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REPORT

"Fair Trial under Article 6 of the European Convention on Human Rights"

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The notion of fair trial is strictly connected to the principle of the Rule of Law or the Rechtstaats-pinzip (principle of the State of Law). The term of Fair Trial is under steady development (especially by the Europen Court of Human Rights) and no real definition is available; there is nevertheless a common understanding of what the right to Fair Trial does comprise.

Among the three categories of trials (criminal, civil and administrative) the impact of the criminal procedures is the heaviest because it often touches personal freedom and sometimes health and life. Nevertheless the right to a Fair Trial applies as well to criminal and administrative procedures than to civil prodedures.

The sources of the right to a fair trial are found in most modern constitutions and the relevant national legislation such as the Codes of Procedure and – on international level – in the declaration of Human Rights and in the European Convention on Human Rights. If, e.g. we take the Liechtenstein Constitution, the Right to a Fair Trial is not expressively mentioned. However, the State's Court, acting as Constitutional Court, takes the Right to a Fair Trial basically on one hand from the Right to equal treatment before law and on the other hand from the list of Human Rights, anchored in the Constitution. The details then have been set out in the law; specifically in the procedures (criminal, administrative and civil).

This presentation focusses on some general aspect of the Fair Trial under Art 6 of the European Convention on Human Rights.

Before entering into the matter it should be made clear that article 6 of the European Convention on Human Rights and the national rules of the various States do not concern the issue of a trial; but those rules deal with the guarantees of how he process shall be celebrated and under which conditions.

ARTICLE 6

The minimum list contained in Article 6 of the European Convention on Human Rights concerns all procedures, criminal, administrative and civil and guarantees mainly the right to the

- Fairness of Hearing
- Publicity of Hearing
- Reasonable length
- Independence and Impartiality of the Tribunal
- Establishment of the Tribunal by law
- Publicity by press of the Judgment
- Presumption of Innocence
- Minimal rights for everyone charged with a criminal offence concerning
  - information,
  - language and translation
  - defence, and inherent rights thereto.

PUBLIC AND FAIR HEARING

The public and fair hearing (not to be confused with the right to be heared) implicates the right to be **present** at a public hearing. In some extreme criminal cases this might be of crucial importance, e.g. to be able to obtain a visa in order to assist in person at the criminal trial where the individual is accused. The fairness of the hearing comprises the equality of arms, at least formally and at the main hearing. It relates to the hearing of witnesses and the possibility to file

evidence, the right to reply etc. and, in civil matters the fact that both parties, the defendent and the plaintiff shall be treated equally.

Such public hearings are one of the main guarantees for the Fairness of the trial because procedures where the public (i.e. also the independent press) has access do not leave much space for an arbitrary conduct of the trial. Therefor this guarantee is of outstanding importance in criminal matters. This remains valid even if there is a series of exceptions which permit (per se) to ban the public. Such exceptions may be rooted in the interest of morals, public order or national security, protection of the interests of juveniles or the private life or, under the general clause, where the publicity would prejudice the interests of justice but to the extent strictly necessary in the opinion of the court.

The Judgment, anyhow, has to be pronounced in public.

THE PRESUMPTION OF INNOCENCE AND THE OTHER RIGHTS IN CRIMINAL PROCEDURES

The Presumption of innocence is the strict order to all exponents of the State to respect the individual in his or her status before and during the trial as a n o n condemned person. This principle is specifically valid for the press, where the damage by treating somebody as guilty before having been condemned by a court may create irreparable dammage. The principle itself is directly rooted in the principles of the Rule of law or the principles of the Rechtstaat.

As for the other rights of the defence, they are of primary importance for the defence, starting with the right to know exactly (and in an understandable language) what is the content of the accusation, the right to interview witnesses and to have witnesses at discharge heared in the same way than those at charge as well as others having to do with the equality of arms.

REASONABLE LENGTH

In Civil and **administrative** matters the length of civil procedures may come close to or constitute a **denial** of Justice. But the time factor in a trial (including the pre-trial period) has a very heavy impact in criminal matters, where often the individual is deprived of physical liberty. Therefor a speedy instruction and trial are fondamental in order to preserve the human right to personal freedom.

However: Not all overlengthy procedures are to be considered an undue delay in the sense of violation of the right to a fair trial. In fact the right to a fair trial with respect to the speedyness of the procedures is aimed to **protect** the individual from abuses of the State's power and to give the individuals the possibility to come to an end of a juridical uncertainty.

REASONS OF DELAYS

The reasons for a delay may be with the Courts and other judicial exponents of the States (including Prosecutors) or, on the contrary, they may be produced by the fact that individuals (and their attorneys) implicated in the procedure are taking full advantage of all legally foreseen possibilities (which would include all possible appeals and the extension to all possible evidences such as extensive briefs and counterbriefs, extensive claims for expert's opinions and hearings and the like), which, at the very end, will create a much longer procedure than the average procedure should normally be. Usually those reasons which do not lay with the court but are due to the envolved parties exercising their legitimate rights are recognised to be not undue delays.

Other reasons of delay may lay in the fact that the matter itself is very complex and the complexity of the case has been recognised by the European Court for Human Rights as a reason to consider the length not to be an undue delay, even if the reasons lay with the Court

and less with the parties involved.

Reasons of Delays laying within the Judiciary

The administration of Justice follows – within the general principles of the instruction of a case (criminal, civil and administrative) – a logical way until a final judgment which is almost universal in its ground elements. If a case suffers undue delays due to the Judiciary, it is normally the incactivity of the court which is the cause and this may be due to several factors such as:

(a) In a procedure followed by a single Judge up to a certain stage the **Judge** may **change** for reasons of death, health or other reasons. Often the case has to start from the beginning and the change of Judge may produce delays.
(b) In other cases the court will have to depend on **files pending** before other courts or will have to **wait** for the issue of other cases which themselves are lenghty.
(c) Other cases may simply be retarded due to the **overload** of work of the courts.
(d) Some delays however are simply due to **lazyness** of Judges.

Sometimes it might become difficult to individualise a concrete reason because several causes play together. This renders more difficult the analysis and the finding of possible remedies.

It is clear that the reasons which lay beyond the volonty of the court and may produce delays which are perceived to be undue, are not to be simply taken as given; the courts have the obligation to monitor the case and to remedy by themselves, e.g. if experts do not file their reports; if attorneys are not prensenting briefs in due time; if parties clearly act under dilatory tactics; if means of evidence is presented unproperly, i.e. unrelated to what are the facts to be underlayed by evidence, etc.

CALCULATION
As for the calculation of the duration of a trial, in civil and administrative matters it becomes rather simple because it starts with the entering of the claim with the court and ends with the final judgment.

In criminal matters things are less simple. In criminal matters the goods to be protected are life and health besides the security of law. Therefor, and because privation of liberty often starts with the instruction of the case, the time of instruction, i.e. the pre-trial phase, has to be added to the time of trial properly spoken. The laps of time of course then ends with a final judgment as for the other types of procedure.

It is not easy to determine effectively if a procedure is violating the right to a fair trial by overlength. But, and without entering into the complex jurisprudence of the European Court of Human Rights, trial times of 15 or more years for a first degree judgment which have been – but still are – not unfrequent in Euope, are considered beyond reasonability. It is clear that in almost all cases these overlengthy durations have no reason at all to be and are to be seen as **denial** of justice.

When in civil matters a debtor may simply refuse to pay a bill because he knows that the judicial procedure to be introduced by the creditor will take more than 10 years and that a pre-trial negotiation with the creditor might procure a substantial discount, then something is wrong with the whole juridical system and the situation becomes incacceptable. Such systems do not guarantee any more the right to a fair trial and remedy must be sought.

At first it is to the courts to try to find remedies within their own system of controll. And then it will be to the Governments to monitor and instaure the fair administration of Justice and to repair failures and damages. This however is only possible if the will thereto exists and the means, financially and in terms of human resources is given to the Judiciary. Then it needs a

strong publicity of the situation and the remedies undertaken; this can be achieved with the aid of independent press.

THE INDEPENDENCE AND IMPARTIALITY OF THE TRIBUNAL

The other key point to a fair trial is the **independence** and **impartiality** of the tribunals.
The Judiciary power plays a key role in the control of the respect of the laws.

Judges are acting to repress breaches of law in criminal matters; in the civil courts individuals are looking for justice mostly against other individuals, and, before the administrative courts the individuals seek their rights against the power of the State; mostly, if not exclusively, against the Government and its administration; this part of competences may also comprise military and other specific courts according to the individual constitutions of a specific nation. Finally, on a constitutional level, justice is rendered by controlling and guaranteeing the application of the constitution and the international conventions.

It is clear that the individual needs to be strongly protected in presence of such a huge bunch of power and the reason why the independence of the tribunal (or, in general terms, the judiciary) at all levels is a fundamental condition to a fair trial. Furtheron the independence of the Judiciary as a constitutional principle which has been generally accepted since a long time in constitutions of countries of all types of governmental systems. Often, but not necessaryly, the independence of the Judiciary is also accompanied by a great autonomy.

However, it has to be stated that there is no absolute independence of nobody, nowhere. Each person somehow depends on others and is embedded in the social, political and cultural environment. But the independence, as used in the present context as part of an element for a fair trial, has to be understood as **absence of interferences or pressures** of direct or indirect nature. Therefor we mean a functional independence.

The independence of the Judiciary is in fact a crucial necessity for the Trust and confidence of the citizens and the protection of their individual rights.

Equality of treatment - Impartiality

All men are equal before the law and shall be treated equally by the Judge.

It becomes evident that the simple fact to know that, if you are right, you may obtain Justice and, if you are wrong, you will not obtain it, is fundamental. It is an aspect of the equality of treatment and the **impartiality of the tribunals**; equal facts have to be treated equally and unequal facts unequally.

The principle of the equality before the law brings you also the certainty that everybody submitted to the same law, including the Judge himself, will be treated the same way than everybody else.

But the principle of equality of treatement can only be achieved by an impartial and thus indpendent Judicial and a Judiciary which is not independent will not be able to respect the equality of treatment of the individual before the law and puts at risk permanently the right to a fair trial.

THREATS TO THE INDEPENDENCE OF JUDICIARY AND IMPARTIALITY UNDER ART 6 OF THE CONVENTION ON HUMAN RIGHTS

Under Art 6 of the European Convention on Human Rights the independence of the Court means the fact that the Judge is free of external influence, whilst the impartiality guarantees that the Judge, in his interior, is free to decide neutrally.

The requirement of independence nees to be fixed in the Constitution or at least in the laws. Besides this it is primordial that the impression of independence is safeguarded in order to increase the trust in the Courts.

Furtheron the European Court of Human Rights requires inter alia that the courts must be ordinary courts, instored by law and not only named for special occasions (exceptional courts and the like).
The members of the court must have the status of Judges named for a fix time.

Now, the independence of Justice can be threatened by a series of factors such as the nomination procedure of Judges.

The procedure can be critical if one Judge named by one groupment has to decide on a case which concerns this groupment or political party. Whenever the procedure of nomination of Judges is politically dominated (even if per se admitted), the selection of candidates becomes the first step of threat to the independence of Judges.

It has to be clearly stated that the nomination process, in almost all democracies, rises questions and critics which – to my knowledge – cannot be resolved definitively; since it is necessary that the nomination body receives proposals, someone or some groupments, often political parties, are required to make propositions. The more public and the more transparent such procedures are, the more it becomes difficult to hide pressures and undue influence. In a working democracy pressures becoming public, for example via the press, normally lead to a reaction of institutions or the population in order to restore the supremacy of law and the independence. The protection mechanisms of publicity is usually rather efficient.

The dismissal of Judges must be – by law or in the Constitution – strictly limited and be possible only on an exceptional basis.

THE IMPARTIALITY

The requirement of impartiality, on a very subjective level, should protect the individual from a Judge who – in his personal interior – hides feelings in favour or against one party, which would – under normal circumstances – not lead to the concrete judgment. Therfor even the mere appearance of lack of impartiality should carefully be avoided. Of course the first requirement in that sens is that the Judge be not a parent or spouse to one of the parties. National procedural codes mention further on e.g. hostility or friendship against or towards one of the parties, economical dependence, personal interest in a case.

Sometimes however, the impartiality of a Judge may be challenged due to his behaviour outside of the concrete case; this could be the fact if the person has acted either in pre-trial phase (specifically for criminal matters) or in a lower degree. This could question his impartiality.

VIOLATION OF THE RIGHT TO A FAIR TRIAL (ART. 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS)

The question is: what happens if the European Court of Human Rights finds a breach of Article 6 of the Convention, i.e. a violation of the right to a fair trial.

One of the major problems for individuals having obtained a favorable judgment by the European Court of Human Rights is how to effectively remedy to such violation in general and violations of Article 6 of the Convention on Human Rights specifically, or, in other words: how can the individual get the enforcement of a judgment stating that the right to a fair trial has been violated.

Article 6 of the Convention does not itself foresee any remedy, sanction or the like, if the ECHR should find a breach to the right to a fair trial.

Under article 46 §1 of the Convention the States part to the Convention undertake to abide by the final judgment of the Court in any case to which they are parties. And more concretely, article 13 of the Convention stating that "*everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*", obliges the States to really provide for effective remedies.

It is under Article 41 that the Court may, if it finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, afford just satisfaction to the injured party.

The judgment of the ECHR has no direct influence on the internal legal system of the concerned State. Therefor the judgment of the Court does not cancel the national act. The juridical nature of the obligation to repair the violation and to avoid future violations is rooted in international law and the individual is not intitled to claim directly for repair. Therefor, whenever possible, it should be sought for the *restitutio in integrum*, which, in the great lot of the cases of unreasonable delay will bring no efficient remedy, but could be helpful in many other cases.

Ther respect and the development of Human Rights in general and the right to a fair trial specifically stays with the various States who, acting in community, may better be able to follow a common path.

However: The reparation of the damage allowed by the Court will only be a monetary help and is – per se – not appropriate to give full satisfaction. In any case, if still possible, the concrete reparation is preferable to the award of pecuniary compensation.