

REFLECTIONS ON THE RIGHT TO A FAIR TRIAL AND TRUST IN JUSTICE IN THE LIGHT OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS¹

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Abstract

In this article, discussions on the right to a fair trial are mainly influenced by the provisions of article 6 of the European Convention on Human Rights, and in secondary by the other international and national regulations. In the cases of the European Court of Human Rights, the principle of equality of arms is considered to be one of the fundamental elements of a fair trial. Besides this principle, another essential element for a fair process is the independence and impartiality of the courts, and even the impression of an independent and impartial justice in the eyes of public opinion².

Keywords: *the right to a fair trial, the independence of the courts, the impartiality of the courts, the equality of arms, ECHR.*

1. Introduction

The European Convention on Human Rights (hereinafter referred to as “the Convention”) was adopted in 1950 by the Council of Europe and entered into force in September 1953. The Convention was a symbolic statement of the West's belief and a means of preventing some States of Communism's Return. It was also a reaction to the events that Europe witnessed during the Second World War¹. The Convention establishes a series of civil and political rights and freedoms, guaranteeing their respect by the states that have ratified it.

Romania has ratified the Convention and the Additional Protocols thereto by Law

no. 30 of May 18, 1994, published in the Official Monitor no. 135 of 31 May 1994. Thus, the Convention and its protocols became an integral part of national law, with priority being given to the national courts being obliged to apply immediately the provisions of the Convention and its protocols and the national judgments to be subject to the prescribed control by the European Court of Human Rights.

The purpose of the Convention is therefore to protect human rights. One of these rights is the right to a fair trial, a universal right protected not only by the Convention but also by the Universal Declaration of Human Rights of 1948, the International Convention on Civil and Political Rights of 1966, the American

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² Kyprianaou v. Cipru, ECHR, 15 December 2005, application no. 73797/01.

¹ Harris, O Boyle&Warbrick, *Law of the European Convention on Human Rights*, 3rd edition, Oxford University Press, 2014, p. 3.

Convention on Human Rights of 1978, The African Charter on Human and Peoples' Rights, and humanitarian instruments, such as, for example, the Geneva Convention.

The right to a fair trial is guaranteed in Article 6 of the Convention, as follows: "Everyone has the right to a fair, public and reasonable hearing of the case by an independent and impartial tribunal established by law, which will decide either on the violation of civil rights or obligations or on the merits of any criminal charge against him. The judgment must be pronounced in public, but access to the meeting room may be forbidden to the press and the public throughout the trial or part thereof in the interests of morality, public order or national security in a democratic society, where the interests of minors or the protection of the privacy of the parties to the proceedings so require, or to the extent strictly necessary by the tribunal, where, owing to particular circumstances, advertising would be likely to prejudice the interests of justice.

Any person accused of a criminal offense shall be presumed innocent as long as his guilt has not been legally established."

Thus, according to article 6 of the Convention, the criteria for a trial to be considered fair are: the debates to be public and the case to be examined within a reasonable time. In addition to these criteria, the Court's case-law also includes a number of fundamental principles for a fair trial, namely the principle of equality of arms, the principle of contradictory law, the right of a person accused of silence and of not contributing to his own accusation, and the clear and thorough motivation of judgements.

2. The Principle Of Equality Of Arms - A Fundamental Element Of The Right To A Fair Trial

For over 50 years, the European Court of Human Rights (ECHR) has created an impressive case law, being a source of inspiration not only for the States that have ratified the Convention but also for states that are not under its jurisdiction.

In the case of the ECHR, the principle of equality of arms is considered a fundamental element of the right to a fair trial.

The principle of equality of arms implies that each party is given the opportunity to present its case in such a way that it is not put at a disadvantage to the opposite side². This implies that the accusing authorities present all the material they have, whether they are for or against the prosecution (**Jasper versus the United Kingdom case**).

The purpose of article 6 of the ECHR is "to ensure respect for the right to a fair trial for any individual".

Thus, article 6 (1) of the Convention requires that in order for a trial to be fair, two fundamental principles, namely the principle of contradictoriness and the principle of the right to defense, must be respected, these two ensuring the equality of arms within the process.

A distinctive sign of the ECtHR case-law on article 6 is that a process is examined in its entirety in terms of fairness. This allows some defense rights to be balanced in spite of other rights and interests, provided that the trial as a whole is considered fair to the accused. An example of this is the right of the accused to be present at the hearing of the witnesses.

All evidence must be presented in a public hearing and in the presence of the

² Thomassen W., *Everyone has the right to a fair trial*, Hague Yearbook of international law, Volume 21, Martinus Nijhoff Publishers, 2008, p. 5.

accused with the help of a contradictory debate. However, the Court agreed with written testimonies of victims or witnesses if they were too vulnerable to be cross-examined at a public hearing or if it was impossible for the witness to be present.

Moreover, the Court has agreed that in some exceptional situations written testimonies should be accepted even if the identity of the witness is kept secret and the witness can not be confronted with the defense. Thus, the Court tried to defend both the rights of the witness and the rights of the defense. However, the Court has stated that no trial can be considered correct if the decision was taken only on the basis of such a testimony that the defense could not directly participate in³.

The Court found that there was a breach of the principle of contradiction in the **Dima versus Romania** case, since the Supreme Court of Justice ruled on an accounting expertise to which the applicant had not been summoned. In **Cottin versus Belgium** case, on 2 June 2005, the complainant complained about the fairness of the criminal proceedings in a trial in which he was indicted for bodily injury, since the medical expertise performed to determine the extent of the victim's injury did not respect the principle of contradictory, he being unable to participate in the expertise. The Court held that although the complainant had the opportunity to submit observations to the court on the conclusions of the expert report, it is not clear that he had a real opportunity to comment effectively. As a result of the fact that he was unable to take part in the expertise, the applicant had no opportunity to submit to a counter-interrogation personally or through his lawyer or a

medical counselor, the persons questioned by the expert, to make observations examine the parts examined by the expert or ask him to proceed with further investigations. Therefore, the complainant was deprived of the opportunity to comment on an essential piece of evidence, and the Court found that article 6 (1) of the Convention had been violated.

The European Court of Human Rights also ruled in **Grozescu versus Romania** case, in breach of article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial due to non-compliance with the principle of contradictory the domestic judicial procedure.

In fact, the applicant showed that, in the domestic judicial proceedings, after the case remained in the ruling on the exception of the non-recourse to the appeal, the court, in its absence, allowed the filing of the proof of payment of the stamp duty in the case file by the appellant and gave her word on the merits of the appeal.

In the **Moiseyev versus Russia** case, the Court held that there was a lack of equality of arms, since the prosecutor had absolute control over the attorney's access to the lawyer, and more, each lawyer's visit needed the prosecutor's permission and all the documents between the attorney and the detainee were passed under the prosecutor's filter. The Court also noted that the fact that the prosecutor did not give the prisoner access to all the evidence in the file or the refusal to admit witnesses of the defense represents a violation of the equality of arms, in violation, among others, of the principle of contradictory⁴.

Moreover, in **Dirioz versus Turkey** case, the privileged position of the

³ Thomassen W., *Everyone has the right to a fair trial*, Hague Yearbook of international law, Volume 21, Martinus Nijhoff Publishers, 2008, p. 7.

⁴ Harris, O Boyle & Warbrick, *Law of the European Convention of Human Rights*, 3rd edition, Oxford University Press, 2014, p. 415.

prosecutor in the courtroom did not violate the principle of equality of arms, according to the Court.

In **Komanicky versus Slovakia** case, the Court held that a violation of arms equality was the only situation where only one party participated in the hearing in the absence of the other. At the same time, in the **Wierzbicki versus Poland** case, the Court ruled that parties should be treated equally when there are suggestions of witnesses.

In other cases, the Court held that the principle of equality of arms had been violated and when the parties did not have equal access to the examination of the evidence in the file (**Uzukauskas versus Lithuania** case), the expert was not neutral (**Hentrich versus France** case), or the term the referral of the court was different for the parties, thus making certain favors not granted to the state or to another part of the process (**Stankiewick versus Poland** case).

The Court has also breached the violation of the principle of equality of arms in cases where the state has modified the legislation with retroactive effect, with the intention of influencing the outcome of an ongoing alien process (**Greek Refineries versus Greece** case). The case concerns the annulment by a legislative act of an arbitration sentence establishing the existence of a state debt.

The Court found that the legislator's intervention in the present case took place at a time when the judicial procedure to which the State was party was pending. The principle of the preeminence of the right and the notion of a fair trial oppose any interference of the legislative power in the administration of justice in order to influence the judicial outcome of a dispute. By intervening decisively in favoring the imminent settlement of the procedure to

which he was party, the state violated the rights of the petitioners guaranteed by article 6.1.

3. The Right To A Fair Trial From The Point Of View Of The Independence And Impartiality Of The Courts

In addition to the principle of equality of arms, another element essential for a fair trial is the independence and impartiality of the courts, and even the impression of an independent and impartial justice in the eyes of public opinion⁵.

Courts have to judge and deliberate in such a way that the accused and the community as a whole trust their judgment. This must be the mission of national and international courts⁶.

If the independence of the courts assumes that the system of courts through which the act of justice is made is not subordinated to executive or legislative power, impartiality implies the guarantee in the eyes of the public opinion that the act of justice is uncorrupted.

The guarantees set out in article 6.1. ECHR also include the duty of the courts to give full reasons for their judgments (**Haversus Belgium** case), in which case the Court held that a well-grounded decision demonstrates to the parties that their case has been properly analyzed.

An eloquent example of the independence of a "court" / tribunal is the **Sramek versus Austria** case. The Court investigated whether it was a "independent and impartial tribunal", finding that the requirements of article 6.1. ECHR had been violated. Thus, the Court stated that "the Tyrol law meets the requirements of article 6.1 as regards the term of office of members of the regional authority (three years) and

⁵ Kyprianaou v. Ciprus, ECHR, 15 December 2005, applicant No. 73797/01.

⁶ Thomassen W., *Everyone has the right to a fair trial*, *Hague Yearbook of international law, Volume 21*, Martinus Nijhoff Publishers, 2008, p. 8.

the limited possibility of revoking them. The procedure has a contradictory character. Members, with the exception of a magistrate, are appointed by the Land Government but designated to act on an individual basis and the law prohibits public authorities from instructing them as to the presence of the three officials of the Land Government Office and it is in principle compatible with the Convention. However, one of them, the rapporteur, who occupies a key post, was hierarchically superior to the real estate controller who reported to the regional authority and represented the Land Government in front of it. Undoubtedly, he could not receive instructions from the controller to follow in the examination of cases, but the Court could not confine himself to assessing the consequences that the rapporteur's subordination to the controller could have in fact: appearances can also be important. Since a court has a person who is subordinate as a function and duties to one of the parties, the judges can legitimately doubt the independence of that person. Such a situation seriously affects the trust that jurisdiction must inspire in a democratic society. “

A similar approach is found in **Absandaze versus Georgia** case, where the Court has stated that although “the Supreme Court judges are elected by the Parliament at the proposal of the Head of State, one can not assume that judges receive instructions from him in their judicial work.”

In the **Sacilor-Lormines versus France** case, the Court held that “the mere nomination of judges by a member of executive or by Parliament does not create a relationship of dependence, provided that once appointed they do not have any pressure or instructions in the exercise of their duties. “

Also, in **Filippini versus San Marino** case, the Court stated that although some political sympathies may play a role in the

nomination process, it is still an insufficient criterion to raise doubts about the independence and impartiality of judges.

On the other hand, in the **Salov versus Ukraine** case, the Court held that there had been a violation of article 6.1 of the Convention, considering that there were insufficient safeguards against the external pressure of judges. The Court held that there were many legislative and financial loopholes, in the absence of which there was the possibility of pressure to influence both the appointment of judges and the initiation of disciplinary proceedings or the impact on their professional development.

In the **Pescador Valero versus Spain** case, the applicant claimed that one of the Supreme Court judges was impartial, because he is an associate professor at the University that is a party to the proceedings. The Government opposed this argument as the applicant brought this matter to question two years after the start of the trial, which was the reason for the judge's refusal to withdraw. The Government's argument was not accepted by the Court. The Court has stated that under Spanish law a judge is obliged to withdraw if there are certain reasons, without waiting to be asked to withdraw for incompatibility. Concerning the lack of impartiality, the Court stated that the judge had received considerable incomes from the University, from didactic activity, and the fact that the University was part of the process objectively raised doubts about impartiality. Thus, in this case, the applicant's request was considered reasonable.

Over the years, the Court has outlined “criteria” to determine the independence and impartiality of the courts.

As regards the independence of the courts from legislative and executive power, the Court is guided by the following “criteria”: “the manner of appointment and the term of office of the members of the

court; the existence of protection from outside interventions by the executive or parties; the existence of appearances of independence.⁷

The “Criteria” of the Court regarding the impartiality of the court are analyzed both objectively and subjectively. From a subjective point of view, “the impartiality of the court is analyzed to the contrary”, and from an objective point of view the Court can investigate whether there are “sufficient safeguards to exclude any partial suspicion. The court can use in its appreciation even the appearances.”⁸

And internationally, there have been proclaimed several principles on the independence of justice, as follows:

The United Nation Basic Principles on the Independence of Justice state that:

1. Independence of justice must be guaranteed by the State and enshrined in the Constitution or national laws. It is the duty of all governments and other institutions to respect the independence of justice.

6. The principle of the independence of the judiciary entitles magistrates and obliges them to ensure that judicial proceedings are conducted fairly and with due respect for the rights of the parties.

In the European Charter on the Status of Judges, Article 1, General Principles, states that:

1.1. The statute of judges seeks to ensure the competence, independence and impartiality to which every person is legitimately expected of the courts and of every judge entrusted with the defense of his or her rights. It excludes any provision or procedure that could put in danger the confidence in such competence, independence or impartiality.

4. Conclusions

In the light of what has been said in this article, we can conclude that the independence of the judiciary and the impartiality of the judges is a fundamental guarantee of a fair trial. Although there are some differences between the judicial systems in the European Union, the principles are the same.

At the same time, the principle of equality of arms is considered to be one of the fundamental elements of a fair trial, repeatedly reiterated in the case law of the European Court of Human Rights.

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⁷ Hatneanu Diana Olivia, Cojocaru-Stancesu Raluca, *Cum să formulăm o cerere la CEDO*, Hamagiu Publishing House, 2009, p. 31.

⁸ *Ibidem*.