses
- 5) hearing of evidence, comments and arguments on the entire file (litigation, inquiries of the opposing party)
- 6) the opportunity to provide written explanations after receiving all the material from the other party
- 7) the right to use the assistance of a lawyer.

Although the principle *audi alteram partem* is called universal, it cannot be said to be absolute - that is, it does not mean that it must be applied without exception. The English court in *Ridge v. Baldwin*¹² found that this principle enshrines a fundamental right of the individual and ensures the fairness of the administrative process, but at the same time this principle must be applied flexibly. Circumstances may arise which may lead to non-compliance with this principle in the course of proceedings. This may be the case if a court or other dispute resolution body, such as a quasi - court, has to take an urgent decision to protect public health or safety (for example, a decision to confiscate and dispose of contaminated meat presented for sale, etc.). In such cases, circumstances require to refuse a hearing.

The *audi alteram parte* principle must therefore be applied according to the circumstances. However, it is important to note that in situations where it can be inferred from the circumstances of the case that a hearing of a person would not change the expected outcome, this procedure must still be followed. Due process must be a priority: only after hearing both parties can the courts and quasi-courts make a decision.

¹² *Ridge v Baldwin and others* [1963] 2 All ER 66, https://oup-arc.com/static/5c0e79ef50eddf00160f35ad/casebook_142.htm

In accordance with the established case law of the European Court of Human Rights restrictions are permissible only if they have a legitimate aim and are proportionate and cannot undermine the very essence of the law.¹³ The rights enshrined in Articles 6 and 13 of the European Convention on Human Rights, and Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, which guarantee the right to a fair trial are not absolute and may be limited in certain circumstances. But such restrictions may not impair the right's essence.

ESTABLISHMENT OF THE PRINCIPLE *AUDI ALTERAM PARTEM* IN LITHUANIAN LAW AND ITS IMPLEMENTATION DURING A COVID-19 PANDEMIC

Article 15 of the Code of Civil Procedure of the Republic of Lithuania enshrines the principle of verbatim: „ The parties and other participants in the proceedings shall give explanations, testimonies, as well as submit their requests and wishes orally, except in the cases provided for in this Code.“¹⁴

Article 242 of the Code of Criminal Procedure of the Republic of Lithuania enshrines direct and oral proceedings in court:

„1. When hearing a case, the Court of First Instance must directly examine the evidence in the case: questioning the accused, victims, witnesses, hearing the findings and explanations of experts and specialists summoned to the hearing, examining material evidence, reading minutes and other documents aloud.

2. At the court hearing, the persons interviewed give oral testimony and explanations.

3. Procedures for the examination of evidence other than those provided for in paragraphs 1 and 2 of this Article may be followed only in exceptional cases provided by law.“¹⁵

Article 78 of the Law on Administrative Justice of the Republic of Lithuania enshrines the immediacy, verbatim and continuity of court proceedings:

„1. The court of first instance must examine the evidence in the case: hear the explanations of the parties to the proceedings, the testimony of witnesses, the explanations of specialists and the conclusions of experts, examine the written evidence, examine the material evidence.

¹³ Handbook on European law relating to access to justice, Fundamental Rights Agency, 2016, [<https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>]

¹⁴ Code of Civil Procedure of the Republic of Lithuania, Valstybės žinios, 2002-04-06, Nr. 36-1340 [<https://www.e-tar.lt/portal/lt/legalAct/TAR.2E7C18F61454/asr>].

¹⁵ Code of Criminal Procedure of the Republic of Lithuania, Valstybės žinios, 2002-04-09, Nr. 37-1341 [<https://www.e-tar.lt/portal/lt/legalAct/TAR.EC588C321777/asr>].

2. Before the Court of First Instance, the case shall be heard orally and in the same composition. If, at the end of the proceedings, at least one of the judges is replaced, the case must be heard from the outset, unless the parties to the proceedings object to the case being adjourned beyond the postponement of the proceedings. If the case is heard from the outset, witnesses heard in court are not normally summoned again.¹⁶

Although procedural law guarantees the right of a person to be heard during the proceedings, this right may in certain cases be restricted or postponed.

This year Lithuania was facing the threat of a pandemic for the first time, and for this reason the Government of the Republic of Lithuania on March 14 declared quarantine in the territory of the Republic of Lithuania by a resolution. This resolution established the priority of judicial activity in order to ensure a fair balance between ensuring the protection of personal and public health and a person's right to go to court.

Taking into account the situation, the Council of Judges prepared recommendations for the heads of Lithuanian courts to make decisions on the organization of the work of the court under their leadership during the quarantine regime¹⁷, proposing the organization of teleworking for judges and court staff, restricting work on court premises and organizing court hearings by written procedure. The Judicial Council recommended the cancellation of all court hearings scheduled during the quarantine period in cases pending before the oral procedure, except in cases of urgency provided for by law (for example, the resolution of issues related to arrest, removal of a child from an unsafe environment). Schedule (postpone) court hearings in oral proceedings after the end of the quarantine regime. Ensure that those involved in the case are informed immediately of any changes in the date and time of the court hearings. In cases where the proceedings cannot be adjourned and the written procedure is also not possible, oral hearings must be organized with all precautions taken to prevent the risk of the COVID-19 virus spreading, while maintaining the maximum distance in the courtroom between participants or conduct court hearings remotely by telecommunications.

In some cases, the time limits for proceedings are quite short, the problem is how to ensure the individual's right to a speedy trial, the individual's right to be heard, as well as how to ensure

¹⁶ Law on Administrative Justice of the Republic of Lithuania, Valstybės žinios, 1999-02-03, Nr. 13-308.

¹⁷ Council of Judges 2020 March 16 letter No. 36P-48- (7.1.10) "Regarding the performance of judicial functions during the quarantine period", [<https://www.teismai.lt/lt/naujienos/teismu-sistemos-naujienos/del-teismu-darbo-organizavimo-karantino-laikotarpiu/7444>].

the individual's and society's right to health and life. For example, the Law on the Procedure for Pre-trial Administrative Disputes of the Republic of Lithuania provides that “a complaint (request) submitted to the Administrative Disputes Commission must be examined no later than within 20 working days from the day of its submission.”¹⁸ The law provides for the possibility of extending the term of the case for a maximum of another 10 working days: „ If necessary, by a reasoned decision of the Administrative Disputes Commission, the general term for examination of the complaint (request) may be extended for another 10 working days.”¹⁹ When deciding to hear a case by written procedure, a person's right to be heard can be exercised only to a very limited extent, for example through the submission of explanations and statements in writing.

On the other hand, if the parties request an oral hearing in order to guarantee the person's right to be heard, but also to comply with the quarantine requirements, the case must be suspended until the end of the quarantine. In this way, a situation will inevitably arise where the time limits for the proceedings will be violated, and at the same time the individual's right to a speedy procedure will be violated. However, following the quarantine in Lithuania, courts and pre-trial dispute resolution bodies have decided to suspend proceedings in cases where the parties do not agree with the written hearing, considering the right to be heard more important than the right to a speedy trial.

ACTIVITIES OF EUROPEAN JUDICIAL AUTHORITIES DURING A PANDEMIC

The OSCE Office for Democratic Institutions and Human Rights (ODIHR), in co-operation with the European Association of Judges (EAJ) on 9 April 2020 organized an online conference devoted to discussion about the challenges of functioning justice systems despite states of emergencies, curfews and lockdowns due to the Covid-19 pandemic.²⁰

At the time of the conference, many European countries established special measures for the justice systems. In some countries, for example, Albania, Court hearings on administrative, civil and criminal cases, which are not urgent were suspended without an exact termination of

¹⁸ Law on Pre-trial Administrative Disputes of the Republic of Lithuania Article 12 part 1, Valstybės žinios, 1999-02-03, Nr. 13-310

¹⁹ Law on Pre-trial Administrative Disputes of the Republic of Lithuania Article 12 part 2, Valstybės žinios, 1999-02-03, Nr. 13-310

²⁰ ONLINE EVENT: The functioning of courts in the Covid-19 pandemic <https://www.osce.org/odihhr/450385>

suspension. The term of suspension of court hearings was linked to the end of the epidemic caused by the COVID-19 outbreak.

In France was adopted four legal acts (ordonnances) on the basis of the Law on Health Emergency in the context of the Covid-19 pandemic, which adapted rules of criminal procedure, rules applicable to ordinary courts dealing with non-criminal matters, rules of administrative procedure and on prolongation of deadlines expiring during the period of the health emergency. Statutes of limitation and deadlines for the exercise of remedies were extended, the possibility to hold hearings by videoconference was provided for in the Code of Criminal Procedure and without the consent of parties was used in all criminal courts other than jury trials.²¹

In Czech Republic, the Ministry of Justice has introduced the so-called „Lex-COVID Justice“, which extended legal deadlines and remits missed deadlines.

The new laws in Italy, Portugal and Slovenia stipulated that urgent acts in which fundamental rights are at stake – such as proceedings concerning minors at risk or urgent guardianship and domestic violence proceedings – be carried out“.²²

In Austria, the Second COVID-19 Act has interrupted deadlines in civil proceedings until 30 April, which means that the full period re-starts when the interruption ends, for example a deadline of four weeks for an appeal will expire four weeks into May (unless the interruption were to be extended). In Austrian justice system video-conferencing is available as an option for hearings in civil, administrative and criminal matters, and can include hearing witnesses, examination of other evidence and reviewing pre-trial detention²³.

In Hungary at the time of the conference courts acted with changes such as digital hearings and restrictions on physical access to buildings and judicial premises. Some procedural measures were implemented during the state of emergency in Hungary, however, normal deadlines remained applicable to courts and parties of proceedings. In the cases where a procedural regulation imperatively requires the presence of any of the parties to proceedings and there is no other means by way of which the court could proceed with the case, for example,

²¹ This information is based on an unofficial translation of the ordonnances in France and the information presented during on-line 9 April 2020 conference “The Functioning of Courts in the Covid-19 pandemic”

²² European Union Agency for Fundamental Rights, Coronavirus Pandemic in the EU – Fundamental Rights Implications, Bulletin 1 (1 February – 20 March 2020), p.28 [<https://fra.europa.eu/en/publication/2020/covid19-rights-impact-april-1>]

²³ ONLINE EVENT: The functioning of courts in the Covid-19 pandemic <https://www.osce.org/odhr/450385>

impossibility of correspondence in writing, communication by electronic means or of remote interviewing by info-communication tools, the cases were suspended.

It was reported that in Sweden no temporary legislation was adopted which would have interrupted or suspended legal proceedings.

The conference shared experiences from the judiciary in many European countries about their activities during the pandemic. It turned out that various problems arose in the context of videoconference hearings, including lack of meaningful participation during online hearings and shortcomings in terms of observing non-verbal cues, problems with the identification of parties and the examination of evidence, and the lack of means for confidential client-lawyer communication during online hearings. Access of the public may be compensated partially by broadcasting hearings, however shortcomings remain, including with regard to trial monitoring. Many judicial functions and the delivery of fair trial rights mean that face-to-face interaction cannot be entirely replaced by the use of IT-solutions. Parties may not own a computer, not have access to internet, or due to lack of computer literacy may not be able to full participation in online hearings.

Courts need to remain functional to discharge key functions while preserving the right to life and health of judges and judicial staff, as well as for lawyers, parties, witnesses, etc. Judges have special obligations and may justifiably be asked to accept a higher degree of risk given the essential role of the judiciary in securing human rights protection and the rule of law. There is a consensus regarding the definition of “urgent” cases, which cannot be suspended. These include cases with persons in detention, cases where immediate protection is required from domestic violence and other urgent family disputes.

CONCLUSIONS

The *audi alteram parte* principle is one of the most important components of due process of law. The person’s right to be heard in criminal, civil and administrative procedure is enshrined in national and international legal documents. The most important aspect of the *audi alteram parte* procedure is a hearing – the main and most common method is oral process. It also includes acceptance of relevant evidence submitted by the party, acquaintance of the parties with the submitted evidence, examination of witnesses and hearing of evidence, comments and arguments on the entire file (litigation, inquiries of the opposing party). However, this principle is not an absolute and has to be applied according to the circumstances.

Lithuanian national law (Code of Civil Procedure of the Republic of Lithuania, Code of Criminal Procedure of the Republic of Lithuania, Law on Administrative Justice of the Republic of Lithuania, Law on the Procedure for Pre-trial Administrative Disputes of the Republic of Lithuania, etc.) provide for the right to an oral hearing and the right to be heard. When the quarantine was announced in the territory of Lithuania, the Lithuanian courts and quasi-courts decided to suspend the oral proceedings and to hear the cases by written procedure. If the parties, however, request an oral hearing in order to guarantee the person's right to be heard, but also to comply with the quarantine requirements, the cases are suspended until the end of the quarantine. In this way, a situation will inevitably arise where the time limits for the proceedings will be violated, and at the same time the individual's right to a speedy procedure will be violated. However, following the quarantine in Lithuania, courts and pre-trial dispute resolution bodies have decided to suspend proceedings in cases where the parties do not agree with the written hearing, considering the right to be heard more important than the right to a speedy trial. During the quarantine regime courts organize the oral proceedings only in cases where there are urgent issues.

During pandemic, many European countries established special measures for the justice systems: procedures were suspended (except for urgent cases), access to court buildings has been restricted. Summarizing the experience of many European judicial authorities, it has been observed that during the pandemic, oral proceedings were suspended or conducted by telecommunications, mainly by written procedure, thus substantially restricting a person's right to be heard during court proceedings. The concept of “urgent cases” is the same in many states, which include cases with persons in detention, cases where immediate protection is required from domestic violence and other urgent family disputes. The courts are challenged to deal with such urgent cases immediately despite the pandemic.

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