

A Trial to Understand the Concept of Fair Trial*

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*“Injustice anywhere is a threat
to justice everywhere.”
Martin Luther King, Jr.*

ABSTRACT

Upon the infusion of science and technology into the every aspect of life, the state mechanism, as the most developed and organised institution in the society, has acquired the right to enter into the most private spheres either as regulator or as protector of rights. The only guarantee against the unprecedented and irresistible enlargement of the state mechanism in all modern societies is the judicial protection of human rights fairly and effectively.

It is universally accepted that right to a fair trial is one of the core human rights and cornerstone of protection mechanisms. The European Court of Human Rights depicts the fair trial as a basic principle of the rule of law in a democratic society and aims to secure the right to a proper administration of justice.

Although there is a wide accepted tendency nowadays on considering human rights as a product of western civilisation, the concept of human rights is not a registered item of a particular civilisation, geographic region, culture or country. Therefore, the concept of fair trial has various national, philosophical, judicial, historical and geographical dimensions and a rich diversity of ideas prevails on its definition.

It is almost impossible to formulate the concept of fair trial exhaustively, or to assert a universally accepted definition due to extensive case-law of various national and international judicial instances, different legal traditions and abundance of academic literature on the issue.

Nevertheless, it is worth searching the meaning, scope and sources of the fair trial in order to provide a solid basis to understand it. The term fair trial represents a universal value and a common fruit of international human rights law which has, in one sense, cultural and historical roots in many legal traditions.

Keywords : Fair Trial, Due Process Clause, Definition of Fair Trial, Scope of a Fair Trial, Sources of Fair Trial Principles.

Adil Yargılanma Kavramını Anlamaya İlişkin Bir Deneme

ÖZ

Toplum içinde en gelişmiş ve örgütlenmiş kurum konumunda olan devlet mekanizması, bilim ve teknolojinin hayatın her safhasına nüfuz etmesiyle birlikte, gerek kural koyucu gerekse hakların koruyucusu olarak en özel kişisel alanlara girme hakkını elde etmiştir. Tüm modern toplumlardaki devlet mekanizmasının bu önceden görülmemiş ve önlenemez büyümesinin önündeki tek sigorta, insan haklarının yargısal sistemler tarafından etkin ve adil olarak korunmasıdır.

Adil yargılanma hakkının, temel insan haklarından birisi ve koruma mekanizmalarının temel taşı olduğu evrensel olarak kabul edilmiştir. Avrupa İnsan Hakları Mahkemesi adil yargılanmayı, yargının doğru işlenmesini garanti altına alan ve demokratik bir toplumda hukukun üstünlüğünün temel prensibi olarak betimlemiştir.

Günümüzde insan haklarını, Batı Medeniyeti'nin bir ürünü olarak görme yaygın bir eğilim olsa da, insan hakları kavramı belirli bir medeniyetin, coğrafyanın, kültürün veya ülkenin tescilli malı değildir. Bu nedenle, adil yargılanma kavramının da ulusal, felsefi, yargısal, tarihsel ve coğrafi boyutları vardır ve tanımı konusunda geniş fikir farklılıkları mevcuttur.

Adil yargılanma kavramını eksiksiz olarak formüle etme ya da evrensel olarak kabul edilmiş bir tanım ileri sürme, çeşitli ulusal ve uluslararası yargısal mercilerinin ayrıntılı içtihatları, farklı hukuk gelenekleri ve bu konudaki akademik kaynakların çokluğu ve çeşitliliği nedeniyle neredeyse imkansızdır. Ancak yine de, adil yargılanma kavramının sağlam bir temelde anlaşılması için anlamını, kapsamını ve kaynaklarını araştırmaya değer. Adil yargılanma terimi evrensel bir değeri temsil etmektedir ve uluslararası insan hakları hukukunun, bir anlamda pek çok hukuk geleneğinde kültürel ve tarihsel kökleri olan, ortak bir meyvesidir.

Anahtar Kelimeler: Adil Yargılanma, (Adil) Usul Şartı, Adil Yargılanmanın Tanımı, Adil Yargılanmanın Kapsamı, Adil Yargılanma İlkelerinin Kaynakları.

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INTRODUCTION

The emergence of national, regional and universal mechanisms on protection of fundamental rights and freedoms in the aftermath of the Second World War was one of the most fortunate events of the human rights history. In result of unprecedented atrocities witnessed throughout the world during the 20th century, protection of human rights has become not only a permanent item of national and international courts' agendas but also a common concern of each individual.

The codification of human rights, including fair trial, in international instruments, establishment of international and constitutional courts after the Second World War have paved the way for effective protection of human rights. Thus, human rights are no more considered as a matter of neither a domestic state affair nor an illusion. However, there are still considerable gaps in many parts of the world between law and practice of fundamental rights and freedoms¹.

There has been another silent development even in most democratic societies during the last few decades: compulsory enlargement of state power. Life has become more comfortable, but at the same time more complicated due to rapid innovations in science and technique especially with regard to transportation, communication, economy, mass media, health and education. Any field of novelty means generally new rights and freedoms, as well as new kind of conflicts. New conflicts mean introduction of new rules and generally new restrictions. The state, in addition to its conventional powers and duties, has remained the unrivalled regulator and the arbitrator in new fields of activities.

The compulsory relationship between an average individual and the state seemed to be limited until the 19th century (probably justice, tax, military, property affairs and etc.). However today the most discreet aspect of an individual, his/her personal, professional or commercial activities can be determined, regulated and even limited in detail by numerous state authorities using advanced mechanisms that the individual has no choice but to accept *status quo*. It is not possible to say that protection mechanisms of the rights and freedoms used in domestic and international orders have shown the same rapid development and enlargement. The law of fundamental rights and freedoms always follow behind the developments and the practice has been even worse. Thus, imbalance of power between the state and the individual has become more obvious, complicated and dangerous.

In this context, the individual has become more vulnerable and open to state intervention in modern times. Rules and procedures are to be developed and implemented fairly to minimise the risk that rights and freedoms of innocent people may be violated by the state power or the third parties. Therefore, principles of fair trial bear utmost importance in protection of traditional as well as new emerging rights and freedoms.

I. THE CONCEPT OF FAIR TRIAL

A. Definition Problems on the Concept of Fair Trial

National, regional and international legal systems and instruments define principles and terms related to fair trial in various ways. However, we do not see a clear definition of the concept of fair trial in binding international instruments and national constitutions. The principles, rights and freedoms related to the concept of fair trial are enumerated in those documents rather than giving a definition of fair trial.

In addition, both the international and national courts have been reluctant to make any definition on the concept of the fair trial. Even it was argued, for instance, in *Dietrich v. R (1992)* that: “[T]he concept of a fair trial is one that is impossible, in advance, to formulate exhaustively or even comprehensively. Only a body of judicial decisions gives content to the concept.”² In this context, judgments and decisions which are directly relevant to the question of fairness may not be of much use, since the practical content of the fairness may be expected to "vary with changing social standards and circumstances", and "what might be fair in one case

¹ In legal literature, the metaphor of “Dr. Jekyll - Mr. Hyde” was used to depict the failures between the existing legal provisions on human rights and the real situation of rights and freedoms. Please see Wilkinson, J. H. (2010). “The Dual Lives of Rights: The Rhetoric and Practice of Rights in America”, California Law Review, April 2010, Volume 98, No.2, p.278.

² *Dietrich v. R* [1992] HCA 57; (1992) 177 CLR 292 (13 November 1992). An important judgment of High Court of Australia rendered on 13 November 1992 on right to a fair trial, more specifically right to a defence counsel at public expense. For the text of the judgment, please see, http://www.austlii.edu.au/au/cases/cth/high_ct/177clr292.html IAD:14.7.2014.

might be unfair in another". Whether the case-by-case examination of the fairness requirement may result in an unprincipled manner is another question to be discussed (Hope, 1996; 177).

Although the term "fair trial" can be construed as new due to its "official appearance" in the second half of the 20th century, the core assets, concept and the notion of fair trial principles can be considered as old as the concept of justice. Most of the fair trial principles have been implemented by various legal traditions under different names such as "justice, divine justice, natural justice, law of the land, rule of law, due process and etc.". Among written sources; Codes of Hammurabi, Codes of Solon, Torah, Lex Duodecim Tabularum, Bible, Hindu Vedas, Quran, Analects of Confucius, Medina Document, Farewell Declaration, Magna Carta Libertatum, Codifications of Sultan Suleyman I "The Legislator", the English Bill of Rights, the French Declaration on Rights of the Citizen and of the Man and the American Bill of Rights can be given as the most spectacular examples before the codification of international human rights instruments (Flowers, 2014; Weston, 2014 et als.)³. Therefore, the term fair trial represents a universal value and a fruit of international human rights law which has, in one sense, cultural and historical roots in many legal traditions.

Human rights and freedoms are common patrimony of the mankind. It is not a registered mark of a particular culture, religion, region, or a civilization. The concept of human rights is also an ongoing process rather than a frozen set of results. Therefore, ancient cultures and civilizations of Mesopotamia, Anatolia, Greece, Egypt, Rome, India and China, religions, natural law doctrine and humanist philosophical ideas had and still have indispensable contributions in this open-ended process.

Since the concept of fair trial has various philosophical, judicial, historical and geographical dimensions, a rich diversity of ideas prevails on its definition. Despite those challenges, there may be still a point in trying to make a generic, or a generally acceptable definition of a fair trial as a first step to strike the sword on the Gordion knot.

B. Similar Concepts: Due Process and Fair trial

The concept of due process clause has to be evaluated to define concept of fair trial, since due process clause has a considerable influence on the issue. Due process clause, a concept of Anglo-American legal traditions whose constitutional roots date back to *Magna Carta* of 1215 and American Bill of Rights of 1791, carries out a similar function to fair trial principles⁴.

Due process clause is defined as "a fundamental principle of fairness in all legal matters, both civil and criminal, especially in the courts. All legal procedures set by statute and court practice, including notice of rights, must be followed for each individual so that no prejudicial or unequal treatment will result."⁵ or as "legal requirement that the state must respect all legal rights that are owed to a person"⁶, or as "a course of formal proceedings carried out regularly and in accordance with established rules and principles, a judicial requirement that enacted laws may not contain that result in the unfair, arbitrary, or unreasonable treatment of an individual"⁷, or as "regular administration of law, according to which no citizen may be denied his or her legal rights and all laws must conform to fundamental, accepted legal principles"⁸.

³ For more detailed information, *please see*, "A Brief History of Human Rights" <http://www.humanrights.com> IAD:13.7.2014. ; "From Hammurabi to Patriot Act A History of Human Rights" <http://www.randomhistory.com/history-of-human-rights.html> IAD:13.7.2014. ; Human Rights Documents Online <http://primarysources.brillonline.com> IAD:13.7.2014.

⁴ Although it is widely accepted that the term "due process" was developed from the 39th Clause of the *Magna Carta*, in the course of history it was rarely upheld by the English law. On the other hand, due process clause was incorporated by the 5th Amendment and the 14th Amendment of the United States Constitution. Therefore, the concept is not used in contemporary English law. However, with the entry into force of the Human Rights Act (1998) incorporating substantial provisions of the European Convention on Human Rights, the concept of "fair trial" became the part of the English domestic law. Finally, "right to a fair hearing", which is a central concept for fair trial and mainly the subject of the Sixth and Seventh Amendments, is applied in the light of the Fourteenth Amendment of the US Constitution.

⁵ "Due Process" <http://legal-dictionary.thefreedictionary.com/Due+Process+of+Law> IAD:13.8.2014. For similar definitions, *please see*, West's Encyclopedia of American Law; Blacks's Law Dictionary <http://thelawdictionary.org> . IAD:13.8.2014.

⁶ "Due Process" https://en.wikipedia.org/wiki/Due_process IAD:13.7.2014.

⁷ "Due Process" <http://www.merriam-webster.com/dictionary> IAD:13.7.2014.

⁸ "Due process" <http://dictionary.reference.com> IAD:13.7.2014.

In accordance with the case-law of the Supreme Court of the United States due process concept produced fundamental sub-concepts such as procedural⁹ and substantive due process¹⁰, and provided tools on prohibition of arbitrary laws and on incorporation of the Bill of Rights¹¹. Even it can be argued that the ample case-law of the federal and state supreme courts, together with the extensive literature on the issue, have given a new theoretical background and understanding to the concept of due process irrespective of its historical roots and beyond the initial meaning of the Fifth and Fourteenth Amendments of the Constitution (Williams, 2010; 408-509; Chemerinsky, 1999; 1501-1534)¹².

Finally, it can be said that the concepts of due process and fair trial are of similar nature and generally overlapping, but there are some aspects which fall outside this coincidence (Vogler, 2012; 930- 947 ; Altıparmak, 1996; 219-250) .¹³

C. Definition Trial of Fair Trial

As mentioned above, it is almost impossible to formulate the concept of fair trial exhaustively, or to assert a universally accepted definition due to extensive case-law of various national and international judicial instances, different legal traditions and abundance of academic literature on the issue.

Although the concept was first appeared in Article 10 of the Universal Declaration of Human Rights¹⁴ of the UN in 1948 as “right to fair hearing”, today the meaning has become more wider than initially introduced¹⁵. Mostly in result of extensive case-law of the European Court of Human Rights and the UN human rights committees, “right to a fair hearing” enlarged its meaning towards numerous principles of fair trial. Nowadays fair trial principles, in addition to maintaining several safeguards during criminal, civil and administrative proceedings, act as a shield for protection of other fundamental rights and freedoms.

The concept of fair trial¹⁶ is defined as “a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms, most importantly of the right to liberty and security of person.”¹⁷

⁹ Procedural due process can be defined as a legal doctrine that requires state authorities to follow fair procedures before depriving a person of life, liberty and property. When the state authorities seek to deprive a person one of these interests, procedural due process minimally requires that the state affords the relevant person notice, an opportunity to be heard, and a decision made by an impartial judge or arbitrator. “Procedural Due Process” https://en.wikipedia.org/wiki/Procedural_due_process IAD:13.7.2014.

¹⁰ Substantive due process may be defined as substantive limitations placed on the content or subject matter of state and federal laws by Fifth and Fourteenth Amendments to the US Constitution. Substantive due process aims to protect individuals against *majoritarian policy enactments* that exceed the limits of governmental authority, whereas procedural due process aims to protect individuals from coercive power of government by ensuring that *adjudication processes* under valid laws are fair and impartial e.g. right to sufficient notice, right to an impartial judge, right to give testimony and etc. *For more information and historical development of the clause, please see* “Substantive Due Process” https://en.wikipedia.org/wiki/Substantive_due_process IAD:13.7.2014. In general, substantive due process prohibits the government from infringing on fundamental constitutional rights and freedoms. By contrast, procedural due process refers to the procedural limitations placed on the manner in which a law is administered, applied, or enforced. *For more information please see* “Substantive Due Process” <http://legal-dictionary.thefreedictionary.com> IAD:13.7.2014.

¹¹ “Due Process” https://en.wikipedia.org/wiki/Due_process IAD:13.7.2014.

¹² For evaluation of different understandings of due process, *please see also*, “Substantive Due Process” http://rationalwiki.org/wiki/Substantive_due_process IAD:13.7.2014.

¹³ For linguistic and legal evaluation of the concepts of “fair process” and “due process”, *please see*, Correia, S. (2011): “Administrative Due or Fair Process: Different Paths in the Evolutionary Formation of a Global Principle and of a Global Right”, in *Values in Global Administrative Law* (Ed.Gordon Anthony), Oxford 2011, pp.313-361. ; Byrd B. S.: *Einführung in die anglo-amerikanische Rechtsprache* [Introduction to the Anglo-American Legal Language], 2.Auflage, München 2001, pp.45-46.

¹⁴ Article 10 of the Universal Declaration of Human Rights reads: “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*”

¹⁵ The provisions of the Universal Declaration of Human Rights, (UN General Assembly Resolution 217A, 10 December 1948), are generally considered as part of customary international law and may be of importance if a state has not been party to an international binding instrument.

¹⁶ Fair trial in French is usually translated as “*procès équitable*”. Velu, J.- Ergec, R.: *Convention européenne des droits de l’homme*, 2e édition, Vol.I, Bruxelles 2014, pp.403-644.; Favoreu, L. – Gaïa, P.- GHEVONTIAN, et als. *Droit Constitutionnel*, 17e édition, Paris 2015, pp.999-1011. However, an exact translation of the term “fair” seems not possible in German without any misunderstanding. Therefore, compound words, such as “*fair-trial-Grundsatz*” or “*recht auf ein faires Verfahren*”, are used to express

As explained above, although the term “fair trial” has normally a broader meaning than a “fair hearing” in international human rights literature, these concepts are generally interchangeable in the American usage. In this context, fair trial is depicted as “a trial that is conducted fairly, justly, and with procedural regularity by an impartial judge and in which the defendant is afforded his or her rights under the US Constitution”¹⁸, or as “neutral trial conducted to accord each party to the proceeding their due process rights”¹⁹, or as “trial in the presence of an impartial judge and jury”²⁰.

The European Court of Human Rights depicts the fair trial as a basic principle of the rule of law in a democratic society and aims to secure the right to a proper administration of justice (Leanza and Pridal, 2014; 3-12). The Strasbourg Court, producing the largest case-law in contemporary understanding of fair trial rights, has stressed in *Perez v. France* that “right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively” (Harris and O’Boyle et als, 2014; 370-371)²¹.

The UN Human Rights Committee’s General Comment, which stands as an authoritative interpretation of the meaning and application of the Article 14 of the ICCPR²², has underlined that “The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.”²³

Inter-American Commission on Human Rights pointed out in *Guy Malary v. Haiti* that “the right to a fair trial is one of the fundamental pillars of a democratic society. This right is a basic guarantee of respect for the other rights recognized in the Convention, because it limits abuse of power by the State” (ICJ P. Guide, 2004; 2).

In the light of these findings, principles of fair trial may be defined as sets of norms and standards designed to protect fundamental rights and freedoms of individuals and groups from unlawful or arbitrary intervention, restriction, or deprivation by the state authorities or other third parties throughout a trial and related judicial processes.

D. Two Sides of a Fair Trial Coin

It is universally accepted that right to a fair trial is one of the core human rights and cornerstone of protection mechanisms²⁴. Thus, the concept of fair trial has two inter-related sets of guarantees: procedural guarantees for other rights and substantial guarantees on conduct of judicial adjudication. These safeguards will be enumerated below under a separate title, however, the relationship between the fair trial and other rights are to be underlined.

Each fundamental right or freedom, in case of a threat, an unlawful intervention, an infringement or a violation, has to be asserted via criminal, civil or administrative proceedings before the judicial authorities (police, prosecution, tribunal, courts and etc.) and other competent national or international authorities. Therefore, procedural fair trial guarantees granted by international instruments, national constitutions or laws have a decisive role in the implementation of other fundamental rights and freedoms.

For instance, fair trial principles are relevant to the exercise of the right to an effective remedy. The imposition of capital punishment upon conclusion of a trial, during which fair trial guarantees have not been respected, constitutes a violation of the right to life. Compelling a person to confess guilt through ill-treatment or torture violates both the minimum fair trial guarantees prohibiting such compulsion and the prohibition against torture and inhuman, cruel or degrading treatment. Criminal defamation charges

the term. For further and detailed discussion in the German context *please see* Heubel, H.: *Der “fair trial” ein Grundsatz des Strafverfahrens ?*, Duncker & Humblot, Berlin 1981.

¹⁷ Fair Trial (Right to a) <http://www.legislationline.org/topics/topic/8> IAD:13.7.2014.

¹⁸ “Fair trial” Merriam-Webster’s Dictionary of Law, Springfield 1996, p.186.

¹⁹ Fair Trial Law and Legal Definition <http://definitions.uslegal.com/f/fair-trial> IAD:13.7.2014.

²⁰ “Fair Trial” Featuring Black’s Law Dictionary <http://thelawdictionary.org/fair-trial> IAD: 13.7.2014.

²¹ For a similar approach of the European Court in the past, *please see, Delcourt v. Belgium*, para.25.

²² [A] Right to a Fair Trial and Due Process in the context of Countering Terrorism, New York 2014, p.4.

²³ UN Human Rights Committee, CCPR General Comment 32 (2007), General Remarks.

²⁴ Nevertheless, the issue of hierarchy within the field of human rights remains still debated. *Please see*, Shelton, D. (2005). “Are There Differentiations among Human Rights? Jus Cogens, Core Human Rights, Obligations *Erga Omnes* and Non-Derogability”, UNIDEM Seminar on “The Status of International Treaties on Human Rights” Coimbra (Portugal), 7-8 October 2005.

against journalists may, if kept pending for several years, amount to a violation of the right to trial without undue delay, as well as having a chilling effect on the media which would adversely affect the right to freedom of expression. Any different treatment regarding access to courts and tribunals based on the race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status will not only violate fair trial principles but will also amount to a kind of discrimination.²⁵

II. SOURCES FOR PRINCIPLES OF FAIR TRIAL

The sources for the fair trial principles may be summarised as follows: international instruments, national legislation, case-law of international and national courts, and finally doctrine.

A. International Instruments

International and national instruments may be classified as binding and non-binding. Fair trial standards may constitute binding obligations that are included in human rights treaties to which the state is a party. But, they may also be found in documents which, though not formally binding, can be taken to express the direction in which the law is evolving (Lawyers Committee, 2000; 2).

Principles of fair trial are explicitly mentioned not only in Article 10 of the Universal Declaration of Human Rights, but also in Article 6 of the European Convention on Human Rights (ECHR)²⁶, in Article 14 of the International Covenant on Civil and Political Rights (ICCPR)²⁷, in Articles 3, 7 and 26 of the African Charter on Human and Peoples' Rights, in Articles 3, 8, 9 and 10 of the (Inter) American Convention on Human Rights (IACHR), in Article 20 of the ASEAN Human Rights Declaration and in many other international instruments²⁸.

The ECHR, ICCPR and IACHR may be considered as the most effective human rights protection systems at international plan on account of comprehensive case-law produced, efficient machinery of judgments enforced and successful results achieved. In this context, the absence of a regional protection system on human rights in Asia seems to be a real deficit. There are many reasons underlying historical, political and practical reasons for this absence. The initiatives to establish an Asian protection system on human rights have always been in vain. The Summer School on Constitutional Adjudication of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) has been contributing to realise a common forum on protection of human rights. Association of Southeast Asian Nations (ASEAN)²⁹ has also been working to set up a permanent international institution on protection of human rights. Although we are hopeful, there seems to be still a long way to have an effective protection system on human rights in Asia.

B. National Legislation

Depending on the legal culture, history and traditions, each state prefers to secure principles of fair trial, *conditio sine qua non* of rule of law, in constitutions or laws.

C. Case-Law of International and National Courts

Interpretation of courts on international instruments and national legislation constitutes another source of inspiration in determining the meaning, scope and protection area of fair trial principles.

²⁵ UN Human Rights Committee, CCPR General Comment 32 (2007), paragraphs 58-64.

²⁶ For the text of Article 6 of the ECHR *please see* "Official texts" <http://www.echr.coe.int>.

²⁷For the text of Article 14 of the ICCPR, *please see* <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> IAD:14.7.2014.

²⁸ The list may be enlarged. For instance, Articles 20(2) and 21(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia both provide that the accused shall be entitled to a fair and public hearing. The rights of the accused as contained in these Statutes are heavily inspired by Article 14 of the ICCPR. For more information, *please see* Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, p. 251-313.

²⁹ Association of Southeast Asian Nations (ASEAN) <http://www.asean.org> IAD:14.7.2014 ; ASEAN Intergovernmental Commission on Human Rights <http://www.asean.org/communities/asean-political-security-community/category/asean-environment-website-2> IAD: 14.7.2014.

Judgments of national and international courts maintain the legal instruments containing the principles of fair trial as “living documents” in order to meet the changing needs of the individuals and society. It should be mentioned here that there is a slightly different approach between the UN Human Rights Committee and the European Court of Human Rights concerning the degree of latitude to be afforded to States when implementing fair trial standards under the ICCPR and the ECHR. The Strasbourg Court grants States some margin of appreciation³⁰ in determining the meaning and application of fair trial rights and principles, whereas the UN Human Rights Committee prefers a more strict approach³¹. On the other hand, the European Court in its established case-law produced many autonomous interpretation concepts such as “positive and negative obligations of the state”³², “principle of effectiveness”³³ which can act as counterbalance points.

In refining its construction of a qualified right under Article 6 of the Convention and in determining what constitutes a fair trial, the European Court of Human Rights stated that there is no single unvarying principle. However, a *sui generis* proportionality test is applied by the European Court to determine the circumstances of the case which is known as “essence of the right” test. As mentioned in *Salesi v. Italy*, The member states have to comply with the minimum protection standards of the Convention, since financial or practical difficulties cannot justify the failure to comply with the requirements of a fair trial (Vitkauskas and Dovydas, 2012; 7-10).

D. Doctrine

Academic literature faces with serious difficulties on the concept of ‘fair trial’. Almost each author has his or her own ideas of what a fair trial should be and of its content, and, although jurists in general agree on the basic features of a fair trial, several aspects still remain controversial as discussed above.

III.THE SCOPE OF FAIR TRIAL RIGHTS AND PRINCIPLES

Fair trial rights and principles, according to which a trial or a related proceeding is to be assessed in terms of fairness, are numerous and still evolving. However, fair trial rights and principles may be classified roughly under three groups: pre-trial, trial and post-trial rights³⁴.

A. Pre-trial Rights

Fair trial rights and principles have to be granted and implemented at the first contact of the “alleged responsible person” with the “first act or negligence” of the authorities using public power. Therefore, the concept of fair trial rights and principles has to include other related rights and principles such as protection of personal liberty, notification, access to legal aid and legal assistance and prohibition of torture and ill-treatment.

³⁰ For the autonomous concept of margin of appreciation, please see Greer, S.: The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, Strasbourg 2000, pp.5-35. ; Harris, D.J. and O’BOYLE, M. et als. *Ibid*, pp.14-17. The margin of appreciation doctrine had been so firmly entrenched in the case-law that the concept was included in Additional Protocol 15 to the Convention.

³¹ In Paragraph 4 of the General Comment 32 it was mentioned that “Article 14 contains guarantees that States Parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees.” Please see, UN Human Rights Committee, CCPR General Comment 32 (2007).

³² “Negative obligation is one by which a state is required to abstain from interference with, and thereby respect, human rights. ... Positive obligation is one whereby a state must take action to secure human rights.” For these definitions please see Harris, D.J. and O’BOYLE, M. et als. *Ibid*, pp.21-22. Therefore, the state has to take all necessary steps to ensure that fair trial rights are guaranteed in practice as well as in theory. Mole, N. and Harby, C. The Right to a Fair Trial, Second Edition, Belgium 2006, p.7.

³³ The Strasbourg Court seeks effective protection of the rights guaranteed in the Convention and its Additional Protocols. For the cases in which this interpretation principle was used, please see, *Artico v. Italy, Klass v. Germany, Marckx v. Belgium and Soering v. UK*.

³⁴ For these titles, the classifications made by OSCE/Office for Democratic Institutions and Human Rights (ODIHR) and the Amnesty International (AI) are generally chosen since most exhaustive approaches have been provided in their manuals. Please see AI Fair Trial Manual, Second Edition, London 2014, pp. vii-xiii. ; Legal Digest of International Fair Trial Rights, OSCE Publication, Warsaw 2012, pp. 3-8.

In this context, major rights and principles at the pre-trial stage may be summarised as follows: right to liberty, rights of people in custody to information, notification of rights, right to be informed promptly of any charges, right to the assistance of a lawyer pre-trial, right to choose a lawyer, right to have a lawyer assigned, right to free legal assistance, right to competent and effective counsel, right to time and facilities to communicate with counsel, right to communicate and receive visits, right to inform a third person of arrest or detention, right of access to family, right of access to doctors and health care in custody, right to be brought promptly before a judge, right to challenge the lawfulness of detention, right to continuing review of detention, right to reparation for unlawful arrest or detention, right of detainees to trial within a reasonable time or to release pending trial, right to adequate time and facilities to prepare a defence, right to counsel during questioning, prohibition of coercion, right to remain silent, right to an interpreter, right to see or obtain records of questioning, rights to humane detention conditions and freedom from torture and ill-treatment.

B. Rights at Trial

Hearing is the most important proceeding of the trial. Parties should have all opportunities to reflect their point of view and challenge the acts of the other parties and the court proceedings during the trial.

Rights at the hearing includes right to equality before the law and courts, right to equal access to the courts, right to trial by a competent, independent and impartial tribunal established by law, right to a fair hearing, right to a public hearing, principle of the presumption of innocence, right not to be compelled to incriminate oneself, right to remain silent, exclusion of evidence obtained in violation of international standards, the prohibition of retroactive application of criminal laws and of double jeopardy, principle of legality, right to be tried without undue delay, right to defend oneself in person or through counsel, right to be present at trial and appeal, right to call and examine witnesses, right to call and question witnesses, right to an interpreter and to translation, right to a public judgment, and finally right to know the reasons for the judgment.

C. Post-trial Rights

The judgment is the most important and expected result of a trial. Even it can be argued that fairness of all the proceedings depends mainly on fairness of the judgment. In this respect, punishments and judgments have to conform with international standards, retroactive application of lighter penalties, right to appeal and retrials, right to have the judgment reviewed by a higher tribunal, right to retrial or reopening on grounds of newly discovered facts, right to retrial and reopening of cases after findings of international human rights bodies.

Another major point in post-trial rights is right to proper enforcement and execution of judgments. The enforcement of the judgment is as important as trial. If a final judgment cannot be enforced, the trial and related processes will become meaningless.

CONCLUSION

Fair trial principles constitute the backbone of all applicable procedures and substantial laws almost in every legal culture, sometimes however, under different titles.

In the absence of fair trial principles, the rule of law, human rights and consequently the idea of justice may become illusionary.

This study was intended to make introductory remarks in order to provide certain facts and fundamental ideas on the concept of fair trial. A contemporary photograph of the existing circumstances in relation to the concept of fair trial is intended to be reflected. However, the concept of fair trial is an evolving and on-going process. New threats against rights and freedoms emerging in the 21st century will eventually need new guarantees and result in establishment of new rights and protection mechanisms within the scope of fair trial principles.

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