Right to a Public Hearing According to Art 6 ECHR and Art 47 of the Charter of Fundamental Rights of the EU: Constitutional Perspectives

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1. Introduction

The terms 'open justice', just as the more general terms of 'publicity', 'transparency' or 'accountability', are already persuasive in themselves in the sense that they constitute desired objectives. After all, it would be difficult to imagine not being in favour of 'open justice', 'publicity', 'transparency' or 'accountability'.

My analysis is devoted to constitutional perspectives under Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and under Article 47 of the Charter of Fundamental Rights of the European Union (CFR or the Charter) on the right to a public hearing. I shall examine the scope and content of this right under those respective instruments.

2. Background

Before turning to Article 6 ECHR and Article 47 CFR, however, it is helpful to look at these provisions in the wider picture of their respective legal orders. I shall start with the ECHR and then turn to the legal order of the EU.

The Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, together with its successive protocols, is a human-rights catalogue under international law which is directed at the 47 Member States of the Council of Europe. It constitutes the flagship of that organisation and is undoubtedly the most prominent and operational convention of the more than 200 conventions elaborated under the auspices of the Council of Europe. Its strength lies not least in the fact that it is guarded and protected by the European Court of Human Rights which is, as we all know, a judicial monitoring mechanism which

can be triggered – and this is quite extraordinary in public international law – by way of an individual complaint.

In this Convention, Article 6 occupies a prominent – if not *the* prominent – place. Pursuant to the first paragraph of that provision, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and *public* hearing within a reasonable time by an independent and impartial tribunal established by law.[1] As we shall see in more detail below, the European Court of Human Rights has given clear contours to that provision by way of a rich case-law.

As is well known, the EU constitutes a Union of law, based on the Rule of Law, a *Rechtsgemeinschaft* in the terminology of the first Commission President, Walter Hallstein. This means that all its actions are founded on law and a legal basis and that they are reviewable by an independent judicial institution. As for that institution, Article 19(1) of the Treaty on the European Union (TEU) entrusts the Court of Justice to 'ensure that in the interpretation and application of the Treaties the law is observed'. That same provision furthermore obliges the EU Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[2] Together with Article 47 of the Charter, this provision codifies the principle of effective legal protection (or right to an effective judicial remedy), which is a general principle of EU law. That principle, in turn, comprises the principle of access to justice which, as we shall see in more detail, *inter alia*, entails the right to a public hearing.

Article 47 CFR is, moreover, part of an extensive fundamental-rights catalogue which applies by virtue of Article 51 of the Charter, as interpreted by the Court of Justice, within the scope of application of EU law, be it exercised by the EU institutions or by the Member States.

1 The same provision goes on to state that '[j]udgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

2 The Court of Justice gave a remarkably far-reaching meaning to this provision in its recent decision in Case C-64/16 *Associação Sindical dos Juízes Portugueses* (27 February 2018) EU:C:2018:117.

The right to an effective judicial remedy is a general principle of EU law that exists within the context of the multi-level constitutional system of the EU.[3]

Article 47 CFR, entitled 'Right to an effective remedy and to a fair trial', reads as follows:

(1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
(2) Everyone is entitled to a fair and *public hearing* within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
(3) Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

It is already apparent from the wording of this provision that Article 47 CFR contains a whole bundle of procedural rights ranging from an all-encompassing general principle in the form of the right to an effective remedy before a tribunal to technical matters such as legal aid. One of the rights of this bundle is the claim to a public hearing.

The relationship between Article 6 ECHR and Article 47 CFR is the following: the part of Article 47 CFR which is the subject our interest, that is to say, its second paragraph, is based on Article 6 ECHR. Indeed, according to the official non-binding but nevertheless instructive Explanations relating to the Charter, the first paragraph of Article 47 CFR is based on Article 13 ECHR,[4] while the second paragraph of Article 47 CFR corresponds to Article 6(1) ECHR.[5]

As a consequence, the case-law developed by the European Court of Human Rights with respect to Article 6(1) ECHR can be transposed to Article 47(2) CFR. This is, moreover, confirmed by Article 52(3) CFR,

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3 See Herwig CH Hoffmann, 'Article 47' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (CH Beck 2014) paras 47, 48.

4 According to which '[e]veryone 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.'

5 See Explanations relating to the Charter of Fundamental Rights (2007) OJ C 303/17, 30, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007X1214%2801%29> accessed 03 November 2018.

according to which in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Moreover, the standard afforded by Article 6(1) ECHR cannot be underscored in Article 47(2) CFR, as Article 52(3) CFR goes on to state that that article 'shall not prevent Union law providing more extensive protection'.

3. *Meaning and Scope of the Right to a Public Hearing*

The rationale of this right has been described by the European Court of Human Rights in the *Axen* case in the following manner:

> The public character of proceedings ... protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.[6]

Publicity is thus seen as one guarantee of the fairness of trial.[7] Again, in the words of the European Court of Human Rights, the object pursued by the requirement to a public hearing under Article 6(1) ECHR is 'to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial'.[8]

In order to determine whether there has been a public hearing, the European Court of Human Rights considers the proceedings as a whole. Thus, for instance, the absence of a public hearing on appeal or cassation raises an issue under Article 6(1) ECHR only if the superior court is 'determining' a particular issue.

This is not the case in legal systems where the appeal or cassation court carries out a supervisory role, in the sense that decisions of earlier hearings

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6 See *Axen v Germany* App no 8273/78 (ECHR, 8 December 1983) para 25; *Malhous v The Czech Republic* App no 33071/96 (ECHR, 12 July 2001) para 55. See also Wolfgang Peukert, 'Artikel 6' in Jochen Abr Frowein, Wolfgang Peukert, *Europäische Menschenrechtskonvention. EMRK-Kommentar* (3rd edn, Engel 2009) para 187.

7 Robin C A White, Clare Ovey, *The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 270.

8 See *Pretto and others v Italy* App no 7984/77 (ECHR, 8 December 1983) para 27.

can be overturned only on points of law, requiring a further hearing in the court below.

Incidentally, there are two hearing aspects enshrined in the right to a public hearing: whether the proceedings are open to the public and whether there is an oral hearing at which the applicant may address the court.[9] There is, therefore, not only the right to a public hearing but also to an oral hearing. The Strasbourg Court has also confirmed this.[10] The latter right can also be inferred from the wording of Articles 6 ECHR and 47 CFR, as those provisions refer to a 'hearing.'

4. No Absolute Nature of the Right to a Public Hearing

At the same time, one has to emphasise that the right to a public hearing is not absolute.

First, a party can waive that right of its own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. This is what the Court of Justice held in *Melloni*.[11]

Secondly, Article 6(1) ECHR contains a list of limitations to the right to a public hearing on grounds of public policy (morals or public order), national security, protection of juveniles, privacy or, more generally, where strictly necessary in the interests of justice. However, these exceptions, like all exceptions to general rules, are narrowly construed.

Though this list is not expressly included in Article 47(2) CFR, these limitations also apply in the context of that provision, by virtue of Article 52(1) CFR which provides for the general possibility of limitations and by virtue of Article 52(3) CFR,[12] to which I referred above already, and according to which the meaning and scope of the ECHR and Charter rights are the same when such rights correspond. The scope of a right obviously

9 See Karen Reid, *A practitioner's guide to the European Convention on Human Rights* (4th edn, Sweet & Maxwell 2012) point II-167.

10 See *Allan Jacobsen v Sweden* App no 16970/90 (ECHR, 19 February 1998) para 46.

11 See Case C-399/11, EU:C:2013:107, para 49.

12 See Albin Eser, 'Titel VI, Justizielle Rechte: Artikel 47 bis 50' in Jürgen Meyer, *Charta der Grundrechte der Europäischen Union* (3rd edn, Nomos 2011) point 35. See moreover Peukert (n 6) Artikel 6, point 187.

includes the limitations of a right. The Court of Justice takes the same approach.[13]

The question has often arisen as to the conditions under which a public hearing can be disposed of. Here, the *Riepan* judgment of the European Court of Human Rights is instructive.[14] Mr Riepan, who was serving a prison term following a previous conviction threatened a prison warder, on account of which criminal proceedings were instituted against him. The Steyr regional court (*Landesgericht*) decided to hold the hearing at the prison. It set a date for the trial and issued a hearing list (*Verhandlungsspiegel*) containing, *inter alia*, the date and place of the hearing as well as the name of the prison where the hearing was to be held. Subsequently, the regional court, sitting with a single judge, held a hearing in the closed area of the prison. According to the minutes of the hearing, it was public. Following the hearing, the regional court convicted the applicant. An appeal was held before the Linz Court of Appeal (*Oberlandesgericht*) in a public hearing.

The European Court of Human Rights held that although publicity of the hearing was not formally excluded, hindrance in fact can contravene the ECHR just like a legal impediment.[15] It went on to state that a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place and if this place is easily accessible to the public. When a trial is held in a prison, the State is under an obligation to take compensatory measures to ensure that the public and media are duly informed about the place of the hearing and are granted effective access.[16] Such compensatory measures had not been taken in this case by Austria.[17]

Moreover, the European Court of Human Rights did not see any room for a possible justification of security reasons under Article 6(1).

Finally, this Court examined whether the lack of publicity at first instance had been remedied by the public appeal hearing. It found that this was not the case. All the evidence should, in principle, be produced in the presence of the accused at a public hearing with a view to adversarial

13 See Case C-682/13 P *Andechser Molkerei Scheitz v Commission* not published (2015), EU:C:2015:356 paras 43ff.

14 *Riepan v Austria* App no 35115/97 (ECHR, 14 February 2001).

15 Ibid para 28. This constitutes in fact consistent case law of the Strasbourg Court, see eg *Airey v Ireland* App no 6289/73 (ECHR, 9 October 1979) para 25.

16 *Riepan v Austria* (n 14) para 29.

17 Ibid paras 30 and 31.

argument.[18] Given the detrimental effects that the lack of a public hearing before the trial court could have on the fairness of the proceedings, the absence of publicity could not be remedied by anything other than a complete re-hearing before the appellate court – which had not occurred in the case at issue.[19]

Furthermore, the Strasbourg Court explained that an oral hearing may not be required where there are no issues of credibility or contested facts which would necessitate the oral presentation of evidence.[20] This Court allows for the possibility to proceed without a hearing when the proceedings are 'exclusively legal or highly technical'.[21] And as a rule of thumb, it is more lenient when it comes to civil proceedings.

Furthermore, the Strasbourg Court clarified that the need to protect professional confidentiality[22] can justify imposing limitations, as can the protection of children.[23]

Regarding the meaning and scope of the right to a public hearing, we can therefore summarise at this stage of our analysis that proceedings without a public hearing constitute a violation of this right. The exceptions to this right are narrowly construed. And it is difficult to remedy a situation in which a public hearing has not taken place.

5. TV in the Courtroom

I should now like to address the meaning of the term 'public' in more detail. Here, I would like to look at the question of TV cameras in the courtroom. It is well known that in some jurisdictions such practice is employed. A very notable example is the European Court of Human Rights which has the practice of filming high-profile cases and placing them online. This allows the interested public to follow cases first hand. However, the majority of jurisdictions do not allow for TV in the courtroom. Certainly, this is the case for the Court of Justice, to which I will turn in more detail below.

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18 Ibid para 40. See also *Barberà, Messegué and Jabardo v Spain*, no 10590/83 (ECHR, 6 December 1988) para 78.

19 *Riepan v Austria* (n 14) paras 40 and 41.

20 See *Jussila v Finland* App no 73053/01 (ECHR, 23 November 2006) para 41ff.

21 See *Koottummel v Austria* App no 49616/06 (ECHR, 10 December 2009) para 19.

22 See *Diennet v France* App no 18160/91 (ECHR, 26 September 1995) para 34.

23 See *B and P v United Kingdom* App no 36337/97 and 35974/97 (ECHR, 24 April 2001) para 37.

Looking at examples on the national level, the German Constitutional Court has a clear stance on this matter. Under the German Courts Constitution Act,

> the hearing before the adjudicating court, including the pronouncement of judgments and rulings, shall be public.[24] Audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content shall be inadmissible.[25]

This provision has been challenged in the context of constitutional complaints alleging an infringement of the fundamental right to broadcast.[26] The two cases at issue were high-profile in that they concerned, respectively, a trial against former members of the East German Politbüro and proceedings about the legality of a crucifix in public buildings – both of these are, incidentally, matters which also came before the Strasbourg Court.

It was alleged that a public hearing includes a 'broadcast and tv-public'. The German Constitutional Court did not agree with such an approach and held the provision in question to be constitutional.[27] In doing so it specifically referred to Article 6 ECHR.[28] That Court held in particular that proceedings take place 'in public, but not for the public'[29] and that the publicity which was protected was that of the public in the courtroom.[30]

In a later case the German Constitutional Court marginally loosened its jurisprudence in the sense that it allowed for TV cameras, in the court-

24 Gerichtsverfassungsgesetz (GVG), available, in English, at: <https://www.gesetze-im-internet.de/englisch_gvg/index.html> accessed 03 November 2018.

25 See § 169 GVG. This provision applies to civil and criminal proceedings, but there are comparable provisions for administrative and specialized jurisdictions (eg financial or social matters).

26 In German: *Rundfunkfreiheit*. This right is a sub-right of the right of freedom of expression under art 5 of the German Basic Law (*Grundgesetz*).

27 Judgment of 24 January 2001, 1BvR 2623/95 and 1 BvR 622/99, available in German at <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2001/01/rs20010124_1bvr262395.html> accessed 03 November 2018.

28 Ibid para 70.

29 Ibid para 72.

30 In German: *Saalöffentlichkeit*.

room, before and after proceedings and during pauses – but not during proceedings themselves.[31]

Under German law, therefore, banning TV cameras from courtrooms during proceedings does not run counter to Article 6 ECHR. To my knowledge, most states go for this option which, I would also submit, is within the confines of the right to a public hearing. I will come back to this in my conclusion.

6. Public Hearings before the Court of Justice

Public hearings at the Court of Justice are an issue of my daily work.

Article 20 of the Statute of the Court of Justice stipulates that the procedure before the Court of Justice consists of two parts: written and oral.[32] It goes on to specify that the

> oral procedure shall consist of the reading of the report presented by a Judge acting as Rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate General, as well as the hearing, if any, of witnesses and experts.

Ergo, a hearing is but a part of the oral procedure and the Opinion of an Advocate General is part also of that oral procedure.

A hearing can, according to Article 76 of the Court's Rules of Procedure,[33] be dispensed of if the Court considers itself sufficiently informed on the basis of the written pleadings or observations lodged during the written procedure.[34] Moreover, that same provision invites the parties to the proceedings and, in the case of a preliminary reference, an interested person to submit a reasoned request for a hearing.[35]

In practice this means that if a party or an interested person submits a reasoned request for a hearing, a hearing will normally take place. And

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31 See Decision of 19 December 2007, 1 BvR 620/07, available in German at <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2007/12/rs20071219_1bvr062007.html> accessed 03 November 2018.

32 Protocol (No 3) on the Statute of the Court of Justice of the European Union (2004) OJ C 310/210.

33 Rules of Procedure of the Court of Justice (2012) OJ C 337/1.

34 All of this on a proposal from the Judge Rapporteur and after hearing the Advocate General.

35 That is to say the Member States, the Commission and the institutions which have adopted the act the validity or interpretation of which is in dispute.

even if no such request is submitted, in many cases the Court will prefer to hold a hearing. As a consequence, only a minority of cases is processed and judged without a hearing.

And yet, the determining criterion for holding a hearing is whether the Court feels the need to be better informed. The Court itself admits this in its Practice directions to parties,[36] adopted on the basis of the Rules of Procedure,[37] where it states that

> [h]aving regard to the importance of the written part of the procedure in cases brought before the Court ... the decisive criterion for holding a hearing is ... the assessment made by the Court itself as to the potential contribution of that hearing to the outcome of the dispute or to determining the answers which it could provide to the questions referred by a court or tribunal of a Member State. A hearing is therefore arranged by the Court whenever it is likely to contribute to a better understanding of the case and the issues raised by it ... .[38]

I must admit that this is the approach I take myself when I propose, together with the Judge Rapporteur of a case, whether or not to hold a hearing before the Court.

Regarding the Court of Justice, I would submit that the situation is more than satisfactory vis-à-vis the principles established by Article 6 ECHR and Article 47 CFR. In particular regarding the preliminary reference procedure, it should not be forgotten that this procedure constitutes a dialogue between judges in which the parties to the main proceedings play a different role than at the national level. Their contribution is first and foremost one of providing information to the court on the legal and factual background at the national level. And in the main proceedings at the national level a sufficient level of publicity is already ensured.

Furthermore, Article 31 of the Statute specifies that the hearing is public unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons. Article 79 of the Rules of Procedure specifies that for serious reasons related, in particular, to the security of the Member States or to the protection of minors, the Court may decide to hear a case *in camera*. This provision has been used in the past in staff matters cases before they came under the jurisdiction of what

36 Practice directions to parties concerning cases brought before the Court (2014) OJ L 31/1 (Practice directions).

37 See art 208, according to which the Court may, by a separate act, adopt practice rules for the implementation of the Rules of Procedure.

38 See Practice directions (n 36) point 45 ('The purpose of the hearing').

is now the General Court. Otherwise, it is resorted to on rare occasions only, as in the case on the *Puszcza Augustowska* (primary forest of Augustów), a case which has, however, been radiated since the Commission decided to end infringement proceedings.[39]

7. *Concluding Remarks*

My conclusion begins with a question on open justice in the context of the need to have TV cameras recording or livestreaming in a courtroom: What are the advantages and disadvantages of such an eventuality?

Everyone is in favour of 'open justice'. There is no doubt that a public hearing contributes to the proper administration of justice. It constitutes a crucial element of the procedure – from the point of view of both the parties and the judges.

The question remains how far such 'transparency' should go. Does the livestreaming of all judicial hearings and the subsequent commenting involving all social media really contribute to the public debate?

Everyone believes in transparency. Nevertheless, it is obvious that at least some judicial activities should be excluded from 'transparency'. In this context I would like to refer to the book of Ivan Krastev, *In Mistrust We Trust*.[40] Even if we do not share the views of the author, we should bear in mind his arguments against full 'transparency'.

His views could be perceived as a blot on the beautiful landscape of transparency. As the conclusion of my analysis I would like to quote two passages from his book:

> In contrast to those advocates who believe that a politics of full disclosure improves the quality of public debate, I think that injections of huge flows of information make public conversation more complicated, shifting the focus away from the moral competence of the citizens to his expertise in one or another area. Contrary to the expectations of the transparency movement that full disclosure of government information will make public discourse more rational and less paranoid, my argument is that a focus on transparency will only fuel conspiracy theories.

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39 Case C-193/07 R *Commission v Poland* not published (2007) EU:C:2007:464.

40 Ivan Krastev, *In Mistrust We Trust: Can Democracy Survive When We Don't Trust Our Leaders?* (TED Publishing 2003).

> The rise of the transparency movement has the potential to remake democratic politics, but we should be sure we are in agreement as to the direction of the change. Is transparency movement capable of restoring trust in democratic institutions, or is it, alternatively, going to make "mistrust" the official idiom of democracy?

I shall leave the readers with these thoughts.