

The Right to be Judged by an Independent And Impartial Court

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Abstract: The present essay desires to analyze the general guaranties of the right to an equitable/ fair trial namely: the subjective right of being judged by an independent and impartial court, settled by law. For the beginning we shall mention some historical settlements with regard to protection of human rights, some juridical terms about fundamental human rights and liberties and the most important aspects concerning the impartiality and independence of a court.

Key words: impartial and independent court, human rights, fundamental liberties, protection of human rights, international instruments, The European Convention of human rights .

One of the most important directions in developing the international law after the World War II was the constant preoccupation for the human rights protection.

The international juridical frame that pointed the beginning of the “rights era” is represented by a series of documents that create the so-called “The International Charta of the Human Rights”, documents that were elaborated, adopted and applied by UNO, that for the first time mentioned at a universal scale “the states’ trust in fundamental human rights, in the dignity and the value of the human being, in the equality of men, women, and nations, no matter their size”.

A very important moment that pointed the tremendous role of UNO with regard to the human rights protection is represented by the creation and adoption of the Universal Declaration of Human Rights by the General Assembly of UNO, at 10th of December 1948. The text of the Declaration represents the first act of international public law that contained an enumeration of certain rights recognized to any person. On the ground of the content of the Universal Declaration of Human Rights, other

two general international treaties regarding the defense of the human rights were elaborated by UNO, namely the International Pact regarding the Civil and Political Rights and the International Pact regarding the Economical, Social and Cultural Rights.

Within the general regional international instruments regarding the protection of human rights, the Convention for Defending the Fundamental Human Rights and Liberties, also known as the European Convention of Human Rights, has an important place. The Convention proved to be an efficient international instrument in defending the human rights settled in its content and in the additional protocols. Up to this moment, 14 additional protocols were adopted.

The preamble of the Declaration of the Human and Citizen Rights of the French Revolution in 1789 proclaimed that the “ignorance, forgetting and the disrespect of human rights are the only causes of the public misfortunes”. One century later, the Universal Declaration of Human Rights from 1948 settles that “ignorance and disrespect of human rights lead to barbaric deeds that revolted the human conscience”, therefore “it is essential that the

human rights to be protected in a juridical system so that the person should not be constrained, as a final act, to rebellion against the tyranny and oppression”.

The respect of the fundamental human rights and liberties represents the essence of a democratic society. The Constitution of Romania settles the fundamental rights, freedoms and duties in Art.15-57, and the Art.21 settles free access to justice, thus according to paragraph (1), “every person is entitled to bring cases before the courts for the defense of his legitimate rights, liberties and interests”.

12 years passed from the moment Romania ratified the European Convention of Human Rights. In the mean time, the Romanian State suffered more that 100 convictions in front of the European Court, being obliged to pay damages in the amount of 1 million Euros, and to modify several laws. The right to a fair and public hearing represents one of the components of the principle of assuring the preeminence of law in a democratic society.

The right to a fair hearing in criminal trials is specified by a number of concrete rights, such as the right to be presumed innocent, the right to be tried without undue delay, the right to prepare a defense, the right to defend oneself in person or through counsel, the right to call and examine witnesses and the right to protection from retroactive criminal laws. However, the international standards governing the conduct of trials make clear that the rights specifically enumerated are "minimum" guarantees. The observance of each of these guarantees does not, in all cases and circumstances ensure that a hearing has been fair. The right to a fair trial is broader than the sum of the individual guarantees, and depends on the entire conduct of the trial.

The right to a fair and public hearing is an essential component of the fundamental principle that resulted from the disposals of the Convention applied in the jurisprudence of its bodies, namely the one of affirming a European public order of human rights. The affirmation of the existing of an European public order regarding the fundamental rights and liberties guaranteed in the Convention, among we cam mention the right to a fair and public hearing, occupies a primordial place.

The Article 6 of the European Convention of Human Rights finds its roots in Art. 10 and 11 from the Universal Declaration of Human Rights (10th of December 1948) that settle: Art.10 – „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 of any criminal charge against him”, and Art.11 - paragraph 1 „everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense”, paragraph 2 „no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.

The term “tribunal” does not have an autonomous meaning, detached in the sense of the tern from the international law of the states-parties, therefore we should not take into consideration the classical jurisdictions, where the tribunal was characterized from the material point of view through its jurisdictional function, meaning that this court was entitled to solve only the issued found in its strict competence, on the ground of the juridical norms and proceedings.

In the terms of the Convention, the bodies that have the competence of formulating approvals or recommendations do not represent “tribunals”. The tribunal must be settled by law.

With regard to the applicability of Article 6 of the European Convention in front of the national courts, even if this text does not institute the obligation of a double degree of jurisdiction in the civil matter, we should mention that if the state instituted such a system, than it must assure the guarantees of a fair and public hearing in front of the superior courts.

Even if it was expressly stated in the content of Art.6 paragraph 1, the right to a fair and public hearing imposes the right to access an independent court. Therefore, Art.6 of the European Convention obliges the states to create a judiciary system that must guarantee the impartiality of a court.

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent

strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and the facilities for the preparation of his defense; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

1. The Theory of Appearance

From the beginning of its jurisprudence, the Court stated that the mechanism of guarantying the European Convention of Human Rights has in its view the protection of some effective and concrete rights in this context. It is definitely not sufficient the fact that the states members recognize the free access to justice to any person, but it is more than essential that the court to accomplish some qualities in order to call itself tribunal.

The Court also settled this assertion in one of its most important decisions, affirming in this occasion that the jurisdictional role of a body is not sufficient for it call itself a tribunal, but it is necessary that the body to answer to a series of proceeding guaranties, among which we should mention the independence and impartiality of the members who are part of this body. In a more

concise expression, Article 6 of the European Convention obliges the states to create a judiciary system that must guarantee the neutrality of the court. The obligation of the states members to guarantee to their citizens the free access to a independent and impartial court must be analyzed as the positive obligation of assuring the neutrality of judge power.

By it jurisprudence, the Court created the theory of appearance, according to which it is not necessary for the one who invoke the lack of neutrality of a court to prove that for an exterior observer of the cause there is the appearance of lack of neutrality. In many cases it is possible to exist some clues of lack of neutrality, but the judge to be neuter, but it is no problem if the disputed issues are judge by other magistrate.

The theory of appearance was hardly criticized by the doctrine, the main reason being that under the dominance of this theory the neutrality of the judge cannot be verified by reporting to some objective considerations.

Another important aspect that I must specify is the hypothesis in case a magistrate who lacks neutrality participates to some phases of the proceedings. Under this aspect, the Court made a distinction, settling that in case a impartial magistrate participates to the accomplishing of some important acts in the course of judiciary proceeding such as, the hearing of the defender represents a serious infringement upon the provisions of Article 6 of the European Convention, while if the magistrate participate at some less important acts, such as the settlement of judge date, we cannot speak about the violation of Article 6.

Often found in the jurisprudence of the court of Strasbourg, the right to have access to an impartial and independent court, stated by article 6, paragraph 1 of the Convention, guarantees the right to an equitable trial and it must be stated amongst the most important rights in a democratic country's law.

2. An Independent Tribunal

The European Court settled in its jurisprudence that in order to establish if a court is independent or not, some specific factors must be taken into consideration, such as: the modality of appointing the members of the court as well as the term of their mandate; the existence of an adequate proceeding against exterior pressure as

well as the possibility of verifying if it presents or not the appearance of independence.

The independence of the court represents its quality of receiving orders or suggestions, of any nature, or the capacity of deciding sole upon the disputed issues. The sine qua non condition of independence, expressly settled in the text of the Convention is that the court must be settled by the internal law, therefore there must be a serious of proceeding norms that must guarantee and govern its existence.

The independence of the court represents the fact that the court should not be submitted to orders and instructions coming from other court or authority, as well as the lack of any exterior constraint, pressure or influence. In order to determine if a court is independent or not, the European judges take into consideration the modality of appointing the members of the court, the term of their mandate, the immovability of the judges, as well as the existence of some guarantees against exterior pressure in accomplishing the jurisdictional functions of the court.

The independence represents the absence of any subordination or no connection with a third party, whereas the impartiality is analyzed only by reporting to a magistrate without referring to a third party. It is easy to observe that the two terms are closed so that an independent justice has all the chances to be impartial and independent, one of the first conditions of impartiality. In other words, the judge who lacks the independence can be suspected of partiality.

With regard to the independence of a court, reporting to the modality of appointing its members, the former Commission decided that the existence of a disciplinary jurisdiction for the members of the interested group is legitimate.

One of the demands required by the Convention is that of an *independent court*.

The European court states the conditions to be fulfilled for the court to be considered independent: a) the members' designation and the duration of their mandate; b) the existence of adequate protection against external pressure; c) the possibility to check whether the court appears to be independent or not.

This final notion, the most important of all three, is turned into reality through the trust the courts must convey to all litigants. This is why the Court stated in its jurisprudence that, if the court of law should be comprised of members who find themselves to be in a relation of subordination, in regard to their position and job, with one of the

parties, than the litigants can legally question the independence of that member.

According to the current legal provisions, during their mandate, the judicial assistants are granted stability and they must obey the law. The legal provisions regarding the obligations, the prohibitions and the incompatibilities of the judges are also applied to judicial assistants. Also, provisions relating to the annual leave, free medical assistance and free transportation which are applicable to judges are also applicable to judicial assistants.

A very important aspect revealed in the court's practice is the fact that judicial assistants take the same oath as judges. In regard to penalties, the judicial assistants are subject to the same legal dispositions and disciplinary sanctions, as well as reasons for dismissal as judges and prosecutors. Therefore, we believe that courts which are employ judicial assistants create the appearance of independence to all litigants, as stated by article 6, paragraph 1 of the Convention.

In a wider plan, with regard to the competence of an independent tribunal, the European Court decided that the absence of the juridical qualification of the members of a court is not against the disposals of Article 6 paragraph 1; the principles established in its jurisprudence regarding the independence and impartiality of a court have the same value for the magistrates who exert the same function without having the specific juridical qualification as the magistrates of career.

The independent position of the judge power towards the legislative power settles that the legislator cannot interfere in the process of judging in any other form than the ability of issuing law that the judging courts must apply.

With regard to the independence of the judge power towards the executive power, the Court verifies the existence of some public servants hieratically subordinated, within the tribunal. The Court estimated that their simple presence in the tribunal is not incompatible with its independence. The European Court also decided that if the tribunal comprises among its members, a person who finds in subordination towards the function and the job of a party, the defenders may have some legitimate doubts with regard to the independence of a judge. For example, it was stated that in case a marine disputed issue is judged by a commission formed by judges appointed by and subordinated to the Minister of Justice and Minister of Navigation that could appoint and revoke the court, Article 6 of

European Convention is thus infringed upon with regard to the independence of the court.

From the organic point of view, the independence of the judges is verified upon the modality of appointing the judge and the term of their mandate. The appointment of the judges by administrative bodies and the limited term of the judge mandate are considered clues of dependence towards the body that appoints the judges. The independence of the judge imposes the obligation for the states members to interdict the judges to be members of a political party or of some interest and pressure groups, etc. We must also keep in mind the underline made by the European Court in its jurisprudence, according to which the qualification of the tribunal, in the terms of Article 6 paragraph 1 belongs only to a body of full jurisdiction that answers to the exigency of independence towards executive and legislative powers, imposing thus the examination of the state that ensures the independence of a member of the tribunal.

3. The Impartiality of the Court

Another quality imposed by the convention is that of impartiality. This principle must be applied in any type of court, including the one that employs judicial assistants.

According to the European jurisprudence, the impartiality is defined as the absence of any prejudice or of any preconceived idea with regard to the solution of a trial. The request of impartiality gives birth to a subjective and objective appreciation. In the conception of a Court of contentious business of human rights matter, the term "impartiality", referred to in Article 6 paragraph 1 can be appreciate in a double meaning: on one hand, it refers to the subjective step that signifies the attempt of determining the personal persuasion of a judge in a certain case, meaning thus a certain subjective impartiality, on the other hand, this term consists in an objective step that wants to determine if the judge offers all the sufficient guaranties to exclude in one's person any legitimate suspicion of a so-called objective impartiality of a court. In other words, the subjective impartiality settles that the judge has no reason to favor or not to favor a party. This impartiality is presumed up to the contrary proven (see in this case the Jurisprudence of European Court of Human Rights, *Le Compte vs. Belgium*).

The objective impartiality is appreciated by taking into consideration the appearance of impartiality of the institution (see in this case the Jurisprudence of European Court of Human Rights, *Demicoly vs. Malt*, 1991). With regard to the impartiality of the judge, the appearances have a decisive role. The independence and the impartiality of the court is in a strong connection, since the court that is not independent towards the executive shall not accomplish the condition of impartiality. This represents the lack of any pre-judging or of any other interest of the judge in the case who is appointed to solve the disputed issues.

On the ground of the right of any person to an impartial court, admitted and guaranteed by means of Article 6 of the European Convention and by all the modern Constitutions, the state has the positive obligation to settle the judiciary system, so that any jurisdiction to be obliged to verify the impartiality *ex officio*, or at the request of a party.

The disregard of the obligation to assuring an impartial judgment determines the annulment of the whole proceeding realized in front of the partial magistrate.

As well as the Court has already shown in order for the tribunals to inspire to the public the trust in the act of justice they must take into consideration some requirements of organic nature in composing the tribunals. With regard to the situation also discussed, the European Court decided as being excessive to consider that the former magistrates of the public prosecutor must be eliminated from a formation of judgment upon a certain cause, even if in their quality as prosecutors they never encountered the case or never heard about it, namely they never participate to any solution in the phases of penal proceedings.

The Court also decided that the fact that a member of a tribunal knows one of the witnesses interrogated in a cause does not mean that the judge had already formulated a prejudgment in favor to that person's testimony. The problem of a personal partiality is raised when the magistrate tends to solve the disputed issues in front of him, starting from some prejudgments. The classic example is that when the judge and one of the parties are in a conflict. The problem of impartiality appears rarely in the jurisprudence from Strasbourg, but it appears more frequently in the jurisprudence of the states that signed the Convention. The lack of personal impartiality can be observed only when, due to some subjective

convictions, the judge becomes incompatible with its role of judging in balance the cause in front of him.

The European Court of Human Rights analyzed this notion in relation to its two sides: objective and subjective impartiality. As for the subjective impartiality, the court stated that this aspect is subject to debate amongst its members and they have established, as a principle, the fact that subjective impartiality is presumed to exist until proven otherwise, regardless if it concerns a magistrate, a member of the people's jury or people specialized in different fields of activity, who help solve litigation along with court officials. In regard to objective impartiality of a court or a member of the court of law, the Court, acknowledging the fact that appearance plays a very important part, claimed that the judge who is presumed to not be completely impartial in solving litigation is obliged to abstain from doing so.

Thus, considering all the aspects mentioned above, we find that the institution of the judicial assistants, as it is currently stated, meets the conditions imposed by the European Convention of Human Rights, specifically the rights and guarantees stated by article 6, paragraph 1.

The functional term impartiality is reported to "other's opinion" regarding the magistrate. Thus, we can speak about a functional impartiality when the magistrate is, due to exercising one's functions, in such a position that any person can believe that the magistrate tends *a priori* towards a certain solution of the disputed issues in his front.

The implications of the functions cumulus are as well very interesting in considering the appreciations of the impartiality of the tribunals. In the cause Procola vs. Luxembourg (1995), the cumulus of consultative and jurisdictional functions signified a lack of "structural impartiality" of the Luxembourg State Council.

Final Considerations regarding the Independence and Impartiality of a Court

It is very clear that Article 6 paragraph 1 imposes in a distinct manner the condition of the impartiality of the court than the court's independence. The essential issue of the cause

remains that of watching if the exigencies of the Convention are respected. In the matter of independence and, in a certain measure, in the matter of functional impartiality, the causes of their appearance can be erased by means of measures of legislative nature, which must establish proceedings that must avoid the risk of magistrates' dependence towards a third party or the risk of cumulus of decisions.

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