

## Case Note

## THE RIGHT TO A FAIR TRIAL AND THE RIGHT TO A FAIR DECISION IN SLOVAK CRIMINAL LAW

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**Summary:** 1. Introduction. – 2. Justice in Law. – 3. Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. – 4. Application Practice in the Slovak Republic. – 5. Concluding Remarks.

**Keywords:** *criminal proceedings, fair decision, justice in law, right to a fair trial*

### ABSTRACT

*Background: The right to a fair trial, resulting from international documents, the Constitution, and the legal order of the Slovak Republic, is confronted in terms of content with the requirement and reasonable expectation of fair decision-making in criminal proceedings. The paper seeks to define the concept of justice and its procedural and substantive aspects as the course but also as the result of criminal proceedings. Criminal proceedings are always aimed at resulting in a certain decision of the body active in criminal proceedings and the court. Criminal proceedings*

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*without a decision would not make sense. The content and quality of the decision, especially from the point of view of legality and fairness, reflect the legal culture of the state and its bodies.*

**Methods:** *The scientific methods used in this article are legal comparison, content analysis of websites, functional analysis of legal acts, and analysis of the decisions of many international and national courts.*

**Results and Conclusions:** *Justice in law has an ambiguous meaning from a legal-theoretical point of view, mainly because it is a concept with a high degree of abstractness. No legal-theoretical definition of justice can be found in the case-law of Slovak as well as Czech courts. In Slovak case law, the term justice occurs exclusively in the context of the right to a fair trial, i.e., at the procedural level. However, as already mentioned, the Criminal Codes also refer in several places to the term 'fair decision' as the result of criminal proceedings, i.e., the substantive level of justice. It should be recalled here that each individual has his or her own autonomous idea of justice and his or her own criteria for evaluating other people's actions. It is almost impossible to reach a consensus on guilt and punishment in an individual criminal decision with the public and especially with the parties to the proceedings, i.e., the injured party and the accused. Especially, individual justice in the decision is debatable, especially in cases of diversions or in the application of the principle of opportunity.*

## 1 INTRODUCTION

We have a principle of ancient lawyers that has been passed down since the Roman period: 'Law is the art of knowing what is just and morally good'. Or, as one of Rome's most famous lawyers, Publius Iuventius Celsus, says: 'Ius est ars boni et aequi' – 'Law is the art of goodness and justice'.

Justice as such has affected humanity since its inception. The clear and obvious roots of justice date back to antiquity and are associated primarily with mythology. The embodiment of truth and justice was first associated with the goddess Maat and later Isis from ancient Egypt. In Greek mythology, it was the goddesses Themis and Dike. For the Romans, these goddesses merged into one – the goddess Justitia, representing the allegory of justice as we know it today, i.e., as a young woman holding a set of scales (the symbol of justice) and a double-edged sword (the symbol of judgment) in her hands. Nowadays, she is also shown as blindfolded (the symbol of impartiality).

In the historical-theoretical, philosophical, and legal discourses on the concept of justice, it is necessary to reflect primarily on the teachings of Plato and Aristotle. Their teaching was based on the Hellenic notion of justice as a civil virtue assuming loyalty to the law when observed. It is worth mentioning that Aristotle distinguished between moral justice and legal justice. Moral justice is reflected in personal relationships; legal justice is found in public relations. Aristotle's conception distinguishes between two basic forms of justice, the definition of which has survived to the present day. Distributive (distributional) justice is applied in the distribution of goods according to the rule 'treat equals equally'. Procedural (commutative, compensatory) justice is applied to the treatment of the individual according to the 'equals should be treated equally and unequals unequally' rule.

Justice was also the focus of other important philosophers and philosophical trends (Thomas Aquinas, David Hume, Immanuel Kant, Hans Kelsen, Thomas Hobbes, John Rawls, Gustav Radbruch, and others). Over the years, a number of theories and definitions have emerged in attempts to clarify the essence of justice. However, it is necessary to keep in mind that every theory of justice is directly dependent and derived from the specific ideological and moral view of the world of individual authors.

## 2 JUSTICE IN LAW

Justice is a rich and frequently invoked concept in the past and present. It is used in heterogeneous contexts and in various scientific disciplines (law, sociology, economics, history, political science, etc.), but it is also mastered (and relatively intensively) by the general public. The heterogeneity of the application is currently confirmed by adjectives that are associated with justice: legal, ethical, political, economic, social, environmental, historical, gender-based, etc. The hypertrophy of this concept also affects the creation and application of law, but not always in a positive sense. However, justice is not only a question of rationality but also a problem of emotionality. As Weinberger stated: 'The pursuit of justice is a task of search, a task of reason and heart'.<sup>3</sup>

When examining the concept of justice in law, it is possible to look at the concept in four interconnected ways, none of which can be sovereign. Therefore, it is possible to consider:

- Descriptive justice (to find out how justice is perceived)
- Explanatory justice (to explain the principles of justice)
- Normative justice (to formulate essential principles of justice)
- Instrumental justice (to characterise justice as a tool to achieve results).<sup>4</sup>

When examining the attributes of the concept of justice, we inevitably come across the problem of objectivity or subjectivity of justice, and thus the objectivity or subjectivity of morality or law as well. From the point of view of a specific legal culture and legal order, it is necessary to consider the basic inevitable agreement on the objectivity of these concepts, at least. Otherwise, the law would only become an unreliable normative system. Efforts to unify jurisprudence would fail, and court decisions would vary radically from case to case. In this context, however, we must accept that each individual has their own autonomous idea of justice and their own criteria using which he evaluates the actions of other people or social institutions. Or, as Bernd Rüthers points out, not only every individual but also every religion or worldview has its own justice.<sup>5</sup> After all, in ancient times, when a crime was committed, it was fair to require 'an eye for an eye, a tooth for a tooth', but now the tendencies of restorative justice prevail.

In this context, the relativism of opinions was expressed very well by Hans Kelsen in the idea:

What is justice? No other question is so passionately discussed, for no other question has so much precious blood flowed, so many hot tears, so many other noble greats have thought about any other question, from Plato to Kant. And yet even today, this question is as unanswered as it once was. Maybe because it's one of those questions for which the resigning wisdom applies, that one never finds a definitive answer to it, but one can only keep trying, to ask better.<sup>6</sup>

From the point of view of the development of law, whether continental or Anglo-American, it can be stated that in the past, the principle of justice was emphasised in the substantive sense, but now procedural justice is touted as a guarantee of fairness.<sup>7</sup> Therefore, the imperative also applies: 'criminal proceedings are led to end with a lawful and fair verdict'.<sup>8</sup>

3 O Weinberger, *Inštitucionalizmus: nová teória konania, práva a demokracie* (Bratislava 2010) 364.

4 M Večeřa, *Spravedlnost v právu* (Masarykova univerzita, Brno 1997) 15-16.

5 B Rüthers, *Das Ungerechte an der Gerechtigkeit: Fehldentungen eines Begriffs* (Mohr Siebeck 2009) 8.

6 H Kelsen, *Reine Rechtslehre* (Verlag Österreich 1960) 201.

7 P Holländer, *Filosofie práva* (Aleš Čeněk 2012) 380.

8 J Jelínek, J Říha, Z Sovák, *Rozhodnutí ve věcech trestních se vzory rozhodnutí soudu a podání advokátů* (Leges 2015) 65.

Given the scope, diversity, and multiplicity of the issue, we will further focus on the theoretical, normative, and application contexts of the concept of justice in the field of criminal law in the legal order of the Slovak Republic.

The most important international human rights treaty on the European continent, ensuring respect for the most important human rights and at the same time containing an institutional framework that allows individuals to defend themselves effectively against the state if these rights are denied, is the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the ECHR). The Czech and Slovak Federal Republic joined the Council of Europe only in 1992 and ratified the Convention on 19 March 1992. The Convention became binding on the Slovak Republic on 1 January 1993.

In modern democratic society, the regulation of rights and freedoms is ensured at the international, union, and national levels. The right to a fair trial is undoubtedly one of these fundamental rights and freedoms. It can even be seen as a right that stands above others because it guarantees a way to protect other rights. Despite its importance, it is paradoxically the most violated right. The reason is undoubtedly its wide content, which consists of several components and the insufficient interpretation and application of these components to specific cases.

However, we cannot find an explicit definition of the right to a fair trial in any regulation dating back to the 17th and 18th centuries that enshrines this right. The definition consists of several components that guarantee the individual procedural protection in the exercise of their rights and interests.

### 3 ART. 6 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Although Art. 6 of the ECHR is entitled 'Right to a Fair Trial', it cannot be said that it defines the content of that guarantee in a comprehensive manner. Other rights and guarantees are also enshrined in other articles (Art. 5, Art. 7, Art. 13, Art. 4 of the Protocol 7).<sup>9</sup>

What are then the basic procedural guarantees of a fair trial contained in Art. 6 of the ECHR?

A fair, public, and reasonably expeditious hearing is a fundamental guarantee that every process, both criminal and civil, must comply with in order to be considered fair under Art. 6. These guarantees are minimal, not exhaustive. From the general concept of justice, the court implied other rights of the accused, not explicitly stated in Art. 6, e.g., the right to remain silent and not to accuse oneself, the right to be present at a hearing, etc. Similarly, the right to the presumption of innocence under Art. 6(2) is only one aspect of the broader concept of a fair trial.

The guarantee of fairness of the proceedings is of a procedural nature and does not mean a guarantee of any material subjective right, nor that the outcome of the proceedings (court decision) will be fair. Thus, it is not the fairness of the decision but the fairness of the proceedings on the basis of which the decision was made that is guaranteed by Art. 6 of the ECHR.<sup>10</sup>

Due to the scope of the issue, we will briefly outline the basic requirements of Art. 6 in relation to justice:

9 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 Order as amended <<https://www.refworld.org/docid/3ae6b3b04.html>> accessed 22 November 2021.

10 B Repík, *Evropská úmluva o lidských právech a trestní právo* (ORAC Praha 2002) 135 et seq.

#### A) Publicity of proceedings and decisions

This requirement protects its participants from the secret execution of justice beyond public scrutiny. It is also one of the means of maintaining public confidence in the courts. The right to a public proceeding is closely linked to the right to an adversarial procedure, generally assuming the oral nature of the proceedings. The right to a public proceeding applies only to court proceedings and does not, in general, apply to preparatory proceedings, which are more or less secretive. The publicity of the judgment is exceptional.

#### B) Speed of proceedings

An integral part of the right to a fair trial is the right of the accused to have their criminal charges decided within a reasonable time. This right prevents the loss of evidence or the weakening of its probative value. It also prevents the accused from being exposed to the infringement of their rights and freedoms and to uncertainty about their fate for too long. The slow administration of justice is the most serious problem of justice in most countries of the Council of Europe. The concept of reasonable time is relative. The appropriateness of the time of the proceedings is assessed according to the specific circumstances of the case. The state is obliged to organize its criminal system in such a way that courts and other law enforcement authorities can act at the required speed.

#### C) The right to a fair trial

The right to a fair trial is only one component of the broader concept of the right to a fair trial, although it appears to be a central component of it. It is an open concept with no exact boundaries. These individual guarantees are regulated in Art. 6(3 and 2).

##### 1) Principle of equality of arms

Equality in court has two meanings. Above all, the aim is for everyone to be tried by the same courts and according to the same procedural rules, without any discrimination or privileges. At the same time, it is a question of equality of the parties to the proceedings, who are in different, conflicting procedural positions. This equality is not expressly stated in the Convention, but it had to be implied from the requirement of justice by the case-law.

##### 2) Principle of an adversarial process

Adversarial proceedings are considered to be a general principle of conduct, without which it is impossible to talk about a process which is essentially a confrontation between two parties, each of whom must be able to express themselves, deny the other party's suggestions, arguments, and evidence, and present their own evidence. Its close principle is 'Audiatur et altera pars', which was already known to the Romans. The European Court of Human Rights (hereafter, ECtHR) has defined adversarial proceedings that each party must in principle not only be able to present the evidence and arguments they deem necessary for their claims to succeed but also to acquaint themselves with any documents and observations submitted to the court in order to influence its decision and comment (Mantovanelli v. Commission France 18 March 1997).

##### 3) The right of the accused to be present at the court hearing

This right is not explicitly stated in Art. 6 but was deduced by the case-law of the ECtHR. Participation in the hearing is derived from the purpose of Art. 6 as a whole, stating that the right of the accused to defend themselves in person, to hear or have witnesses to be heard, to have an interpreter present at the hearing free of charge, may be exercised only in their presence at the hearing.

##### 4) Right to state reasons for the decision

This correlates with the accused's right to make suggestions, arguments, and objections in order to receive an appropriate response. It is also given in the public interest, as it is one of the guarantees that the administration of justice is not arbitrary and non-transparent and that court decisions are subject to public scrutiny. It is also a precondition for the accused to be able to exercise the remedies available to them effectively.

#### D) Right of appeal

According to the case-law of the European Court of Justice, the guarantees of Art. 6 also apply to corrective proceedings if the state has established appeal or cassation cases.

Everyone whose rights and freedoms as set forth in the Convention have been violated shall have an effective remedy before a national authority, even if the violations have been committed by persons in the performance of their official duties (Art. 13).

The concept of appeal mentioned in the title of Art. 2 of Protocol 7 has an autonomous meaning. It means any appeal against a decision on guilt or punishment, not just an appeal.

#### E) Right of defence

Art. 6(3) contains a list of the elements of the broader concept of a fair trial, the summary of which forms the right to defence. These rights are closely interlinked, interdependent, and, to some extent, overlapping. Their inherent goal is to ensure the justice of criminal proceedings as a whole.

##### 1) The right to be informed of the charges

As regards the content of the information, the accused must be informed in detail of the nature and reasons for the accusation. The act of the accusation must be sufficiently identified by a description of the proceedings, an indication of the place and time of its commission, or by stating who the injured party is. The nature of the accusation is then the legal qualification of this act. This right does not apply only to the original act of the accusation but also applies throughout the proceedings, with the right to inspect the file.

##### 2) The right to have adequate time and facilities to prepare a defence

This right contributes to redressing the imbalance between the accused and the law enforcement authorities, which have the means of investigative and coercive powers. The requirement is at the same time a guarantee against too rapid procedure and a counterweight to the right guaranteed in Art. 6(1) to decide on the charges within a reasonable time. However, it is not about granting a single time limit after that moment, but of a series of time limits after the accused should have reacted to a particular act or measure, as well as time limits for the election or appointment of a lawyer, for lodging an appeal, etc.

##### 3) The right to defend oneself in person or with the assistance of a lawyer

This is another fundamental element of a fair trial. It ensures equality of arms, and its primary purpose is to provide the accused with a position that is not significantly less favourable than the position of the prosecution. The lawyer is also referred to as the 'guard dog of the lawfulness of the proceedings' (*Ensslin et al. v. Germany*, 8 July 1978). The assistance of a lawyer is crucial in terms of respecting all other rights under Art. 6. Most of these rights would be ineffective for the average accused without the help of a lawyer.

This right includes the right to free assistance from a lawyer if the accused does not have the means to pay for a lawyer and it is requested by the interests of justice.

##### 4) The right to free assistance from an interpreter

The purpose of this right is to prevent inequalities between the accused who does not understand the language used in court and the accused who speaks and understands that language. It is therefore a special provision preventing discrimination, especially in relation to Art. 6 in relation to Art. 14 of the Convention.

#### F) The right to the presumption of innocence

The principle of the presumption of innocence is intended to ensure that the person accused of a criminal offence does not bear the negative consequences of this accusation, equivalent to the consequences of a guilty verdict, and at the same time to allow the judge to decide impartially.

In general, the following known rules are derived from the presumption of innocence:

- Unproven guilt has the same meaning as proven innocence
- The burden of proof lies with the prosecution, and the accused is not obliged to prove their innocence
- The *In dubio pro reo* rule
- The rule that, in the course of criminal proceedings, only such restrictions may be imposed on the accused as are strictly necessary to achieve the purpose of the criminal proceedings.

#### G) Right to proper evidence

The Convention guarantees a fair trial in Art. 6(1) and the right of the accused to have their guilt proven in a lawful manner in Art. 6(2) but does not regulate evidence as such, although this is an essential, if not the most important, part of the proceedings. The adjustment of evidence is primarily a matter for the member states.

This approach is necessary given the great variety of evidence arrangements that exist not only between continental systems and the common law system but also within those systems. In principle, it is therefore for national law to regulate and assess by the national court the admissibility of evidence, as well as the weight, relevance, and veracity of the evidence and its probative value.

## 4 APPLICATION PRACTICE IN THE SLOVAK REPUBLIC

It is interesting that the Constitution of the Slovak Republic, as amended, does not explicitly mention the concept of the right to a fair trial in any of its provisions.<sup>11</sup>

In principle, however, the rights belonging to a fair trial (and resulting from international documents) and enshrined in the Constitution of the Slovak Republic can be classified into two groups. In the first group, we include constitutional rights according to Arts. 46, 47, and 48. This type of constitutional procedural right can be applied regardless of the type of proceedings or proceedings, as they have universal validity. The second set of rights forming a fair trial is the so-called criminal peculiarities, which can be found in the Constitution of the Slovak Republic in Arts. 49, 50, and 17. In addition to the provisions quoted, Art. 7 of the Constitution must be mentioned, which has enabled the application of the rights to a fair trial under the ECHR and the settled case-law of the ECtHR.

In the case-law of the Supreme Court of the Slovak Republic, the use of the term 'justice' can be divided into two basic categories in court decisions. The first contains cases of

<sup>11</sup> Constitutional Act no. 460/1992 Coll. Constitution of the Slovak Republic, as amended <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20210101>> accessed 22 November 2021.

interpretation of those provisions of the legal order, which contain the concept of justice. The second category consists of cases where the National Council of the Slovak Republic deals with justice in a procedural sense rather than an evaluation of the procedure of participants and courts (as a procedure within the right to a fair trial).

The most frequently interpreted provisions in connection with the right to a fair trial are usually Art. 46(1) of the Constitution and Art. 6(1) of the Convention.

According to the opinion of the National Council of the Slovak Republic presented in one of its decisions: '(It is ...) the court's duty in each case to make every effort to find such a solution that will be compatible with the general idea of justice'.<sup>12</sup>

In this sentence, the court untraditionally expressed the material form of justice. The Supreme Court of the Slovak Republic often emphasises that every state body:

Must not only respect the law itself, but its interpretation and application of the law must lead to a just result in accordance with the ancient Roman principle of *ius est ars boni et aequi* (law is the art of good and justice). In other words, law must first and foremost be a living instrument of justice, and not just a body of legislation that is mechanically and formally applied without regard to the meaning and purpose of the specific interest protected by the relevant legal norm.<sup>13</sup>

For the sake of coherence, it will undoubtedly be necessary to address the question of how often and in what context the concept of justice and its derivatives occurs in the individual provisions of valid and effective criminal codes.

In the Criminal Code, the concept of justice is explicitly mentioned twice. In the first case, it is the name of the factual nature of the crime according to S. 344, i.e., 'Obstruction of justice'.<sup>14</sup> This offence is committed by a person who, in court or in criminal proceedings, presents evidence as true, even though they know that the evidence is falsified or altered, further falsifies, alters, or obstructs the evidence, or obstructs its acquisition, as well as obstructing or preventing the presence or statement of the party to the proceedings, participants, their representatives, witness, expert interpreter, or a translator.

A person who uses violence, a threat of violence, or another threat of serious harm to act on a judge, a party to a criminal proceeding, a party to a proceeding, a witness, an expert, an interpreter, a translator, or a law enforcement authority shall also interfere with justice. Thus, the substance of the offence expresses an interest in the protection of a proper and fair criminal procedure so that a fair decision can be reached.<sup>15</sup>

The second reference to justice is found in the criminal offence of persecution of the population under S. 432(2e), according to which this criminal offence is committed by a person who arbitrarily prevents the civilian population or prisoners of war from deciding on their criminal offences in a fair trial. Thus, again, it is an appeal to and an interest in a fair trial, even during war.

In the Slovak Criminal Procedure Code, the term 'justice' and its verbal derivatives occur a total of five times.<sup>16</sup> Already in the provision of S. 1, the subject of the law is defined as the regulation

12 Resolution of the National Council of the SR, Ref. No. 6CDo 71/2011.

13 Judgment of the Highest Court of the SR, Ref. No. 1Sžso/36/2010. See also D Čurila, *Spravedlnost a súdovské rozhodovanie, Disertační práce* (Právnická fakulta Masarykovy univerzity Brno 2014) 154.

14 Act no. 300/2005 Coll. Criminal Code, as amended <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/300/20210701>> accessed 22 November 2021.

15 J Ivor, P Polák, J Záhora, *Trestné právo hmotné, Osobitná časť* (Wolters Kluwer 2017) 412.

16 Act no. 301/2005 Coll. Criminal Procedure Act, as amended <<https://www.slov-lex.sk/pravnepredpisy/SK/ZZ/2005/301/20211201>> accessed 22 November 2021.



of the procedure of bodies active in criminal proceedings and courts so that 'criminal offenses are duly detected and their perpetrators are justly punished according to the law'.

Although the text directly implies an appeal for the just punishment of perpetrators, it also indirectly implies a demand for a fair trial. Among the basic principles of criminal proceedings, in the provision of S. 2(7), the right to a fair trial is explained as the right of everyone to have their criminal case heard fairly and within a reasonable time by an independent and impartial tribunal ... The provision of S. 2(10) addresses the principle of evidence so that law enforcement authorities can establish the facts of the case without reasonable doubt, clarify with equal care the circumstances of the accused and the accused, and take evidence to enable the court to make a fair decision. However, the concept of a fair decision is not specified in this or other provisions.

The term can be found again in the provision of S. 253(3) regulating the procedure of the President of the Chamber at the main hearing to ensure that the main hearing is not delayed by interpretations and speeches unrelated to the present case and that it is aimed at clarifying the matter as effectively as possible to the extent necessary for a fair decision.

The last reference of the concept of justice is given in the provision of S. 334(2) governing the court's procedure for deciding on a proposing the agreement on guilt and punishment:

If the court deems the agreement on guilt and punishment not manifestly disproportionate in the proposed wording but consider it unfair, it shall communicate its reservations to the parties, who may propose a new wording of the agreement... However, the legislator did not specify, in view of the circumstances and criteria, the fairness (unfairness) of a draft guilt and punishment agreement should be assessed. The institute of the agreement on guilt and punishment has many supporters in our legal theory and application practice, but at the same time many opponents. It is often referred to as an agreed justice or justice market. The absence of legislative criteria for justice is consistent with this view.

## 5 CONCLUDING REMARKS

In conclusion, here are a few summary ideas drawing on the philosophical-legal considerations on the definition, application, and content of the concept of justice and its conceptual derivatives in criminal proceedings.

At present, it can be stated that there is a mutual and substantive interconnection between the international, European, and Strasbourg interpretations of the right to a fair trial. The guarantee of the right to a fair trial with all partial components of the set of a fair trial is also reflected in the Slovak constitutional and criminal law level and legislation.

Justice in law has an ambiguous meaning from a legal-theoretical point of view, mainly because it is a concept with a high degree of abstractness. No legal-theoretical definition of justice can be found in the case-law of Slovak as well as Czech courts. In Slovak case law, the term justice occurs exclusively in the context of the right to a fair trial, i.e., at the procedural level.

However, as already mentioned, the Criminal Codes also refer in several places to a 'fair decision' as the result of criminal proceedings, i.e., the substantive level of justice. It should be recalled here that each individual has his or her own autonomous idea of justice and his or her own criteria for evaluating other people's actions. It is almost impossible to reach a consensus on guilt and punishment in an individual criminal decision with the public and especially with the parties to the proceedings, i.e., the injured party and the accused.

Individual justice in the decision is debatable, especially in cases of diversions or in the application of the principle of opportunity.

In this sense, the question arises as to whether the vague substantive concept of a fair decision should not have been replaced by the concept of a legal decision.

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