

THE CASE SHOULD BE EXAMINED BY AN INDEPENDENT, IMPARTIAL TRIBUNAL, ESTABLISHED BY LAW, A COMPONENT OF THE RIGHT TO A FAIR TRIAL

Nicolae, Gradinaru¹

Abstract:

Establishing by law the tribunal, as an element of a fair trial, takes into account the jurisdiction to solve the case, both from a material and a territorial point of view.

In this context, the legal provisions in the internal legislation are clear and precise, clearly delimiting the competences of the courts involved in the execution of the act of justice.

The right to a fair trial also departs from a technical detail, namely the random assignment of causes. This random criterion, however, has proven to be essential in the way the process is going on for many of those who are the subjects of Justice. The current regulation effectively assures the right to a fair trial from the perspective of the existing regulation in Romania regarding the random assignment, thus, according to art.11 of the Law no.304 / 2004, the trial activity is carried out in compliance with the principles of the random distribution of the files and the continuity, except in cases where the judge can not participate in the trial for objective reasons, and Article 53 paragraph 1 of the same normative act stipulates that the distribution of the cases on a complete court is done randomly in a computer system.

Keywords: *tribunal, independent, impartial, fair, random process.*

One component of the right to a fair trial is the examination of the case by an independent, impartial tribunal established by law.

According to art. 10 of the Law no. 304/2004, all persons have the right to a fair trial and to solve the cases within a reasonable time by an impartial and independent court, established according to the law.

The right to a fair trial is a fundamental principle of the civil process provided for in the Code of Civil Procedure governed by Article 6, so that any person has the right to a fair trial in an optimal and predictable manner by an independent court, impartial and established by law. For this purpose, the court is obliged to dispose of all the measures allowed by the law and to ensure the speedy conduct of the trial.

This right is enshrined in Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 6 (1), provides for the right of everyone to a fair trial, thus, "Everyone has the right to have the case heard fairly, publicly and within a reasonable time , by an independent and impartial tribunal established by law, which will decide either on the violation of civil rights and obligations or on the merits of any criminal charges 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 private life of the parties to the proceedings so require, or to the extent strictly necessary by the tribunal, where, due to particular circumstances, advertising would be likely to prejudice the interests of justice. "

According to Article 10 of the Universal Declaration of Human Rights², the right to a fair trial is established according to which "any person has the right to full equality of fairness and public hearing by an independent and impartial tribunal that will decide either on the rights and its obligations, either on the merits of any criminal prosecution against him ", and

¹ Associate Professor PhD "Constantin Brancoveanu" University, Pitesti

² The Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948.

Adopted and proclaimed by the General Assembly of UNO by Resolution 217 A (III) of 10 December 1948.

Romania signed the Declaration on 14 December 1955 when it was accepted by the Member States through R 955 (X) of the UN General Assembly.

Article 30 of the Declaration states that "no provision of the latter may be interpreted as implying for any state, grouping or person the right to indulge in any activity or to commit any act directed towards the abolition of some of the rights or freedoms enumerated therein", and by art.14 p.1 of the International Covenant on Civil and Political Rights¹.

The analysis of the text of the Convention shows that the right to a fair trial has several components, namely:

- free access to justice;
- to examine the case fairly, publicly and within a reasonable time;
- to examine the case by an independent, impartial tribunal established by law;
- publicity of court judgments.

Independence involves two sides, namely the independence of the courts and the independence of the magistrate.

The independence of the courts takes into account that the system of courts through which justice is carried out is not part and is not subordinated to executive or legislative power.

This is reflected in Article 126 paragraph 1 of the Constitution of Romania, which provides that justice is exercised by the High Court of Cassation and Justice and by other courts established by law, namely judges, tribunals and courts of appeal. Article 2 paragraph 2 of Law no.304 / 2004 stipulates that justice shall be performed by the following courts: High Court of Cassation and Justice; courtesy courts; courts; specialized courts; military courts; judges.

In the same sense are the provisions of art. 126 paragraph 3 of the Constitution stipulating that by law the competence and the procedure for the trial are established.

The independence of judges is reflected in Article 124 paragraph 2 of the Romanian Constitution, which provides that judges are independent and subject only to the law.

This implies, as in the case of the courts, that the magistrates can not be influenced by the executive or legislative power in the act of justice.

Independence, so understood, does not exclude the intervention of the judicial control courts that intervene following appeals against judgments.

At the same time, it should be underlined that the verifications ascribed to the Law no.92 / 1992 on the judicial organization, within the competence of the head of the court, do not affect the independence.

This control does not in any way affect the work of judgment.

Thus, Article 18 para. 4 of the Law no.92 / 1992 on judicial organization states that "Under no circumstances can the checks carried out lead to interference in the ongoing processes or to the renegotiation of what has already been judged".

The independence of judges is given by the guarantees in this respect, by its status.

Thus, by the special provisions provided by the Law no.92 / 1992 for the judiciary organization, the appointment and promotion of magistrates (title IV) are regulated.

At the same time, the proposals for appointment according to magistrates are given to the competence of the Superior Council of Magistracy, under the conditions of its organic law (according to article 125 paragraph 2 of the Romanian Constitution).

¹ The International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, entered into force on 23 March 1976, was ratified by Romania by Decree No.212 / 31.10.1974, published in B.Of. No 146 / 20.11.1974.

All men are equal before the courts and courts of justice. Everyone has the right to have a fair and public hearing of the litigation to be dealt with by a competent, independent and impartial tribunal, established by law, to decide either on the merits of any criminal charge against it or on the rights appeals and its civil liability. A court hearing may be declared secret in whole or in part for its conduct, either in the interests of good morals, public order or national security in a democratic society, or, if the interests of the particular lives of the parties in question so require, in so far as the tribunal considers this to be absolutely necessary when, due to the particular circumstances of the case, advertising would harm the interests of justice; however, any judgment in criminal or civil matters shall be public except in cases where the interest of minors requires otherwise, or when the trial concerns marriage or custody of children.

Another guarantee given to magistrates and ensuring their independence is given by their immobility.

This implies that any advancement or transfer can only be done with the consent of the judges.

Immobility is regulated in the Constitution of Romania, at the rank of principle; thus, according to Article 125 paragraph 1, the judges appointed by the President of Romania are irremovable. The same text shows in paragraph 2 that the promotion, transfer and sanctioning of judges is within the competence of the Superior Council of Magistracy.

Impartiality, as an element of a fair trial, is the guarantee of the trust of the judges in the magistrates and the institutions in which they carry out their activity, through which the act of justice is carried out.

The importance of this issue is recognized by the dedication of a whole chapter of the Code of Civil Procedure, which provides for the concrete cases in which a magistrate and the other persons involved in the act of justice are incompatible, as well as the procedures to be followed in the event of their intervention.

Issues of impartiality can also be found in Section 3 of Chapter IV on procedural incidents relating to the jurisdiction of the court, in the Code of Civil Procedure, on the transfer of trials.

At the same time, the Constitution acknowledged the importance of this aspect of a fair trial, providing that the position of judge is incompatible with any other public or private function, except for teaching functions in higher education.

Establishing by law the tribunal, as an element of a fair trial, takes into account the jurisdiction to solve the case, both from a material and a territorial point of view.

In this context, the legal provisions in the internal legislation are clear and precise, clearly delimiting the competences of the courts involved in the execution of the act of justice.

(Chapter I, Title III of the Code of Civil Procedure), territorial jurisdiction (Chapter II), cases of extension of jurisdiction (in special provisions Chapter III), as well as the procedure for the occurrence of incidents procedural aspects of the jurisdiction of the court with regard to lack of competence and conflicts of jurisdiction (Chapter IV).

The right to a fair trial also departs from a technical detail, namely the random assignment of causes. This random criterion, however, has proven to be essential in the way the process is going on for many of those who are the subjects of Justice. The current regulation effectively assures the right to a fair trial from the perspective of the existing regulation in Romania regarding the random assignment, thus, according to art.11 of the Law no.304 / 2004, the trial activity is carried out in compliance with the principles of random distribution of files and continuity, except in cases where the judge can not participate in the trial for objective reasons, and Article 53 paragraph 1 of the same normative act stipulates that the distribution of the cases on a complete court is done randomly in a computer system.

According to Article 199 paragraph 2 of the Code of Civil Procedure, after the registration, the application and the accompanying documents to which they are attached, where appropriate, the evidence of how they were transmitted to the court shall be handed over to the president of the court or person appointed by him, who will take immediate measures to determine the court panel at random, and art. 475 of the same Code stipulates that the president of the court of appeal or the person appointed by him, as soon as he receives the file, resolution, measures for random assignment to a panel of judges.

According to art. 94 of the Decision no.1375 / 2015 of the SCM¹, it envisages the registration and distribution of the applications to the courts, the file circuit

The court documents filed in person or through a representative, arriving by post, courier or fax or by any other means provided by law, shall be filed with the Registry, where,

¹ Decision No. 1355/2015 of the SCM for the approval of the Internal Rules of the Courts, published in the Official Gazette, no.970 / 28.12.2015.

on the same day after the determination of the subject matter of the case, they are received, except as provided in law, clear date and number in the ECRIS application.

By exception, if the same day or later is found that identical court vouchers have been filed, they will receive a single number in the ECRIS application, forming a single file.

The appeals against the same judgment shall be filed in the same file and shall be settled by the original invitations.

The unique file number consists of: the general electronic register number / court identification number / year of registration of the file.

The number in the electronic general register is the file number in the electronic register for the whole court. This number starts at 1 for the first file of the current year and continues incrementally for each new folder created.

The court identification number represents a unique court identification number. The list of court identification numbers is set out in the Annex which forms an integral part of this Regulation.

The unique number given by the court of first instance is kept unchanged throughout the settlement of the case until the enforcement of the judgment. In cases where the program objectively does not allow the same number to be retained, a new number will be generated in the computer system.

Dossiers filed before the generalization of this application receive unique numbers in the computer system if they are re-routed or if a request is made in relation to them requiring a settlement term.

The files will be registered both in the register of the court's general registry and in the general register of the department to which each case has been assigned.

The determination of the subject matter is usually done by a higher court clerk under the supervision of a judge. Once the number in the ECRIS application has been established, the files are handed over to the staff responsible for random assignment, with attached proof of how they were transmitted.

If, for objective reasons, the court referrals have not received a number in the ECRIS application, they will be processed with priority on the next day, with the approval of the court president or the person designated by the court, and the minutes shall be terminated and mention as the date of filing the filing document at the registry.

Other requests and documents of any kind, including administrative correspondence, arriving by mail, courier, fax, e-mail or any other means of communication, shall be recorded in the General Ledger, the Entry-Outtaking Registry in the register of petitions, and shall, as the case may be, present to the president of the court or to the president of the division, if it concerns his or her activity, or, when the application concerns a case pending before the court to which the case was assigned or the court clerk, . If an application or an act concerns a case pending before the court on the day of filing, after registration, the Registrar Registrar will hand over the application or the act directly to the meeting clerk.

The evidence of the communication of the proceedings is received at the registry of the court under signature, after which they are handed over to the archivist who attaches them to the file, mentioning it on the concept of citation.

Evidence of completion of procedures and communications by telephone, telegraph, fax, e-mail or other means of communication received by the Registrar or the person who transmitted them shall be filed in written form as soon as they have been received.

Documents and documents that can not be attached to the file as well as items serving as evidence shall be handed over directly to the Chief Registrar of the Section or the Chief Registrar, in compliance with the provisions of this Regulation on the Management of Corps.

Registration, keeping and keeping of documents not intended for advertising will be done under the conditions stipulated by law.

Envelopes containing confidential correspondence shall be recorded in the mail entry register, with this indication, without undoing, and then handed over to the addressee.

Courts will take steps to complete all ECRIS application fields with complete and accurate data according to usage instructions.

Under Article 101 of the Rules of Court, case allocation will be carried out in a computer system through the ECRIS program.

If the distribution in the IT system can not be applied for objective reasons, the distribution of the causes is done by the cyclical method.

Random distribution in the IT system is done once, and in cases where procedural incidents occur in the course of the process, the procedural rules set out in this Regulation appear.

Requests for a randomly assigned case shall be judged by the same body unless otherwise provided by law.

For the purposes of applying the random criterion, complements shall be constituted at the beginning of each year and shall be numbered by court or, where appropriate, by section, taking into account the matters in which it is judged, the specialization of the completeness and the stage of the proceedings. Changing the number of the panels or changing the judges who make them will be possible only for objective reasons, according to the law.

Any changes to the composition of the panel of judges or to the allocation of files under this Regulation will be highlighted in the random assignment software.

In the cases of modification of the composition of the panel, copies of the sentences, the decisions of the board of directors and the minutes shall be kept in separate files.

A file shall be deemed to be randomly assigned even if a single party can settle a case if this is due to objective reasons.

Whenever it is necessary to exclude a unit from the random assignment, it shall be ordered by the section president or by the president of the court, as the case may be.

Closely related to this principle of the random distribution of files is the principle of continuity, which presupposes that the same judges who are part of the panel can not be replaced, so Art. 19 of the Code of Civil Procedure stipulates that the judge in charge of dealing with the case can not be replaced during the trial only for good reasons, and Article 214 of the same code provides that members of the panel hearing the case must remain the same throughout the course of the trial.

In cases where, for grave reasons, a judge is prevented from participating in the case, he will be replaced.

If the replacement took place after the parties have spoken, the case is pending.

According to art. 53, paragraph 2 of the Law no. 304/2004, the cases assigned to a panel of judges can not be passed to any other than in the conditions stipulated by the law.

According to Article 19 paragraph 1 letter b), c), d), e), f), g), h), i), j) of the SCM Decision no.1375 / 2015, the management board shall perform the following tasks related to the general management issues of the court:

b) determines the composition of the sections, depending on the volume of activity and the complexity of the cases, also taking into account the specialization of the judges;

c) proposes to the president of the court, in relation to the nature and number of cases, the establishment and dissolution of the specialized teams;

d) approves the establishment and dissolution of the judges, other than those provided under c);

e) order the repartition of judges from one section of the court to another, in cases where the change of specialization is justified by the existence of an obvious and lasting imbalance between sections in terms of volume of activity;

f) informs the Superior Council of Magistracy of the modifications regarding the structure and the nominal composition of the sections of the court;

g) in courts where several departments with the same specialization operate, establishes for each year the items in the ECRIS system corresponding to each section, taking into account the concrete circumstances of the court, as well as the need to ensure the random and balanced distribution of files between sections;

h) establish, at the beginning of the year, the composition of the court panels and, where appropriate, the judicial assistants that are part of these panels, in order to ensure their continuity;

i) approves the configuration parameters of the court panels in the ECRIS application, at the proposal of the section presidents or, as the case may be, of the president of the court;

j) Approves exceptionally the change of the members of the judges' panels and of the judges, in cases where, for objective reasons, this is required.

Changing the composition of the panel may be the result of procedural incidents - the incompatibility of judges (absolute incompatibilities, art.42 other cases of incompatibility, art.43 abstaining, art.44 recusal, art.45 invoking absolute incompatibility, judge can not participate at the trial, even if it has not been abstained or has not been recused.)¹ of measures for the good functioning of justice (except for the connection - art.139, the transformation of the processes - 146, the delegation of the court - art.147 of the Civil Procedure Code), but also administrative cases (rest leave, medical leave, special education leave, parental leave up to 2 years old, suspension from office for up to 6 months or exclusion from the magistracy)².

Violations of these principles are sanctioned with absolute nullity and may be invoked at any time during the trial because they are rules of judicial organization, public order.

According to Article 488 paragraph 1 (1) and (2) of the Code of Civil Procedure, the quashing of judgments may only be requested for the following grounds of illegality:

1. when the court has not been constituted according to the legal provisions;
2. if the judgment has been handed down by a judge other than the judge who took part in the substantive debate of his or her own trial other than the one determined randomly to settle the case or whose composition has been changed in violation of the law.

It is indisputable that random assignment of cases is a rule of judicial organization of principle, established by art. 11 and art. 53 of Law no. 304/2004 in order to provide additional guarantee to the judge's functional independence and the impartiality of the act of justice, the main method of random assignment being the computer³.

¹ Article 45 of the Code of Civil Procedure

In the cases provided by art. 41, the judge can not participate in the trial, even if he has not abstained or been denied. Irregularity can be invoked in any state of the cause.

Art.110 of the SCM Decision no.1375 / 2015

The procedural incidents relating to the incompatibility, the recusal or the abstention of all members of the panel will be settled by the next issue with the next number, which will judge in the same matter. If there is only one trial unit in the matter, the procedural incidents relating to all members of the panel will be settled by him. If there is no longer a body that judges in that matter, the incidents will be settled by the panel in the matter and by the rules established by the court's governing college.

If following the resolution of the procedural incidents stipulated in paragraph (1) it is found that, for reasons provided by law, the allocation of which the case has been randomly assigned to him, is not in a position to judge, the case is randomly distributed. If there is one complete body judging in that matter, the cause is assigned to it.

The cases in which all judges of a section have become incompatible to judge shall be assigned according to the rules established by the governing board.

If the procedural incidents refer to a part of the members of the panel of judges, they will be settled by a panel formed by the inclusion of the judge or the judges established by the permanent planning on subjects, at least quarterly.

If, following the resolution of the procedural incidents according to par. (4) the incompatibility of one or several members of the panel of judges shall be ascertained, the completion of the panel shall be carried out by the participation of the judge or judges enrolled in the permanent list after the judge or judges who participated in the settlement of the procedural incident.

² Art.79 and Art.100 of the Law no.303 / 2004 on the Status of Judges and Prosecutors, republished in the Official Gazette 826 / 13.09.2005.

³ Art.11 of the Law no. 304/2004

The trial is conducted in accordance with the principles of random distribution of files and continuity, except in cases where the judge can not participate in the trial for objective reasons.

By art. 139 of the same Law delegates to the Superior Council of Magistracy the power to adopt secondary norms in order to organize the execution of the law and gives it the right to appreciate in this respect, since by the internal rules of court order adopted by the Superior Council of Magistracy are established , according to par. (1) lit. b) of the said Article, "the manner and criteria for the distribution of cases on full court, in order to ensure observance of the principles of random distribution and continuity".

The right of appreciation which the law confers upon the issuing authority is intended to ensure the administrative rules of organization of courts the necessary flexibility to ensure the public interest in the good performance of justice which, in addition to the principle stated in art. 11 of Law no. 304/2004, is governed by a number of other guarantees of the right to a fair trial, enshrined in domestic and international legal instruments, including a reasonable period of time which could be affected by the rigid application of the random assignment, computer system, for any type of incidental or incidental claim arising in the course of a dispute¹.

Publicity of court judgments.

In addition to the advertising of court hearings, the law also ensures the publicity of judgments².

The publicity of the pronouncement ensures the knowledge of the judgment by the justices in accordance with Article 402 of the Code of Civil Procedure, the decision shall be pronounced in a public hearing at the place where the debates were held, by the president or by a judge, a member of the panel , which will read the minute, indicating also the remedy that may be used against the decision, of course with the exception provided by art.396 paragraph 2 which stipulates that, in case of postponement of the pronouncement, the chairman, with the announcement of the term to which the adjournment was postponed , may determine that the judgment will be delivered by making the decision available to the parties through the court registry.

Speaking at a public hearing allows the party whose cause has been unfavorably disposed of to take legal action before the court of first instance, so that the party present in the judgment may waive the appeal, making a reference thereto in a report signed by the President and the Registrar. (Article 404 of the Code of Civil Procedure).

Pursuant to art. 517 of the Code of Procedure for the appeal in the interest of the law, at paragraphs 3 and 4, the decision shall be motivated no later than 30 days after its pronouncement and shall be published no later than 15 days after the motivation in the Official Gazette of Romania, Part I.

The legal separation of court law issues is mandatory for courts from the date of publication of the decision in the Official Gazette of Romania, Part I.

According to Article 521 of the Code of Civil Procedure, the issue of legal issues is mandatory for the court that requested the removal from the date of the decision, and for the other courts, from the date of publication of the decision in the Official Gazette of Romania, Part I.

Article 53

The distribution of the cases on the full court is done randomly, in a computer system.

The cases assigned to a panel of judges can not be passed on to another only in the conditions provided by the law.

¹ Decision No. 5103/2011 of the High Court of Cassation and Justice

² Art. 12 of the Law no. 304/2004

Meetings are public, except for cases provided by law. Decisions shall be handed down in public, except in the cases provided for by law.

Decisions shall be handed down in public, except in the cases provided for by law.