Chapter 1
The Right to a Fair Trial
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§1.01 Justice and the Right to a Fair Trial

When it comes to defining the ‘right to a fair trial’, the literature faces serious
difficulties. Each Author has his own idea 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.¹

In defining the term, one cannot fail to take into consideration philosophical
concepts associated with the category of justice as well, if only for the adjective ‘fair’
placed before the word ‘trial’. The concept of justice is intuitively understandable, but
its definition poses no fewer problems than defining the concept of law itself.²
Philosophers and jurists have been trying to agree on a common definition of justice
for more than two thousand years, but the results are still unsatisfactory. Moreover, any
attempt to define the concept of justice is complicated by the fact that the word has
multiple meanings: quite often no distinction is made between justice in the legal
sense, in the ethical sense, in the political sense, and in the sociological sense;³ and
different understandings of the concept of justice inevitably lead to different ideas of

¹ The views expressed in this section are discussed, amply, in O. Pridal, Pravo na spravedlivý
proces v. civilním rizeni (The Right to a Fair Trial in Civil Procedure), Ph.D. Thesis, Masaryk
University in Brno, 2011.
² On the definition of law, it is worth quoting the thought expressed by an eminent Author: ‘I am
gladly going to resist the temptation to embark on (another) definition of “law”. What I mean is
this: I conceive law mainly as a living set of norms which develops through its application, and
more particularly through its application by the courts’ (S. Trechsel & S.J. Summers, Human
Rights in Criminal Proceedings (Collected Courses in the Academy of European Law) (Oxford:
what it should entail: social order, the fair distribution of assets and values, righteous life, fair and just judicial activity, etc. 4

The Christian concept of justice, for example, is based on charity and forgiveness. ‘Do unto others as you would have them do unto you’. Justice, in this sense, should be accompanied by compassion and mercy. 5

As Plato had already remarked over 2,000 years ago, a just society exists only if citizens are born and live in a fair and just way. 6 Such a concept is not so dissimilar to the point stressed many centuries later by John Rawls, according to whom the stability of a society depends on whether its members feel that they are being treated justly or not. 7

Applying the law in the exercise of judicial powers is, however, something quite different. In the administration of justice, although the sense of justice may often be intuitive, the possibility to use ‘intuition’ (as well as personal understanding bases on learnt expectations) in judicial decisions is questionable. A constructive model requires that judges act on the basis of legal principles rather than on faith and intuition. In fact, the potential hazards connected with intuitive decisions can easily be identified in terms of possible arbitrariness and abuse.

On the other hand, it is the duty of the judge not only to correctly apply the law, but also to find a ‘just’ solution to the case. 8 The logical corollary of this premise is that a fair court decision may objectively be defined as such when it has been reached through a fair trial. Indeed, a judge cannot draw a substantively fair decision if there has been a gross violation of the right to a fair trial.

4. Justice concerns also the allocation of certain values within social relations, be they positive or negative, related to material objects and benefits, to ethics or moral principles (M. Večeřa, Spravedlnost v. právo (Brno: Masarykova Univerzita, 1997), 16). Thus, if one wants to define the concept of justice, he has necessarily to deal also with the concept of ‘equality’.

5. See, in this sense, J. Pieper, The Four Cardinal Virtues (Notre Dame, IN: University of Notre Dame Press: 1966), 112, wherein the Author states: ‘For it is true, as Thomas says, that ‘mercy without justice is the mother of dissolution’; but, also, that ‘justice without mercy is cruelty’.

6. Plato, Republic, (369 B, 420 B). The work, written in 360 B.C., deals with the search after Justice, seen as the order of the State, the construction of which is its aim. Plato also described Justice as harmony, explaining that ‘adherence to their own business on the part of the industrious, the military, and the guardian classes, each of these doing its own work in the state, is justice, and will render the state just’ (Book 4, 434b-c, in Plato, Republic, as translated by John Llewelyn Davies & David James Vaughan, in Wordsworth Classics of World Literature (Ware: Wordsworth Editions Ltd., 1997), 131). For an analysis of the principle mentioned in the text, see T. Bubík, Filosoficky o spravedlnosti (Pardubice: Univerzita Pardubice, 2007), 58.

7. J. Rawls, A Theory of Justice (Harvard University Press, 1971); J. Rawls, Justice as Fairness: A Restatement (Harvard University Press, 2001). The Author’s idea of justice starts from the basic concept that all persons are free and equal. The Author also explains the notion of justice as fairness, stating – inter alia – that ‘a basic liberty can be limited or denied solely for the sake of one or more other basic liberties’ (J. Rawls, Political Liberalism (Columbia University Press, 1996), 294).

8. According to some Authors, justice is traditionally considered to be something that maintains or restores balance and proportion, and the main rule – at least within the judicial world – may be expressed by the sentence ‘treat like cases alike; and treat different cases differently’. See, in this sense, H.L.A. Hart, The Concept of Law, 2nd edn (Oxford: Oxford University Press, 1994).
The right to a fair trial is, in a way, an intuitive concept: each party is aware that he is entitled to a fair trial, and is subjectively convinced of his knowledge of his rights, as well as of the fact that it is always possible to apply ‘to Strasbourg’. However, when it comes to giving a common definition, valid throughout the Signatory States of the European Convention on Human Rights (ECHR), things start to get complicated, and the interpretation becomes even more complex due to the differences between the common law and civil law systems, especially in the field of criminal law.

The right to a fair trial is explicitly mentioned not only in Article 6 ECHR, but also in Article 10 of the Universal Declaration of Human Rights, in Article 14 of the International Covenant on Civil and Political Rights, in the Sixth Amendment to the

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10. See, among others, D.J. Harris, M. O’Boyle, E. Bates, C. Buckley, Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights, 2nd edn (New York: Oxford University Press, 2009), 203. The Authors stress the relevant differences in criminal proceedings between the ‘adversarial’ system of common law countries and the ‘inquisitorial’ system of civil law countries. These differences have an important impact both in the investigation phase and during the trial.

11. 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.’

12. In particular, Article 14(1) of the Covenant provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
United States Constitution, and in many other international conventions, as well as in national legislations.

The right to a fair trial generally comprises, according to the doctrine, the following basic fundamental rights: the right of access to court and, consequently, to be heard by a competent, independent and impartial tribunal; the right to 'equality of arms'; the right to a public hearing; the right to be heard within a reasonable time; the right to counsel; and the right to interpretation. These rights are listed in almost all international conventions, however some provisions – such as Article 6 ECHR – provide more detailed hypotheses of specific rights. Moreover, these rights have been the subject of a laborious activity of interpretation by the European Court of Human Rights (ECtHR), which has led to a copious case law, with consequent expansion of the number of specific rights deserving protection under the general category of the right to a fair trial. Indeed, as pointed out by the Court, 'the 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'.

13. The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The origins of the Sixth Amendment, as of almost all the provisions of the Bill of Rights, are to be found in the draft proposals by George Mason, which were used, with slight modifications, for the Virginia Declaration of Rights of 12 June 1776 (therefore, before the Declaration of Independence of the United States of America on 4 July 1776). See, on this point, R. Carter Pittman, The Creation of the Sixth Amendment Right to a Fair Trial, in The Right to a Fair Trial, ed. Enid W. Langbert, Esq. (series 'The Bill of Rights') (Farmington Hills: Greenhaven Press (Thomson Gale corp.), 2005), 29.


15. See, for example, Article 111 of the Italian Constitution (as amended by Constitutional Law No. 2/99), which, at paragraph 1, emphatically states: ‘La giurisdizione si attua mediante il giusto processo regolato dalla legge’ (‘The jurisdiction is implemented through a due process, as regulated by the law’ – translation by the Author), and then lists a long series of guarantees in civil and criminal proceedings, basically modelled on Article 6 ECHR.

16. See, on the listing of these rights, Curtis F.J. Doebbler, Introduction to International Human Rights Law, cited above, 108, to which the Author adds the prohibition of an ex post facto law, explaining that the aim of the provision for such warranties is the proper administration of justice, either in administrative or judicial proceedings.

17. See, on this point, R. Clayton & H. Tomlinson, Fair Trial Rights, cited above, 120–121, where the Authors divide the rights provided for by Article 6 ECHR in two categories, ‘express and implied rights’.

Definitions in the Literature and in the Case Law

But what is the right to a ‘fair trial’ (in French, ‘procès équitable’)? Have the literature and the jurisprudence defined a common concept, valid in the different national legal systems – belonging either to civil law or common law tradition – of the States signatory to the Convention?

The right to a fair trial, in accordance with the interpretation given by the Court of Strasbourg, is a basic principle of the Rule of Law in a democratic society and aims to secure the right to a proper administration of justice. The right in question includes, therefore, the right to an effective access to justice, to the equality of arms, to a fair composition of an independent court, to a public hearing, to a Judgment pronounced publicly within ‘a reasonable time’, etc.

Quite interesting, in this perspective, are the below-quoted paragraphs of a recent Judgment, wherein the Court summarizes the criteria to be used when interpreting and applying the provisions of the Convention, and lists several precedents on the subject matter:

In order to determine the meaning of the terms and phrases used in the Convention, the Court is guided mainly by the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (see, for example, Golder v. the United Kingdom, 21 February 1975, § 29, Series A no. 18; Johnston and others v. Ireland, 18 December 1986, §§ 51 et seq., Series A no. 112; Lithgow and others v. the United Kingdom, 8 July 1986, §§ 114 and 117, Series A no. 102; and Witold Litwa v. Poland, no. 26629/95, §§ 57–59, ECHR 2000-III). In accordance with the Vienna Convention the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see Golder, cited above, § 29; Johnston and others, cited above, § 51; and Article 31 § 1 of the Vienna Convention). Recourse may also be had to supplementary means of interpretation, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable (Article 32 of the Vienna Convention; see Saadi v. the United Kingdom [GC], no. 13229/03, § 62, ECHR 2008-….).

Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see, among other authorities, Stec and others v. the United Kingdom (dec.) [GC], nos. 65731/01 and 65900/01, §§ 47–48, ECHR 2005-X).

In addition, the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see Saadi, cited above, § 62; Al-Adsani, cited above, § 55; and Bosphorus Hava Yollari Tarim ve Ticaret Anonim Sirketi v. Ireland [GC], no. 45036/98, § 150, ECHR 2005-VI; see also Article 31 § 3 (c) of the Vienna Convention).
The Court further observes that it has always referred to the ‘living’ nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions (see Soering v. the United Kingdom, 7 July 1989, § 102, Series A no. 161; Vo v. France [GC], no. 53924/00, § 82, ECHR 2004-VIII; and Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I).

(Demir and Baykara v. Turkey, Judgment 12 November 2008, paragraphs 65-68)

Such principles had already been stated quite clearly more than three decades earlier, when the Court ruled that there is no need to resort to ‘supplementary means of interpretation’ (as provided for by Article 32 of the Vienna Convention), in order to identify specific aspects (and meanings) of the right to a fair trial. In Golder v. United Kingdom, the Court stated that Article 6(1) envisages not only to right to a fair trial in an already pending lawsuit, but also the right of access to justice, since it would be inconceivable that the Convention should describe in detail the procedural guarantees accorded to the parties in a pending case and should not grant what comes first, i.e., the access to a court:

Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff Judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to ‘supplementary means of interpretation’ as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the ‘right to a court’, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (art. 6-1) further requires a decision on the very substance of the dispute (English ‘determination’, French ‘décidera’).

(Golder v. the United Kingdom, Judgment of 21 February 1975, paragraph 36)

According to the prevailing interpretation, the right to a fair trial has two components: the right of access to court, and the right to a fair process, which is secured by a certain number of procedural safeguards.

Chapter 1: The Right to a Fair Trial

§1.02

A support to the work of interpreting the meaning of the right to a fair trial can also be found, outside the European Convention on Human Rights, in article 14(1) of the International Covenant on Civil and Political Rights, with reference to which the Human Rights Committee has clarified that it ‘must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings’.

In conclusion, it might well be said that there is not a common, ‘all-inclusive’ and general definition of ‘right to a fair trial’, the meaning of which, on the contrary, has to be identified referring to specific aspects (rectius: rights) that form part of it, as listed in the same Article 6 and as resulting from the case law of the ECtHR.

The right to a fair trial covers indeed the entire proceedings, including the execution stage. It embodies all the basic principles of the Rule of Law in a democratic society. Consequently, it has to be recognized as a structured right, comprising several separate subjective fundamental rights, as mentioned above. Its content shall therefore include not only all the guarantees mentioned in Article 6, but also those principles which are not explicitly mentioned, but can, according to the circumstances, be identified by the Court in exercising its decision-making function.

§1.02 THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on 4 November 1950 and entered into force on 3 September 1953, after being ratified by eight States. It was drafted within the Council of Europe some years after the end of World War II (between 1949 and 1950), when Europe was engaged in a laborious work of reconstruction, both of its economy and material infrastructures and the lives of its people. It is in this period, when European countries were healing the still open wounds deriving from the war, that the notion (and the term itself) of ‘human rights’ became object of strong interest and study throughout the world.

Thus, short after that the United Nations (recently established for the main purpose of maintaining and promote international peace and security) had adopted the ‘Universal Declaration on Human Rights’ of 1948, in the ‘old continent’ the movement for an European integration was becoming stronger and stronger and, with it, also the will to create a common ‘charter’ for the protection of human rights and liberties. On 5 May 1949 the Council of Europe was formally created, with the signature in London.

by ten founding States, \(^{22}\) and the basis for a European Human Rights Convention was laid down.\(^{23}\)

However, according to part of the literature, the seed of the principles set forth in the European Convention on Human Rights, as well as the concept itself of ‘human rights protection’, is to be found much earlier in time, probably already in 1215, when the Magna Charta (in the original, in Latin: Magna Carta) was sealed by King John (on 15 June 1215),\(^{24}\) granting ‘all free men’ of his Kingdom a number of rights and liberties, including what is believed to be the archetype of the ‘right to a fair trial’.\(^{25}\)

In particular, Clause 39 of the Magna Charta states: ‘Nullus liber homo capiatur, vel imprisonetur, aut desesseetur de libero tenemento, vel libertatibus, vel liberis consuetudinibus suis, sat ualgetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae’ (‘No free man shall be captured, and or imprisoned, or disseised of his freehold, and or of his liberties, and or of his free customs, or be outlawed, or exiled, or in

\(^{22.}\) The preamble of the Statute of the Council of Europe reads as follows:

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Irish Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland,

Convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilization;

Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy;

Believing that, for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there is a need of a closer unity between all like-minded countries of Europe;

Considering that, to respond to this need and to the expressed aspirations of their peoples in this regard, it is necessary forthwith to create an organisation which will bring European States into closer association,

Have in consequence decided to set up a Council of Europe consisting of a committee of representatives of governments and of a consultative assembly, and have for this purpose adopted the following Statute:….


\(^{23.}\) Article 3 of the Statute of the Council of Europe reads:

Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

\(^{24.}\) Actually, King John was forced by the feudal barons – who wanted to limit the King’s powers and to protect their privileges - to accept the Magna Carta, and indeed soon after he withdrew from it. However, its principles remained alive and, with several amendments, were included in following editions of the Charter.

any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful Judgment of his peers, and or by the law of the land’). 26

The principle according to which man is born ‘free’ and has a number of rights and liberties developed across the centuries, also with the help of the work of writers and philosophers (among which we cannot avoid to mention Grotius, Hobbes, Locke, Smith, Montesquieu, and Rousseau), and eventually found its most important expressions several centuries later, with the American Declaration of Independence (4 July 1776) and the French Revolution (1789–1799), which paved the floor to the modern states Constitutions. 27

Interestingly, the ‘Declaration of the Rights of Man and of the Citizen’ (Déclaration des droits de l’homme et du citoyen) adopted on 26 August 1789 during the French Revolution, and the first ten amendments to the U.S. Constitution (later known as the ‘United States Bill of Rights’28), adopted by the U.S. House of Representatives on 21 August 1789,29 are both inspired by the principles deriving from the philosophical theories of the ‘Enlightenment’ and from the ius naturalis (natural law), and provide with the definitions of rights and freedoms, which are still the backbone of modern constitutions and international declarations of human rights (including the ECHR).

As of today 47 States have ratified the ECHR,30 which has proven to be the most effective international instrument for the protection of human rights, particularly thanks to the activity of its judicial body.

26. Such translation can be found in L. Spooner, An Essay on the Trial by Jury (Boston: Cleveland, 1852). On the possible link between the right to a fair trial and clause 39 of the Magna Charta, see, among others, R. Clayton & H. Tomlinson, Fair Trial Rights (New York: Oxford University Press, 2010), 4.


29. The first ten amendments to the United States Constitution (known, collectively, as ‘Bill of Rights’) were passed by the Congress of the United States in New York, on 25 September 1789 and ratified on 15 December 1791, to protect individual rights and personal freedoms (in particular, related to liberty and property) and to limit governmental powers (in particular, with regard to judicial proceedings). In the Preamble to the Bill of Rights it can be read, inter alia, that:

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconception or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution (…).

30. As indicated in http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM= &DF=&CL=ENG (accessed on 1 November 2013), as of 1 November 2013 the Member States were: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina,
Actually, as it has been acutely noted, the European Convention was not, \textit{per se},
exceptional and innovative, as it was in many aspects similar to other international
instruments on human rights (such as, for instance, the above-mentioned United States
Bill of Rights or the United Nations Universal Declaration on Human Rights), but what
was ‘extraordinary’ was its ‘enforcement machinery’,\textsuperscript{31} which allowed its effective
implementation through the possibility, granted either to a State or an individual, to file
a petition with the European Commission of Human Rights,\textsuperscript{32} and with the subsequent
establishment of an effective judicial authority of the European Court of Human Rights
to adjudicate the cases brought before it.\textsuperscript{33}

\textsuperscript{31} See, in these terms, M.W. Janis, R.S. Kay & A.W. Bradley, \textit{European Rights Law (Text and
Materials)}, cited above, 19.

\textsuperscript{32} The Commission was given the right to hear complaints submitted by individuals in 1955, with
the consent of the interested State.

\textsuperscript{33} With Protocol No. 11 to the Convention, a permanent European Court of Human Rights was
established.