

RIGHT TO A FAIR TRIAL AND ISSUES OF JUDICIAL INCOMPATIBILITY

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Abstract: *The study reviews several theoretical and jurisprudential aspects relating to the case law of the European Court of Human Rights, the Constitutional Court of Romania, and the High Court of Cassation and Justice, concerning the right to a fair trial, examined from the perspective of judicial incompatibilities. The right to a fair trial is analysed also via the ECHR and Romanian Constitutional Court jurisprudence, focusing on its general aspects within the framework of constitutional law and European Convention. The analysis also explores the implications of these regulations for individual rights within the broader European context.*

Key words: *right to fair trial, European Court of Human Rights, legislation about incompatibilities, constitution, judge, impartiality.*

1. Introductory remarks

The right to a fair trial, in light of Article 6(1) of the European Convention, represents a fundamental right of considerable importance within the legal order and a cornerstone of any democratic state, constituting an essential guarantee for the protection of human rights and freedoms. For these reasons, it has consistently been reflected in the jurisprudential concerns of the European Court of Human Rights, in the case law of the Constitutional Court of Romania, in the practice of all constitutional courts of the Member States of the European Union, as well as in the jurisprudence of ordinary courts. The impartiality and independence of the judge represent the keystone of the administration of justice and form the very core of the principle of a fair trial.

The principle of judicial independence and impartiality is a constitutional principle, being regulated in the Romanian Constitution under Articles 21 and 124, which enshrine free access to justice and the impartiality of justice. This is a mixed form of regulation, explicit with regard to impartiality and the fair trial, while the correlation between them

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is inferred at the level of constitutional principle, suggesting a significant alignment with conventional standards.

Furthermore, the principle of judicial independence and impartiality is also enshrined in the constitutions of other Member States of the European Union, as well as in the United Kingdom and the Republic of Moldova, as reflected in the analysis of Volumes I and II of the Constitutional Codex, 2024 edition.

Thus, the following legal systems regulate, at the level of their fundamental law, the principle of impartiality and, respectively, the right to a fair trial: (i) Austria – the Austrian Constitution enshrines the independence and impartiality of judges, as well as their irrevocability; there is no explicit recognition of the right to a fair trial, which results from the incorporation of the European Convention on Human Rights—this represents a model of indirect regulation. (ii) Finland – Article 21 of the Finnish Constitution expressly guarantees the right to a fair trial, providing that everyone has the right to have their case examined properly and without undue delay by a competent, independent, and impartial court—Finland represents a model of fully explicit regulation, directly aligned with Article 6 ECHR. (iii) Germany – the Basic Law enshrines judicial independence and the principle of the rule of law. The right to a fair trial is derived from Articles 20 and 103—this represents a model of implicit regulation strengthened through case law. (iv) Italy – the Italian Constitution expressly guarantees the right to a fair trial (Article 111), including judicial impartiality, thus providing explicit regulation. (v) Malta – Article 39(1) of the Constitution provides for “the right to a fair hearing within a reasonable time by an independent and impartial court”; judicial independence is ensured through stability, irrevocability, and constitutional guarantees of remuneration—this represents a model of fully explicit regulation of fair trial, independence, and impartiality. (vi) Republic of Moldova – Article 20 of the Constitution regulates free access to justice, while Article 116 guarantees judicial independence; impartiality is inferred implicitly. (vii) Spain – Article 24 of the Constitution enshrines the right to a fair trial and to an independent and impartial judge, representing a fully explicit regulation. (ix) Kingdom of the Netherlands – Article 17 of the Constitution explicitly guarantees the right to a fair trial, while judicial independence and impartiality are implicitly derived from the requirements of the rule of law. (x) United Kingdom – in the absence of a single written constitution, the right to a fair trial is guaranteed through the Human Rights Act 1998, as well as through the incorporation of the European Convention on Human Rights.

Article 6 of the ECHR regulates the right to a “fair trial” before an independent and impartial tribunal, namely the right of any person to have their case heard fairly, publicly, and within a reasonable time by an independent and impartial tribunal established by law.

Therefore, judicial independence and impartiality constitute essential elements of the right to a fair trial, being explicitly or implicitly recognized in all legal systems within the European Union, including the United Kingdom and the Republic of Moldova. These principles are further strengthened by both European and national case law.

2. The Right to Fair Trial - Jurisprudential Guidelines

2.1. ECtHR Case Law

Article 6 of the ECHR does not define the notion of a fair trial, but it expressly establishes, as guarantees of this right, the requirement that a case be heard within a reasonable time and by an independent and impartial tribunal established by law.

In this regard, it should be noted that the case law of the European Court of Human Rights is consistent in reiterating that, for the existence of an independent tribunal as a guarantee of a fair trial, both a classical requirement and a modern requirement must be fulfilled. The classical requirement concerns independence vis-à-vis the political, legislative, and executive powers, as well as the parties to the proceedings, while the modern requirement refers to independence from influences originating from *de facto* powers. In other words, in determining whether a body is independent, various criteria are taken into account in light of the well-known English dictum that “justice must not only be done, it must also be seen to be done.”

At the same time, the Court’s case law consistently establishes that, for a tribunal to be considered impartial as a guarantee of a fair trial, both subjective and objective impartiality must be assessed. In this respect, in the case of *Alexandru Marian Iancu v. Romania*, the Court held that, under the objective test, it must be determined whether, apart from the personal conduct of the judge, there are ascertainable facts capable of raising doubts as to his or her impartiality. The Court further emphasized that, although the applicant’s perspective is important, it is not decisive; what is ultimately relevant is whether the alleged doubt can be regarded as objectively justified, that is, supported by factual elements.

Furthermore, the ECtHR has consistently emphasized that the appearance of impartiality is essential. In *De Cubber v. Belgium* (1984), the Court highlighted the importance of appearances in matters of impartiality, establishing that any legitimate doubt must be excluded from the perspective of both the litigant and the public. Likewise, in *Castillo Algar v. Spain*, the Court reaffirmed that, in assessing objective impartiality, it must be determined whether the party’s fears can be regarded as objectively justified. In that case, the Court found a violation of Article 6 ECHR, as the circumstances were such as to give rise to legitimate objective doubts regarding the impartiality of the tribunal.

Similarly, in its case law concerning the appearance of impartiality, the ECtHR has held that the mere fact that a judge has previously delivered decisions in the same case is not, in itself, sufficient to establish a lack of impartiality; rather, the decisive factors are the extent, nature, and content of those prior assessments. Accordingly, both a substantive and a structural evaluation of impartiality is required.

The analysis of ECtHR case law thus allows for the identification of two categories of situations capable of giving rise to an appearance of impartiality. The first is of a personal nature, relating to the specific conduct of the judge in the case, which may generate legitimate and objectively justified concerns or indications of actual bias. The second is of a functional nature, where it is not the judge’s conduct that is challenged, but rather the exercise of different functions within the same proceedings or the existence of institutional or hierarchical links with other participants in the procedure. In this regard,

ensuring personal independence requires the establishment of guarantees designed to protect the individual independence of judges, while ensuring functional independence requires that courts operate free from interference by the state, the parties, or other interested persons.

The judgment delivered by the Court of Justice of the European Union on 26 March 2020 in the joined cases C-542/18 RX-II, *Simpson v. Council*, and C-543/18 RX-II, *HG v. Commission*, addresses a fundamental issue for the guarantee of the right to a fair trial, namely the legality of the composition of the judicial panel from the perspective of the procedure for appointing judges. The Court was called upon to determine whether an irregularity in the appointment procedure of a judge is capable of affecting the validity of judgments delivered by the tribunal so constituted.

The Court emphasized that the right to a fair trial, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, requires not only that a tribunal be independent and impartial, but also that it be established by law. In this context, it was held that compliance with the rules governing the appointment of judges constitutes a fundamental guarantee for maintaining public confidence in the administration of justice.

Examining the specific circumstances, the Court of Justice of the European Union found that there had been an irregularity in the appointment procedure of one of the judges, consisting in the fact that the competent authority had used a list of candidates drawn up in the context of a public call for applications intended to fill specific posts in order to appoint a judge to another vacant position that had not been covered by that call. In other words, the list had been established for two specific posts, but was subsequently used to fill a third post without the organization of a new, appropriate selection procedure.

Of particular importance is the fact that the Court classified the legality of the composition of the judicial panel as a matter of public policy, which must be examined even of the court's own motion. In this context, the Court highlighted that any serious doubt regarding the manner in which the tribunal is constituted affects the very essence of the right to a fair trial, since the guarantees of independence and impartiality are inextricably linked to compliance with the rules governing the appointment of judges.

Therefore, the reasoning of this judgment demonstrates that any element capable of creating legitimate doubts as to the impartiality or the legality of a judge's status requires that judge to be removed from the judicial panel. Accordingly, national procedural mechanisms concerning incompatibility, withdrawal, and recusal represent concrete expressions of these requirements, their purpose being to prevent and remedy situations in which the impartiality of the tribunal may be called into question.

2.2. Case Law of the Constitutional Court of Romania

The analysis of the case law of the Constitutional Court of Romania has highlighted that judicial impartiality has been examined as a component of the right to a fair trial, in close connection with the institutions of recusal and transfer of venue.

In this regard, the Constitutional Court has consistently held that judicial independence and impartiality constitute fundamental guarantees of a fair trial. In this sense, reference may be made, for example, to Decision no. 17 of 21 January 2015, which states that

judicial independence is a guarantee of a fair trial; Decision no. 196 of 4 April 2013, according to which impartiality constitutes a component of the right to a fair trial; and Decision no. 838 of 27 May 2009, which recognizes the separation of powers and the independence of the judiciary as fundamental principles of the rule of law.

Furthermore, the Court's case law has established that the institutions of incompatibility, withdrawal, and recusal represent procedural mechanisms designed to eliminate legitimate doubts regarding impartiality. In this respect, Decision no. 625 of 26 October 2016 is particularly relevant, as it emphasizes these institutions as procedural guarantees of the right to a fair trial, capable of removing any legitimate doubt concerning the impartiality of the court, namely by excluding any prejudice or biased attitude. Likewise, Decision no. 94 of 10 March 2022, concerning the provisions of Article 64(1)(f) and Article 65(1) of the Criminal Procedure Code, confirms that these legal provisions operate precisely in situations where, even in the absence of an explicit ground for automatic incompatibility, a reasonable suspicion arises that the judge's impartiality is affected.

With regard to the institution of transfer of venue, the Constitutional Court has held that it constitutes an exceptional measure, applicable in situations where full impartiality, particularly in its objective dimension, namely the appearance of impartiality in the eyes of an objective and reasonable observer, rather than a biased or speculative one, cannot be ensured at the level of the court as a whole (Decision no. 98/2017). In the context of transferring a case, the "reasonable suspicion" must be based on objective facts and circumstances relating either to the case itself or to the status of the parties, capable of convincing an objective and impartial observer that judicial impartiality is affected, and not on mere assumptions, even if made in good faith. The final assessment always belongs to the competent court, depending on the specific circumstances of each case (Decision no. 438 of 21 June 2016).

At the same time, the Constitutional Court has held that the transfer procedure does not concern the merits of the case, but rather constitutes a special procedure for determining territorial jurisdiction after the originally competent court has been seized, based on reasons that cast doubt on its impartiality, with the aim of ensuring a fair procedural framework under conditions of impartiality and equality of arms (Decisions no. 226 of 7 March 2006 and no. 558 of 16 October 2014).

Moreover, in line with the case law of the European Court of Human Rights, the Constitutional Court has observed that judicial impartiality must be assessed from a dual perspective, namely subjective and objective impartiality. The subjective approach aims to determine the personal conviction of a judge in a particular case, while the objective approach seeks to establish whether there are sufficient guarantees to exclude any legitimate doubt in this regard (Decision no. 625 of 26 October 2016; Decision no. 558 of 16 October 2014).

In this context, it should be emphasized that the Constitutional Court has consistently concluded that access to a court lacking impartiality, whether objective or subjective, is equivalent to access to justice devoid of effectiveness and inevitably results in a violation of the right to a fair trial.

2.3. Case Law of the High Court of Cassation and Justice of Romania

By virtue of its legal powers of interpretation, exercised through decisions that are binding *erga omnes*, the High Court of Cassation and Justice has consistently held that withdrawal and recusal are procedural instruments aimed at ensuring the establishment of the truth and guaranteeing an impartial and fair trial, both serving to eliminate any doubt as to the impartiality of the court. The Court has stated that, where a declaration of withdrawal is made, no further procedural acts may be carried out thereafter, since the doubts regarding impartiality arise from the judge himself or herself. By contrast, in the case of a motion for recusal, the judge is presumed to be impartial until proven otherwise, and therefore the proceedings may continue until the recusal request is resolved (RIL Decision no. 14 of 28 June 2021). In this respect, it is important to emphasize that the submission of a declaration of withdrawal is not merely a faculty but a legal obligation incumbent upon the judge, expressly provided by law whenever he or she considers that impartiality may be affected, an obligation essential in a democratic society for ensuring the full confidence of litigants.

At the same time, the supreme court has emphasized that the mere existence of a collegial relationship between a judge and a party to the proceedings does not constitute an objective element capable of affecting judicial impartiality. Consequently, the provisions of Article 42(1)(5) of the Code of Civil Procedure must be interpreted restrictively, in the sense that the expression “the court before which one of the parties is a judge” refers specifically to the panel of judges hearing the case, and not to the court as an institution as a whole (RIL Decision no. 20 of 20 October 2025).

On the other hand, interpreting Article 41(1) of the Code of Civil Procedure, the High Court has held that a judge who has delivered a decision on appeal is absolutely incompatible to rule on a request for revision or on an action for annulment brought against the decision rendered in the appeal proceedings concerning his or her own earlier judgment (RIL Decision no. 24 of 19 October 2020). A similar approach, applicable in criminal proceedings, is reflected in RIL Decision no. 32 of 9 December 2019.

In this context, the High Court has established, as a matter of principle, a standard for assessing impartiality, holding that the mere fact that a judge adjudicates cases involving the same persons does not in itself give rise to incompatibility, as long as the new decision is not based on prior rulings or measures adopted by that same judge for the purpose of determining the guilt or innocence of the person concerned. Accordingly, the reclassification of the legal characterization of the act forming the subject matter of the proceedings, by a ruling issued prior to the final judgment, does not in itself imply that the judge has expressed an opinion on the outcome of the case (RIL Decision no. I of 16 January 2006). However, where a judge, by interlocutory ruling, upholds a complaint, sets aside the challenged resolution or order, and retains the case for trial on the grounds that the existing evidence is sufficient, he or she becomes incompatible to adjudicate the merits of that case (RIL Decision no. XV of 22 May 2006).

3. Conclusions

The analysis of the relevant legislation, as well as of its interpretation in the case law of the European Court of Human Rights, the Constitutional Court of Romania, constitutional courts, and national courts, has highlighted that the effectiveness of judicial impartiality constitutes an institutional guarantee of the right to a fair trial. It has even been concluded that the right to be tried by an independent and impartial tribunal is so fundamental that it may be regarded as an absolute right, allowing for no exceptions.

Accordingly, the absence of either of the two components of impartiality (objective or subjective) leads to a violation of effective access to justice and to the inevitable infringement of the right to a fair trial.

In this context, a crucial role lies with the legislature, which must create and implement the necessary mechanisms to ensure, *ab initio*, that cases are heard by an independent and impartial tribunal, as well as to regulate clearly and expressly the situations liable to affect judicial impartiality, and to establish and adopt the procedures required to eliminate circumstances that may undermine judicial independence and impartiality and, consequently, the right to a fair trial.

In this regard, institutions such as judicial withdrawal and recusal, statutory incompatibilities, as well as mechanisms of judicial and constitutional review, represent indispensable procedural safeguards. Their role is to prevent any legitimate suspicion of bias and to ensure compliance with the principles of equality of arms and adversarial proceedings.

At the same time, the State's obligation is not limited to the formal recognition of these guarantees, but also entails ensuring their effective application in practice, through a functional institutional framework and consistent and foreseeable case law. Only under these conditions can the effective realization of the right to a fair trial be guaranteed, as a fundamental element of a democratic society.

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