

WEEK 4 – FAIR TRIAL AND EQUALITY BEFORE THE LAW

Fair Trial – ICCPR Art 14:

- (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 at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...
- (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law

Fair trial – Key Guarantees:

1. Equality before the law
‘Equal before the courts and tribunals’ (art 14(1) ICCPR). This ‘ensures that the parties to the proceedings in question are treated without any discrimination’ (UN HRC, General Comment No 32 [8]). Reflected in equality of arms, WHICH ‘ensures that that same procedural rights are afforded to everyone unless distinctions are based on law and can be justified on objective and reasonable grounds not entailing actual disadvantage or unfairness to the defendant (HRC General Comment 32 (2007)). Equal access to courts and tribunals – see also art 16 ICCPR ‘everyone shall have the right to recognition everywhere as a person of the law’.
2. Fair and public hearing
 - a. *Fair:*
‘Everyone shall be entitled to a fair and public hearing’ – ICCPR art 14(1). Fair ‘entails the absence of any direct or indirect influence, pressure or intimidation, from whatever side and whatever motive’. A hearing is not fair if, for instance, the D in criminal proceedings is faced with the expression of a hostile attitude from the public, or support for one party in the court room that is tolerated by the court, thereby impinging on the right to a defence (HRC General Comment 32 (2007)).
Gridin v Russian Federation (HRC 1997):
With regard to the author’s claim that he was denied a fair trial in violation of article 14(1), in particular because of the failure of the trial court to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for the defence counsel to properly cross-examine witnesses and present his defence...the Committee considers that the conduct of the trial as described above violated the author’s right to a fair trial within the meaning of article 14(1).”
A challenge to fair hearing - Protecting the right to a fair trial in the 21st century – has trial by jury been caught in the world wide web?’ by **Roxanne Burd and Jacqueline Horan – (2012) 36 Crim LJ 103**. “Trial by jury has been caught in the world wide web.” (Burd and Horan, 2012, p.122). Compare: In **Attorney General for New South Wales v X 49 NSWLR 653** at [184] Mason P said: ‘A verdict of guilt and ensuing punishment must be the product of a fair trial. The rule of law can settle for nothing less. Trial by media cannot be tolerated in a civilised society.’ Dicta of Ashley JA in **R v Dupas (No 3) (2009) 198 A Crim R 454** at [191] - ‘it is conceivable ... that the time will come when it is possible to afford the applicant a sufficiently fair trial, either because of a change in evidence or other circumstance or because of a reduction in acceptable standards of fairness.’ Consider ‘the public’s right to know versus a person’s right to a fair trial’, **Peter Bartlett, 13 February 2008**
 - b. *Public*
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 judgement 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’ (ICCPR, art 14(1)).
3. Independent and impartial tribunal
‘By a competent, independent and impartial tribunal established by law’ (ICCPR art 14(1)). Independence “...refers in particular to ‘the procedure and qualifications for the appointment of judges; and guarantees relating to their security of tenure until a mandatory retirement age or expiry of their term of office, the conditions governing promotion, transfer, suspension, and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and the legislature’ (HRC General Comment 32, 2007, [19]).
“...States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.” (HRC General Comment 32, 2007, [19]).
Dismissal – “Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.” (HRC General Comment 32, 2007, [20])
The requirement of impartiality has two aspects:
(1) Judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.
(2) The tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered impartial (HRC General Comment 32 (2007) [21]).
4. Presumption of innocence
Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law (ICCPR art 14(2)). Burden of proof – the presumption of innocence, which is fundamental to the protection of human rights, imposes on the P the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle (UN HRC General Comment 32 (2007) [30]). “It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree. The denial of bail or findings of liability in civil proceedings do not affect the presumption of innocence.” (HRC General Comment 32, 2007, [30]).
 - News coverage undermining the presumption of innocence? “The growing availability of information is challenging the right to a fair trial in the 21st century. For decades courts have maintained the integrity and impartiality of the jury by shielding jurors from pre-trial publicity. However, as the traditional forms of media have expanded into the web, it has become increasingly difficult to control both the dissemination of information and the conduct of jurors.”[Roxanne Burd and Jacqueline Horan, ‘Protecting the right to a fair trial in the 21st century – has trial by jury been caught in the World Wide Web?’ – (2012) 36 Crim LJ 103]
5. Procedural protections

Right to a defence is effected in:

- a. Adequate time and facilities to prepare defence, and communicate with counsel of own choosing: [art 14\(3\)\(b\)](#)
- b. Accused person has the right to attend the hearing: [art 14\(3\)\(d\)](#)
- c. Defend him/herself personally or through legal counsel: [art 14\(3\)\(d\)](#)
- d. Legal counsel assigned where the interests of justice so require, and without payment in any such case if does not have sufficient means to pay for it: [art 14\(3\)\(d\)](#)
- e. Right to Cross-Examine Adverse Witnesses: [art 14\(3\)\(e\)](#)
- f. Right to have own witnesses (and examination of them under same conditions as witnesses against): [art 14\(3\)\(e\)](#)
- g. Right to appeal to a higher court, where convicted of crime: [art 14\(5\)](#)
- h. Informed promptly of nature and cause of charge (in language understood): [art 14\(3\)\(a\)](#)
- i. To be tried without undue delay: [art 14\(1\)\(c\)](#)
- j. Assistance of interpreter if cannot understand or speak language: [art 14\(3\)\(f\)](#)
- k. Right against self incrimination: [art 14\(3\)\(g\)](#)
- l. Compensation for miscarriage of justice: [art 14\(6\)](#)
- m. Rule against double jeopardy: [art 14\(7\)](#)

Note also:

Juvenile persons to receive special protection ([Article 14\(4\), ICCPR](#)): "In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."

Compensation in cases of miscarriage of justice ([Article 14\(6\), ICCPR](#)): "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

Fair trial – summary:

[Richards v Jamaica \(HRC 535/93\)](#)

Mr Ando: "In my opinion, the purpose of a criminal trial is to ascertain what actually took place in the case at issues, that is, to find true facts of a case...since defendants are generally at a disadvantage compared to the prosecution, various procedural guarantees exist to secure a fair trial. The requirements of equality of arms, rules of evidence, control of the proceedings by independent and impartial judges, deliberation and decision by neutral juries, and the system of appeals are all part of these guarantees."

Can the right to fair trial be limited?

"While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14.2 Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency,³ except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.⁴ Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times."

See [UN HRC, General Comment No. 32, 2007, \[6\]](#)

Seminar question:

Mr K brought a case before the Court of Appeal in Finland arguing that his trial had been unfair. In K's case, the court consisted of one career judge and five lay judges. One lay judge, SZ, was the uncle of LM, who in turn was a partner in the SLPC company which had brought the complaint against K. When interrogating K's wife, SZ interrupted her saying 'she's lying'.

Another lay judge, JL, was allegedly involved in the case prior to the trial, as her brother was a member of the Board of the RC Bank at the time that K was a client of the bank. The brother resigned from the Board in 1984. In 1986, the RC Bank also appeared as a complainant against K.

Could K have received a fair trial?