THE RELEVANCE OF THE JUDGE'S ATTITUDE REGARDING THE EXERCISE OF THE RIGHT TO A DEFENSE IN RELATION TO THE INSTITUTION OF IMPARTIALITY

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ABSTRACT: *The article is set to debate the interference between the attitude of the judge in respect to the proper and effective exercise of the defense and the possible lack of impartiality. As the subjective impartiality is difficult to be established, there is a pressing need to identify conducts that might be qualified as proper appearances out of which a lack of impartiality may be deduced, and a situation encountered in practice will be analyzed to establish if we are in the presence of an improper conduct.*

KEYWORDS: *defense; impartiality; appearances; attitude; consequences*
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1. INTRODUCTION

A substantial and indispensable element of the right to a fair trial is the impartiality of the court. As shown in the doctrine, impartiality means lack of prejudice or bias and it is analyzed by pursuing both an objective and subjective test (Harris & O`Boyle, 2018).

This impartiality is necessary in order to obtain the fulfillment of the act of justice, but in most cases, the lack of impartiality is difficult to detect and is even more difficult to prove, given that it must be manifest in the person of a professional trained on the one hand in combating such prejudices and on the other hand in not disclosing their potential existence. This is why mere appearances are a determining factor in establishing the suspicion of lack of impartiality. These appearances are qualified as important in the jurisprudence of the European Court of Human Rights.

Most of the times, the lack of subjective impartiality must be deduced from punctual attitudes, reactions or motivations, being unlikely and in any case inadmissible for a magistrate to express a blatantly prejudgment to an extent that expressly outlines his lack of impartiality.

In the Romanian Criminal Procedure Code system, impartiality is treated as a fundamental principle of the criminal process and an essential component of the

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competence of judicial bodies (Mateuț, 2007), the lack of impartiality being analyzed by reference to the institution of incompatibility of the judicial body.

This article aims to analyze the correspondence between preventing the effective exercise of the right to a defense and the appearance that would justify the suspicion of the lack of impartiality of the magistrate, in respect to a specific situation encountered in the judicial practice.

2. PREMISES

In the case that generated this study, during the court hearing, after finding the judicial investigation completed, the judge started the phase of the debates giving the floor to the prosecutor as prescribed under Article 388 NCPP. He spoke for about 80 minutes in which, for a period of approximately 30 minutes, he referred to the situation of the first defendant, referring to both the facts and the legal framework relating to the crimes committed. Subsequently, without retaining the same facts in relation to all defendants, he proceeded for periods ranging from 5 to 10 minutes to briefly expose the situation of the other defendants in relation to the law. As for the facts he often gave reference to the situation exposed in relation to the first defendant.

After the indictment was presented in the manner described above, the judge considered that in accordance with the principle of equality in arms (although applied incorrectly as we will argue, in respect to the time used by the prosecutor) it is sufficient to give 10 minutes to each lawyer (referring expressly to this term and not to the notion of defendants) who will take the floor in the respective case, given that 8 lawyers were present in the case.

One of the defendants was represented by 2 lawyers. After the first one exposed the defense as so to fit within the time allocated to his presentation, the court refused to give the floor to the defendant's second lawyer, although initially, in determining the duration of the exposures he had related to the number of lawyers. The lawyer showed that he would not repeat what was mentioned previously, that he was present at the overwhelming majority of the 53 trial terms, that he had traveled to in order to be present a distance of 260 km and that he had to add only 4 short sentences. The case file in question had 18 volumes of criminal investigation and 8 volumes of court proceedings.

3. INFRINGEMENT OF THE RIGHT TO A DEFENSE

As far as we are concerned, we consider that it is necessary to view the potential lack of impartiality both in respect to the conduct of the judge and to the procedural moment of the case, respectively that of the debates on the merits. As shown, the debates represent that part of the court procedures in which the prosecutor and the parties are given the opportunity to present their views on the factual and legal situation resulting from the judicial investigation, as well as on any other issue raised. (Volonciu, Tratat de procedură penală. Partea specială, vol. II, ed. a 3-a, 1996).

The statements and conclusions of the parties are formulated orally, in contradictory conditions: They relate to the conflict of criminal law set to be judged (the existence of the crime) and the guilt of the defendant in committing it, and based on the evidence

gathered during the phase of preliminary investigation and judicial proceedings a certain way to settle both criminal and civil actions is proposed by the parties. (Udroiu, 2017)

Regarding the oral and adversarial nature of the debates, it was shown that even in this last stage held before the court, the two main characteristic of the judicial investigation phase are in effect as the procedural subjects are exposing their point of view in the form of a confrontation of opposing positions, in a way that ensures the proper defense of the parties, and are free to openly express their views and combat the claims of the opposing party. Debates are specific trial procedural activities as any trial involves listening to all parties of the conflict so that, from the clash of their claims and conclusions, the judge can establish the truth in accordance with the evidence of the case (Dongoroz, Explicații teoretice ale Codului de procedură penală român, vol II, 1976).

Consequently, in the judicial practice in the only judgment in which the failure to let the defender speak was recorded, it was held that '*[t]he sentence is unlawful due to the fact that the civilly liable party, although present in court, was not given the floor, in breach of the right to a defense, taking into consideration that subsequently the Court pronounced a ruling through which it sentenced the defendant (a minor) in solidarity with his father to civil compensations. Consequently, it is necessary to quash this judgment and the subsequent appeal decision that rejected the appeal of the civilly responsible party and to refer the case to be trialed again by the first Court*. (Decision nr. 967 , 1998)

The doctrine has shown that "the idea of the right to a defense is deeply rooted in the legal mentality, its roots being found in ancient times. Serious traces of this right can still be found in Roman law, which established the rule that no one can be judged, not even the slave in certain circumstances, without being defended" (Volonciu, Tratat de procedură penală. Partea specială, vol. II, ed. a 3-a, 1996).

Bearers of the right to a defense have the obligation to exercise it in good faith, according to the purpose for which it was recognized by law, thus avoiding abuses of procedure (Udroiu, 2017, p. 1578). However it cannot be argued that this right is exercised in bad faith by adding additional ideas in 4 sentences. In assessing good faith, it is necessary to look at the overall fairness of the proceedings, including the presence of the lawyer in front of the court at the majority of appearances set in the case in spite of a lengthy trip on each occasion, even on the day of the proceedings. The European Court frequently conducts such an examination as a whole and it states that the responsibility for the application of the Convention lies primarily with the national courts.

In respect to the content of the right to a defense, we argue that it is not limited to legal assistance from a lawyer, as the right of defense should not be confused with the assistance of a lawyer. (Dongoroz, Explicaţii teoretice ale Codului de procedură penală român. Partea generală, 1975). The right to a defense consists in all the prerogatives, faculties and possibilities granted by law to parties to defend their interests, which is why the assistance provided by the defense counsel is only a component of the right to a defense, (Dongoroz, Explicaţii teoretice ale Codului de procedură penală român. Partea generală, 1975), that as a whole implies other guarantees specific to the criminal proceedings.

Art. 10 of the Romanian Criminal Procedure Code (RCPC) enshrines both procedural rights of the parties and subjects as well as procedural guarantees, among which is mentioned the obligation of the judicial bodies to ensure throughout the criminal process

the full and effective exercise of the right to a defense for the parties and main procedural subjects, - par. (5)] and the provision of legal assistance of a counsel [par. (1)] (Volonciu, Noul Cod de Procedură Penală Comentat, 2014).

Judicial bodies must fulfill their positive procedural obligation to ensure that the rights of the suspect or defendant are effectively and concretely exercised by a lawyer. In order to set out this principle, the Court considered that in the case of an appointed lawyer it is necessary for the court to take measures to replace him if the right to a defense is harmed in its substance by the insufficiency of its exercise, arguing that although the state cannot be held responsible for any shortcomings on the part of a lawyer appointed for legal aid purposes the competent national authorities to intervene in order to respect the right guaranteed by art. 6 par. 3 lit. c) ECHR if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way (Daud v. United Kingdom, 1998). As long as the Court has imposed guarantees on the state to ensure the effectiveness of the defense made by an appointed counsel, we consider that it is inadmissible for a Court to cause the ineffectiveness of the defense made by a chosen lawyer.

We consider that the formal presence of the lawyer in the courtroom is insufficient to guarantee the effective exercise of the right of defense and the substitution of oral presentation by an exclusively written procedure in the manner for which the Court opted when giving the floor to the defense counsel is inadmissible and non-specific to the criminal procedure. The presence of the defense counsel in the courtroom should not be reduced to a formal one, as the right to plead the case is a substantial component of the exercise of the right to a defense.

The European Court has ruled that in order for the right to counsel to be practical and effective, and not theoretical and illusory, its exercise must not depend on the fulfillment of excessively formal conditions, as it is for the Courts to ensure the fairness of the trial and, consequently, to ensure that the counsel participating in the trial for the apparent purpose of defending his client [...] is given this opportunity to do so. (Van Geyseghem, 1999). In the light of those considerations, limiting the lawyers' arguments to 10 minutes as done by the Court might be regarded as absurd even by comparison with the time allotted to the prosecution and it cannot constitute a proper an effective exercise of the right to a defense.

The doctrine has shown that when legal assistance is mandatory, the defendant cannot be tried in the absence of the defense counsel, the provisions regarding the assistance of the defendant by a defense counsel being stipulated under the sanction of absolute nullity (Udroiu, 2017). Silencing the defender is equivalent to his absence. The fact that he is formally in the courtroom without being able to state an opinion or present his conclusions entails the sanction of absolute nullity upon the judgment rendered.

In this context, in practice, it was noted that *"The Court reopened the case for the resumption of the debates, to establish the proper legal classification of the facts described in the indictment, subpoenaing the defendant. At the set court appearance, the court submitted to discussion only the question of changing the legal classification of the criminal act and did reiterate the debates not permitting any conclusions to be presented either by the prosecutor or the defendant's lawyer, although the latter was present. The defendant had the last word. In relation to this situation, the Courts conduct subsequent to the reopening of the case constitutes a violation of the provisions of art. 388 of the*

RCPC. The resumption of debates involves giving the floor to the prosecutor and the parties present to support the prosecution and the defense, respectively. The mere fact that the last word was given to the defendant is not enough to cover this vice. In addition, the fact that after the resumption of the debates the prosecutor's word was not given is equivalent to his absence. Also, the mere presence of the defendant's lawyer in court, after reopening the case, is not able to meet the requirements of the law on the exercise of effective defense, as long as he was not given the floor in the debates. Such a situation corresponds to the case of absolute nullity provided by art. 281 par. (1) lit. f) of the RCPC, since the law requires not the simple presence of the defense counsel, but his effective participation in the criminal proceedings, by exercising his duties according to the mandate and legal provisions applicable in the matter " (Decision of the Pitești Court of Apeals , 2015)

The question that arises is to what extent this nullity still operates as one of the defense counsels submitted his conclusions. Can this obligation be viewed formally, should every defender be given the floor? Obviously we tend to say no, as it is up to the Court to censor the conclusions or limit the time allocated. These prerogatives are expressly provided within the provisions of art. 388 RCPC. However, in order to censor the conclusions of a party, such conclusions must deter form the case, which implicitly means (as a predetermined legally imposed condition) that the floor was granted to the counsel in the first place and that he is able to expose his arguments.

A time limitation can also be imposed but only with respect to the principle of equality in arms. In addition, once the Court has established certain rules for conducting the case, we appreciate that they are mandatory and this is the reason for which we appreciate that the presented situation constitutes a restriction of the right to a defense as the court itself established the time limit in respect to the number of counsels present. Given that the right to be effectively defended by a lawyer is one of the fundamental elements of the right to a fair trial, the infringement of that right should be sanctioned with the absolute nullity of the act that followed and that was fulfilled in violation of the right.

However we will think that this conduct is to be criticized in respect to arguments relating to an obvious lack of impartiality of the Court.

4. LACK OF IMPARTIALITY

As we have shown impartiality means lack of prejudice or bias. The case law of the Court distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect impartiality. (Kyprianou v. Cyprus, 2005).

The Court has always held that the personal impartiality of a magistrate is presumed until there is proof to the contrary (Kyprianou v. Cyprus, 2005), recognizing nevertheless that sometimes it is difficult to present evidence that would overturn the presumption of subjective impartiality of a magistrate. This is the reason why the lack of impartiality requires an examination of ascertainable facts which may raise doubts as to his impartiality (Castillo Algar v. Spain, 1998).

In order to establish that in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, what is decisive is whether this fear can be regarded as objectively justified (Padovani c. Italy, 1993).

The Court has held that appearances may be of a certain importance and that at stake is the confidence which the courts in a democratic society must inspire in the public, including the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw from the case. (Castillo Algar v. Spain, 1998).

According to art. 9 par. (2) of the Ethics Code for Judges and Prosecutors, judges must refrain from any behavior, act or manifestation likely to impair the confidence in their impartiality. In this regard, judges should not make any observations or remarks that could reasonably suggest shaping an opinion about a person's guilt or innocence or that could influence the fairness of the proceedings (Udroiu, 2017, p. 367).

The judge is incompatible if there is a reasonable suspicion that his impartiality is affected [art. 64 par. (1) lit. f) of the RCPC]. In the German doctrine and jurisprudence, the suspicion that a judge is bias is not subject to scrutiny only in respect to a factual reality or the judge`s opinion about his own bias. The decisive factor in this analysis is the opinion of the person exercising his right to challenge the judge`s impartiality, more precisely, the opinion of the suspect or defendant that acts in good faith. The arguments he presents to support his request for recusal must be relevant to any third party with no interest in the matter (Udroiu, 2017, p. 373).

In this context we think that the judge had to ensure that the right to a defense and the facilities necessary for the exercise of an effective defense were respected. Giving the floor to the defense counsel in the debate phase of the trial constitutes such facilitation.

The manner in which the judge behaves during the hearings may constitute a proper ground for his exclusion if it creates a reasonable suspicion of flawed impartiality. It has been shown that if the judge starts drafting the judgment of the case while the defendant's lawyer orally presents his conclusions, this may be a proper reason for his recusal (Udroiu, 2017, p. 378). The situation that generated the present study is molded on the above mentioned situation as the decision of the judge is reached in his inferior forum. As long as the judge seems not to need or take into consideration the arguments of the party, it can objectively be presumed that he reached the solution before the position of defense is being presented and in disregard of that position. This, in the eyes of any person, creates reasonable suspicion of lack of impartiality that constitutes a case of incompatibility expressly regulated by law.

The question of the adequacy of the facilities and the time given to a defendant is assessed in the light of the particular circumstances of each case and the (Oçalan c. Turciei, 2003). Granting a reasonable amount of time to allow the defense's to present its arguments (for example 20 minutes) in a case that lasted 7 years and in which the defense counsel made an 8-hour round trip the same day does not seem disproportionate.

The European Court has never been called upon to rule on the prohibition of presenting the arguments and perhaps this is because it seems inconceivable. However, in a similar, less striking situation, it found that there was a violation of Article 6 in respect to the right to a defense as due to excessive fatigue the defender or defendant could not adequately bring the case before the court. Thus, in Makhfi v. France, the Court found a breach of the principle of equality in arms and of the applicant's right to a

defense generated by the fact that the defense counsel's plea took place at 5 o'clock in the morning, after a court hearing of more than 15 hours as the prosecution and the civil party had supported their conclusions much earlier. The court stated that fatigue can be a factor in placing some parties in a state of inferiority and that it is imperative that both the accused and their lawyers be able to participate in the trial without being placed in a situation of excessive fatigue. (Makhfi v. France, 2005)

5. EQUALITY IN ARMS.

We argue that although the judge wanted to apply the principle of equality in arms, this was done in a deficient manner. The notion of "equality in arms", as part of the right to a fair trial, implies the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed to influencing the court's decision (Lobo Machado v. Portugal, 1996), in a contradictory procedure which does not place any of the parties at a disadvantage, in order to maintain a fair balance between the parties.

Although the Court imposes on proceedings a reasonable time-limit, we argue that this does not imply an expeditiousness that is in the detriment of the procedural rights of one of the parties, as in assessing that the defendant was offered adequate time for the preparation of his defence the nature of the proceedings, as well as the complexity of the case and stage of the proceedings have to be taken into consideration. (Gregačević v. Croatia, 2012).

Limiting the time allocated to the defense in relation to the time given to the prosecutor, and not as it is accustomed in judicial practice by setting a time for each participant at the beginning of the debate, is in itself a serious violation of the principle of equality in arms, that puts the defense in a situation of obvious inferiority.

To emphasize on the absurdity of such an interpretation of art. 388 par. 2 RCPC, in a hypothetical example, such an approach would have implied, if the prosecutor had limited himself to stating "We support the indictment", that the defense would have the right to support the case exclusively by reference to 3 letter word, a fact that in itself is inadmissible.

6. CONCLUSIONS

Failure to allow the defense attorney to present his conclusions in the debate phase of the criminal trial constitutes an infringement of the right to a defense. An attitude of indifference to the arguments presented by the defendant leads any objective observer to the conclusion that the decision has already been taken and seriously affects the impartiality of the magistrate.

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Although the procedural code allows censoring the conclusions or limiting the time given to each party, we believe that such interventions must be exceptional and aimed to ensure the effectiveness of the act of justice and not harm it in any way.

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