RULE OF LAW AND FAIR TRIAL

COLLECTED PAPERS FROM
THE SECOND ROUNDTABLE UNDER
THE EU-IRAN HUMAN RIGHTS DIALOGUE
BRUSSELS, 14-15 MARCH 2003

Table of Contents

Table of contents

the deployment of undercover agents and also make decisions independently in emergency cases.

Finally, there is a relationship with those parts of the state which provide the necessary funds to implement public prosecution. Indeed, there are important changes going on in Germany which are driven by a general policy of moving away from the conventional system of centrally funded prosecution and towards implementing budget systems which make individual public prosecutor's offices responsible for the budget. [49] The "budgeting" process, as it is called in Germany, will certainly have a considerable impact on restructuring criminal prosecution and the way that the principle of legality and the rule of law are theoretically positioned and implemented.[50]

[49] Hetzer, W.: Ökonomisierung der Inneren Sicherheit? Rechtsgüterschutz zwischen Staat und Gewerbe. Zeitschrift für Rechtspolitik 33(2000), pp. 20-24.
[50] Hammer, U.: Staatsanwaltschaft und Wirtschaftlichkeit. Arbeitsgruppe der Justizministerkonferenz legt Bericht zur „Organisations- und Wirtschaftlichkeitsuntersuchung der Staatsanwaltschaften vor. Deutsche Richterzeitung 77(1999), pp. 132-133.

Article 14 Paragraphs 1, 2, 5 of the International Covenant on Civil and Political Rights

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1. Introduction

One of the fundamental human rights at the international level is the right to a fair trial. It was affirmed primarily by the Universal Declaration of Human Rights in 1948[1], the European Convention on Human Rights and Fundamental Freedoms[2], the Inter-American Convention on Human Rights[3] and the International Covenant on Civil and Political Rights (ICCPR).[4]

Based on the liberal principle of the separation of powers and the independence of the judiciary, Article 14 of the ICCPR obligates state parties to create independent, impartial courts and to give them such an institutional and financial structure as to enable them to conduct fair trials in all types of civil and criminal cases and to guarantee minimum rights for all accused persons.[5]

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[1] Resolution 217 (III) G.-A., Arts. 10 and 11.
[2] Art. 6. European Treaty Series No 5.
[3] Art. 6. OAS, Treaty Series, No 5.
[4] Art. 14 UN Doc. A 4299 Para. 64.
[5] Art. 14, 2-7 of the CCPR.

The notion of fair trial has been interpreted ever since by the Human Rights Committee of the ICCPR[6], the European Court of Human Rights, the Inter-American Commission, the Court of Human Rights, and other Committees functioning in the UN framework,[7] thus providing substantial jurisprudence.

2. Procedural Guarantees in Civil and Criminal Trials

"Article14.1. 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 of 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 (ordre public) 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 courts in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit of 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."

This provision poses a number of important issues.

[6] *P.R. Ghandhi*, The Human Rights Committee and the Right to Individual Communication, Dartmout, Ashgate, 1998.

[7] For a detailed list of the above, see *D. Weissbrobt*, The Right to a Fair Trial, M. Nijhoff, 2001, p. 111, et sq.

2.1. The Principle of equality

This principle is illustrated in Article 26 of the ICCPR which declares that «all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It is considered as an important general principle of the rule of law, which is further implemented through specific provisions regarding a fair hearing before an impartial tribunal as well as minimum guarantees to which every person accused of a criminal offence is entitled in full equality under Article 14.3 of the ICCPR. The right to equality must be applied by the judiciary in conjunction with the general prohibition of discrimination under Article 2.1 which leads to the conclusion that all persons must have the right of equal access to the court. As a result, we cannot have separate courts for certain groups of people or discriminatory practice by the courts on the basis of distinguishing criteria since this leads to a violation of Article 14.1[8]. An illustrative example is the opinion of the Human Rights Committee in the Atodel Avellanal v. Peru case[9] where, according to Article 168 of the Peruvian Civil Code, only the husband is entitled to represent matrimonial property before the court, thus creating sex discrimination and violation of the right to equality.

Exceptions to the above principle can been seen, for example, in military courts which are created for offences committed by soldiers, the existence of which does not violate Article 14.1 provided that they meet

[8] See *M. Nowak,* UN Covenant on Civil and Political Rights. CCPR Commentary, Engel Publishers, 1993, p. 239, et sq.

[9] Case 202/86 and in particular § 2.1, 10.1, 11. See also Case 273/89.

the other criteria of Article 14.1. The issue becomes more delicate when military courts judge civilians. The Committee concluded, in a number of cases against Uruguay,[10] "that this could be justified only in very exceptional cases under conditions which genuinely afford the full guarantees of a fair trial."

"If state parties decide, in circumstances of a public emergency as contemplated by Article 4 of the ICCPR, to derogate from normal procedures required under Article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation and respect for other conditions in Paragraph 1 of Article 4."[11]

Thus, in the case of Lanza v. Uruguay, the Committee held that the trial of the two Uruguayans by a military court and under emergency measures violated Article 14. 1 of the ICCPR because irrespective of legislative provisions, the circumstances under which they were judged led to the conclusion that they could not effectively enjoy the safeguards of a fair trial.[12]

2.2. Fair and public hearing

In a suit of law, everyone has the right to be heard by a court. This court must be established by law, be independent and impartial.

[10] Cases 6, 8, 20/77, 28, 32, 3/78, 52, 56/79, 73, 74/80, 103, 105/81.
[11] General Comments 13, GAOR Supp. 40 Doc. A/39/40/1984, p. 144 sq.
[12] General Comments 24(52) of the Committee.

The Committee has interpreted the term "suit of law" in a broad way. In the case of Y.L. v. Canada,[13] it dealt with the question of whether the claim by a former member of the Army for a disability pension was a suit of law. The communication was found inadmissible as the availability of the judicial review of the Pension Board's decision meant that he had no claim under Article 2 of the Optional Protocol. In relation to the expression "suit of law," the Committee made the following remarks: "with regard to the alleged violation of the guarantees of a fair and public hearing by a competent, independent and impartial tribunal established by law, contained in Article 14.1 it is correct to state that those guarantees are limited to criminal proceedings and to any "suit of law"

In the Committee's view, the concept of the "suit of law" is based on the nature of the rights in question rather than on the status of one of the parties or on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated. In the above case, the applicant was a soldier who addressed the Pension Review Board - an administrative body functioning within the executive branch of the Government of Canada and lacking the quality of a court.[14]

In any case, a suit of law should focus on the nature of the right and whether the claim is of a kind which is subject to judicial supervision and control.

In the case of Casanovas v. France[15] where the applicant tried, via administrative tribunals, to reverse his dismissal from the French civil

[13] Case 112/81, Para. 9.2. See also *S. Joseph, J.Schultz, M. Castan,* The International Covenant on Civil and Political Rights, Cases, Materials and Commentary, Oxford University Press, p. 279 sq.
[14] *Ibid,* p. 279, et seq.; see *D. McGoldrick,* The Human Right Committee, Oxford Clarendon Press, 1994, p. 419, et sq.
[15] Case 441/90, see also *S. Joseph and others*, ibid p. 281, et sq.

service, the Committee recalled "that the concept of the "suit of law" is based on the nature of the right in question rather than on the status of one of the parties. It considered that the procedure concerning a dismissal from employment constituted the determination of rights and obligations in a suit of law within the meaning of Article 14.1 and declared the communication admissible.

Fair Trial

The principle of fair trial includes the right to a fair and public hearing, the equality of arms, and mostly the guarantee to be judged by a competent, independent and impartial tribunal established by law. The latter is "an absolute right that may suffer no exception."[16]

The term "tribunal" corresponds to that of national civil and criminal courts. The independent administrative authority can be considered as "tribunal" under certain conditions: established by law, independent and, in general, satisfy the requirement of a tribunal according to Article 14.1 of the Covenant.[17] It is interesting to note that the Court of the European Communities held that "Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given" and "The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, term of office, and removal. The President of the independent body shall at least have the same legal and professional qualifications as the members of the judiciary. The independent body shall take its decisions following the procedure in which both sides are heard, and these

[16] Case 263/1987, Conzales de Rio v. Peru.

[17] See also *P. van Dijk,* The Rights of the Accused to a Fair Trial under International Law, SIM, Special, No. 1, 1983, p. 1 et seq. Dorschconsut v. Bundisbangesellschaff Berlin 17.9.97 (54/96).

decisions shall, by means determined by each state party, be legally binding."[18]

The tribunals must be competent and established by law. That means that there must be a parliamentary or an equivalent, unwritten norm of Common Law which is accessible to all persons subject to it. This law must establish the tribunals and define the subject matter and territorial scope of their jurisdiction.

The tribunal must be independent from the executive and the legislative branches of the state. "If the competencies of the judiciary and the executive are not clearly distinguishable or whether the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of Article 14.1 of the Covenant."[19] Judges can be appointed as such for a long period or for life, perform their duties without the fear of being excluded or dismissed form their job. The independence of a tribunal relates to the appointment and impeachment of judges whereas impartiality aims at a specific holding in a given case. A judge is not impartial when he has a special interest in a case, or is related to one of the parties to the case, or is guided by his emotions etc. In the Campbell and Fell Case, the European Court of Human Rights indicated what it takes into account when assessing independence: "In determining whether a body can be considered to be "independent" - notably of the executive and of the parties to the case - the Court has had regard to the manner of

[18] Case C-54/96 Judgment of the Court, 17 September 1997, Meaning of «national court or tribunal» for the purposes of Article 177 of the Treaty.

[19] Case 468/1991 Olo Bahamonde v. Equatorial Guinea. See also case 291/1988 Torres v. Finland, and concluding observations of the Human Rights Committee for Lithuania. UN. Doc. CCPR/C/79/Add. 87(1977), for Zambia 03/04/96, UN, Doc. CCPR/C/79/Add. 62, for Romania, UN, Doc. CCPR/C/79/Add.30 (1993) and the USA A/50/40, § 266 to 304 (1995).

appointment of its members and the duration of their term of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence."[20]

The principle of the equality of arms offers the same rights and obligations to both parties - the plaintiff and the respondent or the prosecutor and the defendant. Procedural rights must be dealt with in a manner which is equal for both parties. With regard to civil proceedings, the European Court of Human Rights held in the case of Dombo Beheer B.V. that : "Each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[21]

Public Hearing

Article 14.1 guarantees the right to a public hearing meaning that all trials in civil and criminal matters must, in principle, be conducted orally and publicly.

The term "in principle" indicates that this right can be restricted with a number of exceptions as we can see in the 3rd sentence of Article 14.1.

Following the jurisprudence of the Human Rights Committee in the case of van Meurs v. the Netherlands,[22] the public hearing is "a duty upon the state that is not dependent on any request, by the interested party, that the hearing be held in public. Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the

[20] Series A΄ 80/1984, § 78. See also, *D. Harris, M.O' Boyle, C. Warbrick*, Law of the European Convention on Human Rights, Butterworths, 1995, p. 163, et sq.
[21] ECHR, Series A΄ 274, p. 19. See also Stran Greek Refineries and Stratis Andreadis A΄ 301-B, p. 81.
[22] Case 215/86, Para. 6.1 and 6.2.

public so wish." This includes the "duty to make information on the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, for example the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made."[23] Consequently, not only is this principle the right of the parties to the proceedings which can be waived by them, but also the right of the public in a democratic society; it does not, however, apply to all stages of a trial but only to the hearing. The Committee held that a trial not open to the public violates Article 14.1 if the state does not provide any reason for it.[24]

There are a number of exceptions to the above right. The public, including the press, can be excluded from all or parts of the trial for various reasons. The public can be excluded for reasons of morality (a case concerning sexual offence), public order (the order in the courtroom), national security (when dealing with important state secrets, e.g. a case of espionage) so long as the principles of a democratic society are observed.[25]

In addition, the public may be excluded when the interests of the parties so require, when the court faces family matters, sexual offences or other cases in which publicity might violate the private and family life of the parties or the victim. Lastly, the public may also be excluded in the interest of justice - under special circumstances and only to the extent

[23] Case 215/86, Para. 6,1 and 6,2.

[24] Case 74/1980, Estrella v. Uruguay.

[25] The phrase "in democratic society" was inserted after the model of Article 6.1 of the European Convention on Human Rights. For a comparative analysis of the ICCPR and the European Convention on Human Rights Concerning fair trial, see *D. Harris*, The Right to a Fair Trial in Criminal Proceedings as a Human Right, ICLG, 1967, p. 352, et sq.

strictly necessary in the opinion of the court (e.g. continuation of the trial is impeded due to the emotional reactions of the spectators).

The Committee found violations of the right to a public hearing in a number of cases against Uruguay[26] where the authors were sentenced to prison terms in secret by military tribunals. Also in Zaire,[27] the members of Parliament were convicted through the secret proceedings of the state security court.

Every judgment must be pronounced publicly.

This includes two issues: first, that the ruling will be pronounced orally in a public session; and second, that it will be published in a written verdict, so that it can be accessible to everyone. In the case of Touron v. Uruguay, the Committee found a violation of Article 14.1 for, *inter alia*, the decision of the court was not made public.[28]

If the judgments are accessible only to a certain group of people, this constitutes a violation of Article 14.1.

There are also exceptions to this principle, namely when there is a conflict of interests with juveniles,[29] and in guardianship proceedings. Divorce verdicts or similar decisions in matrimonial disputes do not have to be made public.

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[26] See cases 10/77, 32/78, 49/79, 70, 74, 80/80.
[27] Case 138/83.
[28] Communication 7/32, UN Doc A/36/40 (1981) p. 120.
[29] Greek laws provide that all juvenile trials must be held in «*camera*». The Law of 1955 permits the presence of the parties, the parents of the minor and the lawyers. In some European Countries, the presence of students of law is permitted due to training reasons (Austria).

3. The Presumption of Innocence

Article 14.2. "Every one charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law."

This Paragraph of Article 14 provides one of the minimum guarantees for the accused in a criminal trial, namely the presumption of innocence. This principle is essential for a fair trial and will be dealt with in a separate paragraph.[30]

The presumption of innocence is available not only to the defendant in the strictest sense of the word but also to the accused before a criminal charge is filed. A person has this right "until proven guilty according to the law."

The prosecutor must prove the defendant's guilt based on national law and the judge must conduct the criminal trial without having previously formed an opinion as to the guilt or innocence of the accused. All public authorities are enjoined "to refrain from prejudging the outcome of a trial."[31]

In the Minelli Case, the European Court of Human Rights held that: "The presumption of innocence will be violated if, without the accused having previously been proven guilty according to law and, notably, without him having had the opportunity of exercising his right of defense, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty."[32]

[30] See also Article 6.2 of the European Convention on Human Rights.
[31] *M. Nowak,* p. 254, et sq.
[32] Case Minelli, Series A΄ 62, § 37, βλ. και *A. H. Robertson, J. G. Merrills*, Human Rights in Europe, 3rd ed., Manchester University Press, 1993, p. 85, et sq.

It is extremely difficult to prove the violation of the right to be presumed innocent. Although the Human Rights Committee dealt with a large number of cases, it only expressed the violation of this right in two communications against Uruguay.[33]

The Committee has noted "a lack of training regarding Article 14.2 and in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt."[34] In the case of Barbera, Messegué and Jabordo the European Committee for Human Rights stated: "It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defense accordingly and to adduce evidence sufficient to convict him."[35]

Further, the presumption of innocence implies to be treated in accordance with this principle during the preliminary examination and the trial and also refers to the treatment of a person detained on remand. It is, therefore, the duty of all public authorities to refrain from prejudging the outcome of a trial. Consequently, Article 14.2 only applies to criminal

[33] Cases 5, 8/1977.
[34] See also the case law of the European Convention on Human Rights, Article 6.2 *P. van Dijk. G.J.H van Hoot*, Theory and Practice of the European Convention on Human Rights, 3rd ed. Kluwer Law, 1998, p. 458 sq.
[35] EurttR, Series A´ 146 p. 33.

proceedings and not to civil ones. For example, in the case of Morael v. France[36] where the claimant argued that the civil findings of his liability for company debts breached Article 14.2; in the case of W.J.H. v. The Netherlands,[37] and in the case of W.B.E. v. The Netherlands,[38]the Committee held that Article 14.2 does not apply to proceedings for the compensation of an alleged miscarriage of justice.

4. The Right of Appeal

Article 14.5. "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

This provision is formulated in a general way. Everyone convicted of any crime, whether serious or less serious, has the right to bring his case to a higher tribunal. The proceedings in the court of appeal shall have the guarantees of a fair and public trial.

If a case is first judged at the appellate level, the person convicted must be afforded a further appeal since it is clear that Article 14.5 establishes the principle of two-level criminal proceedings. Thus, Article 14.5 only applies to appeals in criminal cases. The only potential protection for the right of appeal in civil trials is derived from Article 14.1. In the case of I. P. v. Finland,[39] the Committee indicated that the ICCPR does not guarantee the right of appeal in civil proceedings. In the case of Reid v. Jamaica,[40] the Committee said that, while the modalities of an appeal may differ among the domestic legal systems of the state parties, under

[36] Case 207/86.
[37] Case 408/90.
[38] Case 432/90.
[39] Case 450/91.
[40] Case 355/89.

Article 14.5, a state party is under an obligation to substantially review the conviction and the sentence.

In the case of Perera v. Australia, [41] the Committee observed that Article 14.5 does not require that the Court of Appeal proceed to a factual retrial, but that the Court must conduct an evaluation of the evidence presented at the trial and of the conduct of the trial.

In the case of Domukovsky et al. v. Georgia, [42] the Committee notes, from the information before it, that the defendants could not appeal their conviction and sentence, but that the law provides only for a judicial review which apparently takes place before a hearing and is on matters of law only. The Committee is of the opinion that this kind of review falls short of the requirements of Article 14.5 of the Covenant which provide for a full evaluation of the evidence and the conduct of the trial to determine whether a violation of this provision has taken place.

Finally, in the case of H.T.B. v. Canada,[43] the Committee noted that one has the right to a review of one's conviction and sentence. One does not, however, have the right to a hearing from the beginning. Thus, the admissibility of new evidence upon appeal can be restricted where such evidence was in fact available during the trial in the first instance.

Article 14.5 guarantees the right of appeal according to the law, meaning the domestic law of the state parties. The issue discussed in a number of cases before the Committee was the denial of access to criminal appeals.

[41] Case 536/93.
[42] Case 623-624, 626-627/95.
[43] Case 534/93.

In the case of Salgar de Montejo v. Colombia,[44] the Committee held that the expression "according to law" in Article 14.5 is not intended to leave the very existence of the right of appeal to the discretion of the state parties since the rights are those recognized by the government and not merely those recognized by domestic law. Rather, what is to be determined "according to law" is the modalities whereby the review by a higher tribunal is to be carried out. It is true that the Spanish text of Article 14.5 only refers to "un delito" while the English text refers to a "crime" and the French text refers to "une infraction." Nevertheless, the Committee is of the view that even though the offence is defined as a "contravencion" in domestic law, the sentence of imprisonment imposed on Mrs. Consuelo Salgar de Montejo is serious enough, all circumstances considered, to require a review by a higher tribunal as provided for by Article 14.5 and that the Colombian Government has not shown a valid derogation from Article 14.5 in accordance with Article 4 of the ICCPR.

In the case of Henry v. Jamaica,[45] the Committee faced the question of whether one has the right to more than one appeal under Article 14.5. It observed that the ICCPR does not require state parties to provide for several instances of appeal. Taking into consideration, however, the wording "according to law", "if the domestic law provides for further instances of appeal, the convicted person must have access to each of them".

This access must be completed within "a reasonable time"[46]. In the case of Currie v. Jamaica,[47] the Committee found a violation of Article 14.5

[44] Case 64/79. See also *D. Wessbrodt*, op.cit. p. 148, et sq.
[45] Case 230/87.
[46] Case 283/88, Little v. Jamaica.
[47] Case 377/89. See also Case 250/87, Reid v. Jamaica and 272/88, Thomas v. Jamaica, as well as case 589/94, Towlin v. Jamaica.

since thirteen years had passed from the time that the first appeal had been orally dismissed.

5. Conclusion

From the point of view of International Law, it has been stressed that it is the duty of democratic states to accept, through separate units (legislative power, justice, administration), two obligations as their pledge of loyalty towards the Covenant:

It is for the member state to assume the obligation and responsibility for the implementation of the provisions of human rights and fundamental freedoms. It falls upon them to ensure that their laws are harmonized with the text of the Covenant which binds them. It is equally their duty to comply with the operative parts of the reports of the Committee.
It is for the member state to put in practice the principle of the collective enforcement of human rights by bringing their complaints to the Committee in their capacity as the guardians of democratic legality.

Human rights -at once the criterion and the substance of a true democratic regime - are of value only if they are presented as part of a continuing process of development.

A state based on the rule of law is one the political system of which not only complies with the requirements of domestic law, but with those of international law as well. Therefore, implementing the Covenant creates three obligations for the state party:

- It must incorporate the Covenant into its legal system and give it precedence over domestic law;
- Its courts must apply the Covenant as a matter of course; and

- It must not leave in operation statutes or regulations - far less quasi - judicial machinery such as emergency courts - liable to circumvent or bring to naught the Covenant's human rights provisions.

In this context, the purpose of the state is mainly to safeguard the democratic progress achieved, to eradicate injustice and arbitrariness, and to promote the welfare of the individual ones.