The Fair Trial Principle in the ECHR’s case law
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Summary

I. Fair Trial Principle in Europe
II. Content of the Fair Trial Principle
III. Conclusions
I. Fair Trial Principle in Europe
Fair Trial Principle is accepted as a standard by European legal frameworks:

- European Convention of Human Rights: article 6-1
- European Union Charter of Fundamental Rights: article 47
- European Constitutions:
  - Portugal: articles 20, 32 and 268-4 and 5 of the Constitution
  - France: Declaration des droits de l’Homme et du Citoyen de 1789, the Universal Declaration of Human Rights and the European Convention on Human Rights
  - Germany: articles 19-4 and 103-1 of the Constitution
  - Italy: articles 24, 111 and 113 of the Constitution
  - Spain: article 24 of the Constitution
The Fair Trial Principle is accepted by European legal frameworks under different terms:

- Procès équitable (ECHR, FR)
- Fair trial (ECHR)
- Tutela efectiva de los derechos (ES)
- Giusto processo (IT)
- Due process (UK)
- Tutela jurisdicional efetiva (PT)
II. Content of the Fair Trial Principle
The Right to a Fair Trial includes:

1. Right to present a claim before a court and have the case decided (access to court)
2. Right to have the procedural rules applied in a way which favours a decision based on substantive law/on the merits
3. Right to have the claim decided by an impartial and independent court
4. Principle of Equality of Arms
5. The Right to an adversarial procedure
6. Right to a transparent procedure
7. Right to a speedy trial
1. Right to present a claim before a court and have the case decided
(access to court)

- **Basic content:** Parties should be allowed to present their claims before a court without disproportionate restrictions and have such case decided.
- The right to access a court may be restricted/does not provide the right to a favourable court ruling.
- It does not comply with the right to access the court:
  - If someone arrested is not given access to a lawyer (ECHR case *Golder* of 21 February 1975)
  - If someone cannot file a case due to his economical condition (ECHR case *Airey* of 9 October 1979)
  - Excessive court fees (ECHR case *Kreuz* of 19 June 2001)
2. Right to have the procedural rules applied in a way which favours a decision based on substantive law/on the merits

- **Basic content:** Courts’ decision should generally be based on the merits. Not in disproportionate procedural technicalities.

- **Examples:**
  - An appeal should not be rejected if the lawyer has wrongly indicated the date of the appealed sentence (ECHR case *Kadlec* of 25 May 2004)
  - If a company is obliged to present paper copies to demonstrate 350.000 cases of unpaid radio fees instead of being allowed to present a DVD when filing the case before the court (ECHR case *Lawyer Partners AS* of 16 June 2009)
3. Right to have the claim decided by an impartial and independent court

- ECHR does not clearly distinguishes independence/impartiality
- **Basic content**: Court’s decision must be solely grounded in the law
  - A decision from the court should not be influenced by other entities
  - The independence/impartiality of the court is presumed (ECHR case *Albert et Le Compte* of 10 February 1983)
- Relevant topics to assess court’s independence/impartiality:
  - Who appoints the judges? Appointment from the government or administrative bodies does not necessarily affects independence/impartiality
  - How long is the term of office of the judge?
  - Is it possible to remove the judge from office?
3. Right to have the claim decided by an impartial and independent court

- The judge should not decide under the orders or instructions of other entities/should not be in a position of receiving orders instructions from other entities
  
  ✓ A decision from a court where a military judge participated was not accepted by ECHR considering the obligations of military personnel (ECHR cases Öcalan of 12 May 2005; Altay of 22 August 2001; Çiraklar of 28 October 1998; Incal of 9 June 1998)
3. Right to have the claim decided by an impartial and independent court

- Appearance of impartiality: The court should not only be independent/impartial. It should also appear independent/impartial
  - Rapporteurs publics and Ministério Público should not attend to trial sessions in Conseil d’État and Supremo Tribunal de Justiça where other parties are not allowed to participate (ECHR cases Martinie of 12 April 2006; Kress of 7 June 2001; Lobo Machado of 20 February 1996)
  - A public prosecutor who has dealt with a case cannot decide such case later on as a judge (ECHR case Piersack of 1 October 1982)
  - A judge who has decided a case in first instance cannot participate in the decision of the appeal (ECHR case Oberschlick of 23 May 1991)
  - If a case is filed against an university, it cannot be decided by a judge who is paid as a professor by that university (ECHR case Pescador Valero of 17 June 2003)
4. Principle of Equality of Arms

- **Basic content:** There should be a “fair balance” between the parties

- Each party must be afforded a reasonable opportunity to present his case (including evidence);

- Without any substantial disadvantage of a party vis-à-vis the other party.

(ECHR cases *Bulut* of 22 February 1996; *Foucher* of 18 March 1997; *Platakou* of 11 January 2001; *Bobek* of 17 July 2007)
4. Principle of Equality of Arms

- Not all inequalities breach the Principle of the Equality of Arms
  - A difference of treatment concerning the parties’ witnesses (evidence given under oath for one party and not for the other) does not necessarily breach the Principle of Equality of Arms (ECHR case *Ankerl* of 23 October 2006)

- Substantive procedural advantages are not accepted. Equality of arms is breached in the following cases:
  - Submission of observations by an Attorney-General/Avocat Général without communication to the defence and to which the defence could not respond (ECHR cases *Borgers* of 30 October 1991; *Bulut* of 22 February 1996)
  - Only two persons had been present at a meeting at which an agreement had allegedly been reached but only one of these two key persons was heard (ECHR case *Dombo Beheer B.V.* of 27 October 1993)
4. Principle of Equality of Arms

Should different procedural rules considering the nature of the party be accepted?

- The Principle of the Equality of Arms is better satisfied if procedural rules are the same for both parties.
- However, ECHR has decided that different conditions and time-limits for lodging an appeal for the public prosecutor (shorter time-limit for the private party; longer for the Public Prosecutor) do not breach the Principle of Equality of Arms (ECHR case *Guigue and SGEM-CFDT* of 6 January 2004).

In some cases different rules regarding terms may not be accepted:

- When time ceases to run for the State in court procedures but not for the other parties (ECHR case *Platakou* of 11 January 2001).
- Different time limits for the applicant to present pleadings in support of oral presentations when the responded does not have any time limit should not be accepted (ECHR case *Wynen* of 5 November 2002).
4. Principle of Equality of Arms

- Should public parties be exempted from paying court fees?
  - The Principle of the Equality of Arms is better satisfied if public entities are obliged to pay court fees
  - However, ECHR has decided that a different legal framework regarding payment of court fees in favour of the public prosecutor does not arm the Principle of the Equality of Arms (ECHR case Stankiewicz of 6 April 2006)
- It is important to assess the factual particularities of the case; not only the legal framework
  - It breaches Equality of Arms if a defence lawyer is made to wait for fifteen hours before being given a chance to plead in the early hours of the morning (ECHR case Makhfi of 19 October 2004)
5. The Right to an adversarial procedure

- **Basic content:** Any element which can influence the solution of the cause should be subject to discussion between the parties.

- Each party should have:
  - The possibility to make known the elements on which his claim is based.
  - The possibility to know and discuss any claim, evidence or document presented to the judge.
5. The Right to an adversarial procedure

- Principle of Equality of Arms and the Right to an Adversarial Trial are very close:
  - ECHR commonly looks at the two principles together (ECHR case *Borgers* of 30 October 1991; *Makhfi* of 19 October 2004)

- Both principles are referred:
  - To the way arguments, documents, elements and evidence are presented before the court
  - To the characteristics of the procedures before the court

- The main difference:
  - Equality of Arms is referred to the status of the parties/to the balance of procedural rights granted to the parties
  - Adversarial Trial concerns to the way the procedure is ruled/is referred to a method of decision
6. Right to a transparent procedure

- **Basic content:** both the parties and the people have the right to be informed and to audit the procedures and the courts’ decisions

- A public hearing is required but some exceptions are accepted:
  - When written pleadings already have all the relevant information
  - If the parties agree not to undertake a public hearing
  - If the appeal court decision is to be solely based in legal matters (ECHR case *Duriez-Costes* of 7 October 2003)
6. Right to a transparent procedure

- Access to the documents and to the status of the judicial procedure should be granted
  - Courts’ decisions should be able to be accessed by everyone (ECHR case Moreira Ferreira of 5 July 2011)
  - In principle, the judge does not have to read the full sentence in the court session. However, this is required if there is no other mean of bringing it to public knowledge (ECHR case Ryakib Biryukov of 17 January 2008)
- Courts’ decisions should be reasoned (ECHR cases Seryavin and others of 10 February 2011; Suominen of 1 July 2003).
  - A detailed answer to each argument is not required and the court may endorse the reasons to other courts’ decision (ECHR case Hirvisaari of 27 September 2001)
7. Right to a speedy trial

- **Basic content:** the courts’ decisions should be taken in a reasonable delay of time

- ECHR has extensive case law over this issue
  - In 16,863 ECHR judgements between 1959-2013, 5,214 are referred to this issue (regarding to PT, 112 of 271 claims)

- ECHR assesses if a decision was taken in a unreasonable delay of time considering the following 4 topics (v.g. ECHR case *Silva Pontes* of 23 March 1994):
  - Complexity of the case
  - Behaviour of the claimant
  - Behaviour of the national authorities
  - Consequences of the delay for the claimant
III. Conclusions
1. ECHR has extensive case law on certain fair trial rights (v.g. independence/impartiality; equality of arms; right to a speedy trial)

2. ECHR has not extensively treated yet certain fair trial rights

   ➢ Right to a transparent procedure: an adequate level of clarity of the legal framework is required

   ▪ ECHR cases *RTBF* of 29 March 2011; *Pérez de Rada Cavanilles* of 28 October 1998.
Thank you!

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