

CONSIDERATIONS ON THE RIGHT TO A FAIR TRIAL – BREACHING OF THE PRINCIPLES OF CONTRADICTORY AND IMMEDIACY BY CHANGING THE COMPOSITION OF THE PANEL OF JUDGES

Gabriela-Nicoleta CHIHAIA¹

Abstract: *This article begins with the problem that arises in the national judicial practice with respect to the application of the principles of contradictory and immediacy at the trial stage, for the observance of the right to a fair trial, provided by art. 6 of the European Convention on Human Rights, in the event of a change in the composition of the panel of judges. In the absence of any clear provisions in national law, two ECHR decisions (Cutean vs. Romania and Beraru vs. Romania) received a different interpretation in national practice, one granting a higher standard of protection of the defendant than the one established by the European Court.*

Key words: *fair trial, ECHR, judicial inquiry, changing panel of judges.*

1. Brief Considerations with respect to the Right to a Fair Trial, Provided by Article 6 of the European Convention on Human Rights

Article 6 of the European Convention on Human Rights states in the first paragraph that, *everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial court established by law, which shall decide (...) on the merits of any charge in criminal matters against him.*

As it has been consistently held in doctrine and practice, the expressions „fair trial” and „reasonable time” used in article 6 para. (1) of the Convention have an „undetermined character”, and are not interpreted uniformly, permitting to the European Court of Human Rights and, implicitly, the national courts, a wide discretion to determine the cases in which they are referred, the practice of the Court establishing only guiding principles in this respect. Thus, although article 6 para. (1) of the Convention sets out different rights (fair trial and reasonable time), however, they are having the same basic idea being united and composing a „a single right” to which no precise definition has been given.

The European Convention provides two kinds of warranties: on the one hand, material

¹ Judge Gabriela-Nicoleta CHIHAIA, *Ph.D.*, Harghita County Court, gabriela.nicoleta.chihaia@gmail.com

rights, and procedural rights, on the other hand, to provide efficiency to those in the first category. Article 6 has the character of a procedural regulation, its main role being to establish the general framework in which a lawsuit must be conducted in the case of complaints concerning civil rights or allegations in criminal matters.

In criminal matters, the notion of “fair trial” is extremely extensive, article 6 of the Convention including all those situations in which national courts rule on a charge in criminal matters. However, according to the judicial practice of the European Court, the right to a fair trial in criminal matters is only recognized for the defendant.

According to the Convention, 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; examination of the case by a court established by law, independent and impartial; equality of arms.

However, mention should be made that the European Court, which has been notified of a possible breaching of article 6 of the Convention, is not empowered to examine errors of fact or law allegedly committed by the national courts unless such errors could have infringed the rights and freedoms protected by the Convention.

Thus, although article 6 of the Convention guarantees every person the right to a fair trial, it does not regulate, for example, matters relating to the admissibility of evidence, which are left to each State to regulate under its national laws, the Court examining only if, as a whole, the judgement in question was fair, namely whether it was carried out in accordance with the requirements imposed for this purpose by the Convention.

In a synthetic analysis, it can be stated that all the guarantees established by article 6 para. (1) of the Convention are generally expressed, ensuring the observance of the right to a fair trial for any individual and there are so many obligations for the public authorities to ensure their implementation.

The European Court has pointed out that, through the right to a fair trial, it finds, among other things, the principle of the preeminence of the right enshrined in article 3 of the Statute of the Council of Europe, this principle finding its conclusions, *inter alia*, in article 6 of the Convention.

By guaranteeing the right to a fair trial, the legal provision details the imperatives inherent in this notion of criminal charges.

The same principle of the preeminence of the right and the notion of a fair trial oppose any interference from the legislative power in the act of justice (ECHR, *Raffineries grecques Stran and Stratis Andreatis vs. Greece*, judgement from December 9, 1994, para. 46), as well as from the executive power.

The European Court has also held that article 6 para. (1) combined with the provisions of para. (3) of the same article, establish essential elements of a fair trial in criminal matters: informing the accused person as soon as practicable about the nature and causes of the accusation brought against him, giving the time and facilities for the defense, the right to defense alone or assisted by a lawyer, the possibility of questioning witnesses in indictment and of convening and hearing the defendants under the same conditions, respecting the principle of contradictory (CEDO, *Barberà, Messegué and Jabardo c. Spain*, judgment from December 6, 1988, para.78).

2. The Principle of Contradictory – Guarantee of the Right to a Fair Trial in Criminal Matters

As it has been stated in the doctrine (Ghigheci, C., 2014, p. 134), article 6 para. (1) of the Convention enshrines as implicit warranties of a fair trial only the publicity of the proceedings and the reasonable time, but from the third characteristic used by the European legislator "in a fair manner", there are implicitly other warranties of a fair trial, such as the equality of arms, the principle of contradictory and the motivation of judgments.

One of the implicit warranties of a fair trial, both in civil matters and, in particular, in criminal matters, is the principle of contradictory, defined by the European Court as the task of the judge to ensure that all elements likely to influence the settlement on the substance of the dispute to be the subject of a contradictory debate between the parties, thus giving the judges the obligation to ask the parties to discuss all the issues on which the settlement of the case depends.

In criminal matters, the principle of contradictory rule implies that both the prosecutor and the parties have the opportunity to get acquainted and to discuss all the evidence, claims or exceptions invoked by the other party (Predescu, O, Udrioiu, M., 2007, p. 365). By defining the principle of contradictory, the European Court of Human Rights has stated that "it is the duty of the judge to ensure that all elements likely to influence the substantive settlement of the case are subject to a contradictory debate between the parties".

In its practice, the ECHR held that the principle of contradictory is observed when the prosecutor and the parties have the opportunity to get acquainted and to discuss the evidence, claims or exceptions invoked by the opponents (CEDO, *Lobo Machado vs. Portugal*, judgment of February 20, 1996), or when the defense party is aware of all evidence in the trial, both of the defense and of the accused (CEDO, *Mantovanelli vs. France*, judgment of Marche 18, 1997).

Like article. 6 para. (1) of the Convention, article 8 of the Criminal Procedure Code, with the marginal title "fairness and reasonable time of the criminal proceedings" expressly provides only the reasonable period of deployment, however, by the notion of "fairness" there are enshrined in the domestic law a series of implicit warranties of the law in a fair trial, since such a process cannot be imagined without warranties such as arms equality, the principle of contradictory, the publicity of court hearings, the motivation of judgments (Ghigheci, C., 2014, p. 135).

Specifically, in the Romanian criminal procedural law, the principle of contradictory is regulated as one of the principles governing the judgment phase, article 351 of the Criminal Procedure Code stipulating that "The case shall be tried by the court established according to the law and shall be debated in the court oral, direct and adversarial session". The court is called upon to question the claims of the prosecutor, the parties or trial subjects and the exceptions raised by them or ex officio and to rule on them by reasoned termination".

The contradictory nature of the judgment phase is closely related to its directness and orality, the three principles working together.

The principle of contradictory is demonstrated throughout the judgment phase, with a broad law being provided as a basic rule for the conduct of judicial inquiries and debates. The waiver of the contradictory nature of judicial proceedings was also penalized by the constitutional court, which revealed the importance of the contradictory nature of the trial phase, which led to a number of important amendments to the Criminal Procedure Code (for example, the finding of unconstitutionality the resolution of the complaint against the prosecutor's order not to be sued, the procedure for the dissolution of documents, etc., all of which are currently being conducted in a contradictory procedure, quoting all parties). The effect of the contradictory nature is that it is admissible to ask questions from the other participants in the hearing in the judicial investigation of the heard persons. Also, important procedural acts in court investigations, such as, for example, giving up evidence or changing legal engagement, imply the plenary manifestation of contradictory, since they must be brought to the attention of the injured party, the other parties and the prosecutor (Neagu, I, Damaschin, M., 2015, p. 150). At the same time, the debates, which represent the culmination of the judgment phase, are characterized by contradictory, the claims being contradictorily supported by the participants, in this way the court can directly perceive the evidence, exposed from different perspectives (Neagu, I, Damaschin, M., 2015, p. 150).

However, there is no need for a contradictory debate to be held in all cases, and the principle is also respected if the court has created the occasion for such a debate by discussing requests and exceptions or by going through the debate phase; the absence of the injured person or of the legally quoted party from the time when the applications or the exceptions were disputed or the debates took place does not lead to the conclusion of the breach of the principle of contradictory, even if the court only listened to the prosecutor's conclusions (Udroiu, M., 2018, p. 244).

3. The Principle of Having the Evidence Handled before the Judge and its Corollary– The Principle of Continuity of the Panel of Judges

Art. 6 par. (1) of the Convention does not provide, either as an implied warranty, the imposition of evidence, but the practice developed by the European Court of Human Rights recognizes the importance of this principle, as we shall present in the following section. Instead, the Romanian Criminal Procedure Code expressly regulates, for the trial phase, the principle of immediacy, stipulating in Art. 351 that "the case shall be tried by the court established according to the law and shall be debated in the court oral, direct and adversarial session."

Therefore, the principle of immediacy is, as well as the principles of contradictory and orality, a specific one to the judgment phase. According to this principle, the court must directly take into account the evidence to be administered in the case, as well as the claims of the prosecutor and the parties to the proceedings (Udroiu, M., 2018, p. 257).

Contradictory, orality and lack of interest have a number of advantages, both for the parties and especially for the judge. Thus, by directly taking evidence, in accordance with the contradictory and orality principles, the judge can carefully observe the psychology and morals of the parties and witnesses in order to be able to weigh the

value of their words, emotions, reactions and attitudes, remaining with a lively impression, fresh and accurate in oral discussions and debates (Ghigheci, C., 2014, p. 135).

However, the Criminal Procedure Code restricts, by some of its provisions, the principle of immediacy: according to art. 374 para. (3), "the evidence administered during the criminal prosecution and uncontested by the parties is not re-administered during the judicial investigation", being presented only in the contradictory debate of the parties and considered by the court at the deliberation. However, if the court deems it necessary for a fair hearing, it may, of its own motion, re-administer such evidence or order new evidence to be procured.

Also, the principle of immediacy is also limited by the abbreviated procedure of the recognition of guilt, provided by art. 374 Criminal Procedure Code, according to which the defendant may request that the trial be conducted only on the basis of the evidence administered during the criminal prosecution phase, since it fully recognizes the facts recorded in the court referral, does not contest the evidence administered and does not request new evidence. And in this situation, the court may order the administration of evidence if it considers that the evidence already administered does not show that the facts of the defendant are clearly established and proven, or insufficient data on the individual is available to allow the imposition of a penalty.

Recognized as unconstitutional by the legal provisions governing this procedure, the Constitutional Court held that "374 para. (7) of the Code of Criminal Procedure, will take them into consideration in the trial, cannot be considered as affecting the right to defense or the right to a fair trial of the defendant, since, according to art. 103 para. (1) of the Criminal Procedure Code, the evidence does not have a pre-established value by law, being judged by the judicial bodies following the evaluation of all the evidence administered". At the same time, the practice of the European Court of Human Rights has crystallized the idea that the use of evidence obtained during the criminal instruction phase does not breach article 6 para (3) letter (d) of the Convention for the Protection of Human Rights and Fundamental Freedoms as long as the rights of the defendant have been respected (*Saidi vs. France* judgment of September 20, 1993, paragraphs 43 and 44 and *Case C- Bracci v. Italy* judgment of October 13, 2005, paragraphs 51 and 54). Therefore, the use of evidence as it was handled in the criminal investigation phase cannot be taken into account if the accused had not been able, at any stage of the previous proceedings, to challenge it. Therefore, the Court held that it cannot be argued that the criticized legal provisions violate the right to a fair trial, even though the defendant, although having the opportunity, did not contest the merits of such evidence" (*Constitutional Court Decision 214/2017*, published in Official Gazette No. 536 of July 7, 2017).

From the analysis of article 351 of the Criminal Procedure Code, two aspects arise: the first is the fact that the evidence administered during the criminal prosecution and mentioned in the indictment must be verified during the judicial investigation by the court, directly, orally, contradictorily and in a public hearing, throughout the phase of the trial, both during the substantive and appeal proceedings. The second aspect, which is to be interpreted, is that the judicial investigation must take place before the same

court, that is to say, before the panel of judges, which will proceed to the debates and subsequently to the judgment. The Criminal Procedure Code establishes in article 392 para. (1), an exception, stating that "only the members of the judicial panel where the debate took place shall take part in the deliberation", which determines the continuity of the panel of judges at the stage of the debates and the judgment of the case.

The continuity of the panel of judges is also emphasized by the provisions of Law no. 304/2004 regarding the judicial organization, as subsequently modified and amended, which in article 11 states that "the trial is conducted in accordance with the principles of random distribution of files and continuity, except in cases where the judge cannot participate in the trial for objective reasons".

4. Penalty Established by the ECHR for Breaching the Principles of Contradictory and Immediacy by Changing the Composition of the Panel of Judges

Unlike the Romanian Criminal Procedure Code, which, as I have just stated, requires the continuity of the panel of judges only at the stage of the debate, the judges in front of whom the debates took place, must also be those who pronounce the judgment of the case, the European Court of Human Rights, through its practice, has broadened the purpose of the principle of immediacy.

Thus, the Court has over time analyzed several cases in which the composition of the panel of judges, either in the first instance or in the appeal, has changed, so that the judges in front of whom all or part of the evidence was handled have not been those who had ruled on the merits of the case, in some of them stating that there has been a violation of article 6 of the Convention as regards the fairness of the proceedings and the defendant's right of defense by failing to observe the principle of immediacy.

The Court has thus stated, by analyzing both cases in which the panel of judges has been entirely changed (either the sole judge, or the collegiate judicial panel with 2 or more professional judges and/or non-professional judges together with professional judges), or just one/some of the members of the judicial panel.

One of the most representative cases in this respect is the *Cutean* case against Romania (ECHR *Cutean v. Romania*, judgment of December 2, 2014, paragraphs 60-73), whereby our country was sentenced to bear in mind that the principle of immediacy is an important guarantee in the criminal proceedings where the court's observations on the behavior and credibility of a witness can have important consequences for the defendant (...). The Court considered that, given the importance of the criminal proceeding, those considerations apply also to the direct hearing of the defendant by the judge who ultimately reaches a decision on the case.

It reminded the Court that, according to the principle of immediacy, in a criminal proceeding the decision must be taken by the judges who were present in the proceedings and in the evidence administration process (see *Mellors vs. The United Kingdom* (dec.), No. 57.836 / 00, January 30, 2003). However, it cannot be regarded as a prohibition on changing the composition of the panel of judges in a trial (*P.K. v. Finland, ibidem*). Significant administrative or procedural factors that can make it impossible for a judge to continue to participate in a trial may arise. Steps can also be taken to ensure that judges who continue to hear the case properly understand the evidence and

arguments, for example, by ensuring the written availability of the statements if the credibility of the witnesses is not questioned, or by listening to relevant arguments or important witnesses before the newly-formed judicial panel.

The change of panel of judges of the court of first instance and the subsequent failure of the appeal courts to hear the applicant and witnesses is equivalent to depriving the applicant of a fair trial, the Court recalling that, in accordance with the principle of immediacy, "in a criminal case the judgment must be handed down by judges who have been present throughout the proceedings and the administration of evidence. The availability of transcripts of declarations cannot offset the effect on the principle of the immediacy of evidence."

Romania has also been convicted in a more recent case by the European Court for breach of the principle of immediacy. Thus, in the case of *Beraru vs. Romania* (ECHR judgment of March 18, 2014, paragraphs 64-68), it was noted that "an important aspect of a fair criminal trial is the defendant's ability to be confronted with the witnesses in the presence of the judge who ultimately makes a decision on the case. The principle of immediacy is an important safeguard in the criminal proceedings where court observations on the behavior and credibility of a witness can have important consequences for the defendant. Therefore, a change in the composition of the court after hearing an important witness should normally lead to a new hearing of the witness. "

However, the practice of the European Court of Human Rights is different if only one of the members of the panel of judges, before which the evidence is wholly or only partially handled, for example, the defendant or an important witness, is replaced until the trial is completed.

Thus, in *P.K. vs. Finland* (ECHR, *P.K. vs. Finland*, the inadmissibility decision of July 9, 2002), the Court held that there are no indications of a violation of article 6 of the Convention when the composition of a collegiate judicial panel consisting of a professional judge and three assistant judges is changed by replacing the professional judge as long as the other three assistant judges remained the same during the trial phase and although the solution of the case was partly based on the statement of a witness heard prior to the modification of the composition of the panel of judges, its credibility and its statement was not challenged before the new judicial panel, which had the record and transcription of that witness's statement, all the more so since it was not the only test on which the pronounced solution was based.

Similarly, the European Court also considered *Graviano vs. Italy* (ECHR, *Graviano vs. Italy*, judgment of May 10, 2005), although during the first instance trial, one of the professional judges of the judicial panel (consisting of 2 professional judges and 6 jurors) was replaced by another professional judge, and the new panel of judges dismissed the defendant's request for re-administration of the testimony, stating that there were written statements made by the witnesses in the case file. The Court has pointed out that it is not whenever a change in the composition of the panel of judges takes place that the procedure must be resumed by re-administering all the evidence before the new panel in order not to breach the fairness of the proceedings. The Court held that the change of one of the eight judges who made up the judicial panel did not deprive

the applicant of his right to examine the witnesses concerned because they were heard at a public hearing in the presence of the applicant and his lawyer had the opportunity to ask them the questions they considered useful for defense. Moreover, as the court stated in its judgments of November 3, 1998 and March 18, 1999, the applicant did not indicate how the re-examination of the witnesses she was requesting could have provided new and relevant evidence. On the other hand, although one of the eight judges was replaced, the other seven judges could assist in producing all the evidence. In those circumstances, the fact that the substitute judge had the opportunity to read the statements made to the witnesses in question (A, B and Others) compensated for his absence during the hearings at which the witnesses in question had been heard.”

5. Implications of the European Court of Human Rights decisions on breaching the right to a fair trial by nonobservance of the principles of contradictory and immediacy in the case law in our country

It is clear from the presentation of the legal provisions of the Romanian Criminal Procedure Code and from the case law of the European Court of Human Rights that our legislation has not been aligned with the European case law in this area. The national standard in the field is lower than the European one, so it offers less protection to the defendant in the criminal proceedings.

This has led to the necessity of an interpretation of the European case law by national courts, which has raised some aspects of non-uniform practice, in the attempt of judges not to violate the right to a fair trial provided by article 6 of the Convention, to the defendants, with the changes made in the composition of the panels of judges.

In a first opinion, ECHR decisions have been extensively interpreted, and it is appreciated that any change in the composition of the panel of judges will entail a readjustment of the evidence already administered. The courts that have embraced this point of view have considered that regardless of the defendants' procedural position, whether or not they wish to read this evidence, it is necessary, considering the Cutean case against Romania and Beraru against Romania, to readmit evidence, re-call witnesses or request new statements from the defendants (in this case, with respect for their right to non-incrimination, including the component of not giving statements).

On the same line, there were courts which, invoking the principle of immediacy with reference to the continuity of the panel of judges, in the absence of the main judge or one of the main judges in the collegiate judicial panel, not only did not hear the defendants or the other party or the witnesses, but they did not even discuss issues related to probation - rendering expert opinions, making demands on supplementary evidence by hearing witnesses, etc. It was appreciated that only the main judge should rule on such claims, as he could best appreciate whether the evidence in question is necessary or useful for the case, which is the one that will ultimately analyze them within the judgment of the case.

We appreciate that such an approach is excessive and only leads to delays in resolving the case, with implications including an impact on the reasonable time of the trial. It is obvious that, in doing so, courts have risen more than the European Court's standard of protection for defendants. As far as the second approach is concerned, we consider it

unnecessary, and the main judge may at any time return to the approved evidence if he considers that they are only necessary for the case to be dealt with.

We consider, however, that it is not admissible for a judge to give a settlement on the merits of the case in the absence of any evidence, the whole court inquiry being made by the panel of judges in another composition.

In a second opinion, the courts only questioned the need for the readministration of evidence and followed such a procedure only if the defendants, in particular, indicated that they were requesting the witnesses to be re-examined or that they wanted to make statements again in the new composition. If it was stated that the witnesses' testimonies were not challenged and their re-examination was not requested, the courts did not order the readministration of the evidence, continuing the judicial investigation with the examination of the other witnesses and/or the administration of further evidence. Thus, in cases in which the panel of judges which pronounced the judgment in question participated in several hearings after the change in the composition of the judicial panel, including when the parties brought arguments on the merits of the case, and proceeded personally to the administration of evidence or examination of witnesses and the discussion of expert opinions, without the representatives of the defendants ever requesting the re-administration of evidence or challenging in any way the lawfulness of the change of the panel of judges, the violation of the right to a fair trial for the defendants, by breaching the immediacy principle, cannot be invoked.

We appreciate that this second opinion embraced by the national courts is closer to the spirit of the European Convention and the practice of the Court. In this respect, the doctrine also postulated that "there is no imperative of (re) administering all the evidence of the case before the summoned party to pronounce the solution (...) determining whether the fundamental guarantee of the right to defense had been respected, including the possibility for the defendant to contest the evidence. In the absence of the defendant's willingness to do so, if he had had the appropriate and sufficient opportunity to challenge the claim and request its recovery or to participate in the administration of evidence, no violation of the right to a fair trial can be invoked (Pușcașu, V.V., 2017).

In this respect, we consider that the statements of the Constitutional Court in the previously quoted Decision No. 214/2017 imply that "the settlement of a criminal case on the basis of non-re-administered evidence by the court before the accused, is not in itself incompatible with the provisions of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the right to a fair trial, since in the criminal proceedings the requirement that the evidence always be produced before the accused person is not absolute, with particular exceptions, while respecting the right of the accused person to have had an adequate and sufficient opportunity to challenge the case and request that it be re-administered or to participate in the administration of evidence. "

Moreover, where the matter is referred to the Court of first instance, including the European Court of Justice, it has been held that it is possible to remedy the appeal, for example by hearing the defendant by the court of appeal, if the judge making the decision had not heard it directly.

6. Final Considerations

The European Court of Human Rights, by pronouncing the two cases against Romania, namely the *Cutea vs. Romania* case and the *Beraru vs. Romania* case, whereby our country was convicted for breaching the right to a fair trial established by article 6 of the European Convention on Human Rights as a result of breaching the immediacy principle, has raised a number of problems in national practice, many courts preferring to interpret the Court's considerations thoroughly, precisely in order not to be accused of breaching the procedural rights of defendants.

The main issue is whether or not the whole or a part of the probationary case is considered to be important (administered by the court in another composition), for observance of the principles of contradictory and immediacy, if the composition of the panel of judges has undergone changes either with respect to all of the members of the judicial panel or the sole judge or only a part of the members of the collegiate panel.

Although the European Court did not impose a ban on changing the composition of the judicial panel, it has in its practice stated that the essential evidence of the prosecution, the statements of witnesses whose credibility is challenged by the defense or the statements of the defendants are administered directly by the panel of judges of the first court or, in certain circumstances, by the appeal court.

We consider that the situation is different, on the one hand, in the case of the single judge and, on the other hand, in the case of collegiate panels, in the first situation a closer analysis must be conducted regarding the re-administration of evidence or, at least, of the main evidence (hearing defendants and witnesses of the prosecution).

In the event that the defendants expressly state that they do not contest the evidence administered by the panel of judges in the previous composition or provide no real motivation to challenge the evidence already administered, we consider that the court is not required to *ex officio* dispose of their re-administration, such an approach may lead to a breach of the reasonable time principle of solving a law case.

References

- Ghigheci, C. (2014). *Principles of the criminal trial in the New Criminal Procedure Code*. Bucharest: Universul Juridic.
- Predescu, O. & Udroi, M. (2007). *European Convention on Human Rights and Romanian criminal procedure law*. Bucharest: C.H.Beck.
- Puşcaşu, V.V. (2017). *Unele probleme privind aplicarea principiului nemijlocirii în cazul modificării compunerii completului de judecată în materie penală* [Some problems regarding the application of the principle of immediacy in case of changing the panel of judges in criminal matters]. <https://www.juridice.ro/535746>. Accessed 09.09.2018.
- Udroi, M. (2018). *Synth and multiple choise questions. Criminal procedure. Special part, 5th edition*. Bucharest: C.H. Beck.