Right to a Fair Trial in Civil Law Cases

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A. Definitions

1. Definition of a ‘Fair Trial’

1. A ‘fair’ trial at the national level is generally defined as a trial by an impartial and disinterested tribunal in accordance with regular procedures (Black’s Law Dictionary 717). It is also frequently referred to as → due process (eg Constitution of the United States of America: 17 September 1787 (as Amended to 7 May 1992) Fifth Amendment and Fourteenth Amendment Section 1 (US); the Constitution of the Federative Republic of Brazil: 5 October 1988 (as Amended to 15 September 2015) Title II, Chapter 1, Art. 5 LIV (Braz); Constitution of the Italian Republic: 22 December 1947 (as Amended to 20 April 2012) Art. 111 (It)—although the interchangeable use of terms should be made with caution (eg the United States (US) makes a distinction between substantive and procedural due process, the latter being akin to the idea of a fair trial; see Rubin 833; Alexander 323)—or ‘fair process’ (eg Constitution of the Republic of Angola: 21 January 2010, Art. 29 para. 4 (Angl); the Constitution of the Portuguese Republic: 2 April 1976 (as Amended to 12 August 2005) Art. 20 para. 4 (Port)).

2. Given their frequent interchangeable use, it is appropriate at this stage to point out the main difference between the notion of a ‘fair trial’ on one hand, and ‘due process’ in the US legal system on the other. The fair trial guarantees as enshrined in Article 6(1) of the → European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR) and Article 14 of the → International Covenant on Civil and Political Rights (1966) (ICCPR) concern court proceedings which lead to a final decision of a contested right or obligation, and not a decision of the authorities which substantially affects individual persons. In contrast, the US due process clause concerns any decision by the authorities which substantially affects individual persons, be it administrative decisions or court judgments (Settem 53; Wasserman 1–14). Similar differentiation is applicable to Article 7 of the Canadian Charter of Rights and Freedoms (Constitution of Canada: the Constitution Acts 1867 to 1982 (Unofficial consolidation current as of September 2008) (Can)) (Macklem and Rogerson (eds) 1159–1161).

3. The right to a fair trial is generally construed in light of the → rule of law, as its cardinal requirement (Bingham 90). It is frequently referred to as one of the most fundamental guarantees for the respect of → democracy and the rule of law and thus represents a standard by which a state’s commitment to democracy and the rule of law is measured. Accordingly, the concept of a fair trial is also a basic component of the wider notion of the → separation of powers.

4. The right to a fair trial is further recognized as a fundamental human right in a number of regional and international documents: Article 10 of the → Universal Declaration of Human Rights (1948) (UDHR); Article 14 of the ICCPR; Article 6(1) of the ECHR; Article 7 of the → African Charter on Human and Peoples’ Rights (1981) (also: Banjul Charter); Article 47 of the → Charter of Fundamental Rights of the European Union (2000) (EU CFR); and Article 8(1) of the → American Convention on Human Rights (1969) (ACHR). Notably, these documents proclaim the right to a fair trial in both criminal and civil cases. Accordingly, in most jurisdictions the constitutional right to a fair trial refers both to criminal and civil cases, or at least no prima facie distinction is made with regard to the nature of proceedings (→ right to a fair trial in criminal law cases).

2. Definition of ‘Civil’
5. Defining a ‘civil case’ or ‘civil rights and obligations’ from a comparative research point of view proves to be a challenging task due to the variety of definitions of the term. In England, for instance, the adjective ‘civil’ is used to distinguish civil from criminal cases; in principle, cases that are not criminal in nature are classified as civil (van Rhee and Verkerk 140). On the other hand, in most civil law countries the main dichotomy is that of between private and public law (→ public law - private law divide). As a result, the rules of procedure applicable to cases within the realm of public law are either criminal or administrative in nature, as opposed to eg England, where the latter actions are generally adjudicated on the basis of the ordinary civil procedure rules (van Rhee and Verkerk 140; Jolowicz (2000) 11–22). Indeed, the procedural law of any modern society will inevitably demonstrate at least some lack of unity between criminal and civil procedure. This has been acknowledged at the regional and international levels by the drafters of the UDHR, who identified separate fair trial provisions for criminal and civil cases (‘Cassin Draft’ (1947)), as well as by the drafters of the ICCPR (Weissbrodt 12–13 and 44–45). The inherent differences in criminal and civil procedure can also be traced back in the drafting history of Article 6 of the ECHR (Levages Prestations Services v France (ECtHR) (1996) para. 46).

6. Indeed, in the absence of a definition of a ‘civil case’ covered by Article 6 of the ECHR, the prevalent criterion that has guided the → European Court of Human Rights (ECtHR) to identify certain cases as such has been an element of an economic interest for an individual or the existence of a private interest at stake (Rozakis 104). The categories of cases bearing a public-law element, which are therefore excluded from the scope of Article 6 of the ECHR, are mainly → immigration and asylum, and tax proceedings (the exclusion of the latter was challenged in Ferazzini v Italy (ECtHR) (2001) para. 8). Article 6 paragraph 1 does not make any distinction, as far as the guarantees therein are concerned, between the civil and the criminal nature of judicial proceedings. Moreover, the case law of the ECtHR has never isolated any of the guarantees as exclusively belonging to civil or criminal proceedings. Nevertheless, the states enjoy greater latitude when dealing with cases concerning civil rights and obligations than when dealing with criminal cases (Dombo Beheer BV v The Netherlands (ECtHR) (1993)).

3. Core of the Right to a Fair Trial

7. Despite the virtually universal recognition of the significance of the right to a fair trial in general, and in civil law cases in particular, the constitutive elements thereof are diverse and constantly evolving. In the literature, a distinction is made: on the one hand, between the fundamental principles of civil procedure which must be upheld in order to fulfil the requirements of justice (Andrews (2003) 45) and those of a fair trial; and, on the other, the ‘other’ principles of civil justice the neglect of which does not immediately endanger the fairness of the civil trial (van Rhee and Verkerk 144). Thus, providing a universal definition of the concept is an impossible and challenging task. In making a determination of what constitutes the right to a fair trial in civil proceedings, reference is generally made to the aforementioned international documents and the case law of the ECtHR, by whose interpretation the 47 European countries have agreed to be bound.

8. While the wordings of these instruments’ relevant provisions vary, albeit very slightly, there is a general consensus on the core of the right to a fair trial in civil law cases. It is generally stated that the right to a fair trial in civil proceedings comprises: the right of access to a court and, consequently, the right to be heard by a competent, independent, and impartial tribunal; the right to ‘equality of arms’; the right to a public hearing; and the right
to be heard within a reasonable time (Clayton and Tomlinson 120-121; Doebbler 108; Leanza and Pridal 6).

**B. History and Evolution of the Right to a Fair Trial in Civil Procedure**

9. While the first expression of the idea of a ‘fair trial’ originates from the seventeenth century, albeit in connection with criminal proceedings (Langford 37), the establishment of the ‘right to a fair trial’ in general, and in civil law cases in particular, is a more recent phenomenon. This is not to say, however, that there were no guarantees of fair civil proceedings prior to this: certain procedural rights and guarantees which are part of the right to a fair civil trial have long been considered as fundamental. For example, the common law has long recognized two minimum fair trial guarantees known as the principles of ‘natural justice’: the principle of judicial impartiality (nemo judex in causa sua); and the right to be heard (audi alteram partem) (Jackson). Over the years, the right has evolved to encompass many other elements including a right of access to the courts, public hearings, and a hearing within a reasonable time.

10. The origins of some of the basic principles that today constitute the right to a fair trial can be traced back to the Lex Duodecim Tabularum (the Law of the Twelve Tables, 455–499 BC): these contained a right to have all parties present at a hearing (Table 2, Law 1), the principle of equality among citizens (Table 9, Law 1), and the prohibition against bribery for judicial officials (Table 9, Law 3). These concepts correspond to today’s right to be heard and defend oneself, the right to be subject to the rule of law, and the right to have one’s case adjudicated by an independent and impartial tribunal, all of which are essential to the conduct of a fair trial (Robinson 1-2).

11. In 1215, the signing of the → Magna Carta (1215) by King John marked another historical event in the development of the right to a fair trial and the rule of law in general. Clauses 39 and 40 thereof are often viewed as the ancestors of the right to a fair trial in its broad understanding (Hertig Randall 4). The two clauses express the right of access to justice and the right to a fair hearing. Relevant for the common law jurisdictions is the reference to what has often been interpreted as a guarantee of a (civil) trial by jury contained in the Magna Carta (Lettow Lerner (2014) 819). In the context of civil proceedings, this is particularly true for the US, notwithstanding the drawbacks of such an interpretation that is often invoked in literature (eg Elliot (ed) 534–538). England, on the other hand, unconstrained by a written constitutional guarantee of jury trial, has effectively abolished the civil jury in most civil cases, and with the growth of summary jurisdiction has limited the criminal jury (Lettow Lerner (2015) 97).

12. As with other human rights, the scope of the right to a fair trial in general was further developed and codified during the Enlightenment period of the eighteenth and nineteenth centuries. Close in kinship and substance, the American Declaration of Independence (1776) (US), the United States Bill of Rights (1791) (US), and the → French Declaration of the Rights of Man and of the Citizen (1789) established the foundations upon which the future legal protection of human rights would be built (Janis, Key and Bredley 8).

13. Following the events of the twentieth century, and in particular the Second World War, a necessity for the ‘constitutionalization’ of the basic civil procedural rules and guarantees emerged (Cappelletti 43) as a reaction to their infringement and abuse. Granting these standards a constitutional status was seen as necessary in order to provide for higher levels of their protection (eg the Constitution of Italy 1947 (Constitution of the Italian Republic: December 22, 1947); Cappelletti and Vigoriti 514). In addition, as part of the same reaction, the ‘internationalization’ of fundamental procedural rights and guarantees took place, with
an increasing number of international documents proclaiming such safeguards and placing them together under the chapeau of the right to a fair trial in civil law cases.

C. Comparative Constitutional Framework

14. The right to a fair trial in civil law cases is complex. The complexity thereof stems from two main dimensions: firstly, the various sources from which it derives (international and regional human rights instruments, constitutions, codes of civil procedure, case law); and secondly, with respect to its scope (constitutive elements). It is with this dual complexity in mind that the right to a fair trial in civil law cases shall be further analysed below.

1. Sources of the Right to a Fair Civil Trial

15. As pointed out at the outset, the standard of the right to a fair trial in civil law cases is established both at the international and regional level. This development has paralleled the enshrinement of the right to a fair trial in national constitutions.

16. In terms of the manner in which the right to a fair civil trial has been given constitutional force, a distinction can be drawn between: (a) those jurisdictions whose constitutional texts contain an explicit reference to the right to a fair trial in general (explicitly or implicitly including civil law cases); (b) the jurisdictions that do not contain a reference to the notion of a fair trial in their constitutions, but where the right to a fair trial in civil law cases has been inferred from other constitutional procedural rights; (c) those jurisdictions that contain a reference to ‘due process’ instead; and (d) those jurisdictions where the right to a fair trial in civil cases has been inferred from the right to a fair criminal trial. The overview provided by this section will follow this categorization.

(a) Constitutions Containing an Explicit Reference to the Right to a Fair Trial in Civil Law Cases

17. In Europe, this is generally the case with the more recently adopted constitutions, ie those drafted following the ratification of the ECHR and the rise of the significance of the ECtHR’s jurisprudence. As a result, the language of the provisions on the right to a fair trial generally follows that of Article 6 paragraph 1 of the ECHR (eg Constitution of the Republic of Bulgaria: 12 July 1991 (as Amended to 6 February 2007) Chapter II, Art. 31, para. 4 (Bulg); Constitution of the Republic of Croatia: 2 December 1990 (as Amended to 1 December 2013) Part III, Chapter 2, Arts 29, 30, 32 (Croat); Constitution of the Republic of Serbia: 30 September 2006, Art. 32 (Serb); Constitution of Romania: 21 November 1991 (as Amended to 29 October 2003) Title II, Chapter I, Art. 21(3) (Rom); the Constitution of Bosnia and Herzegovina: 21 November 1995 (as Amended to 26 March 2009), Art. II para. 3 (Bosn & Herz); Federal Constitution of the Swiss Confederation: 18 April 1999 (as Amended to 9 February 2014) Art. 29 (Switz); Constitution of the Republic of Lithuania: 25 October 1992 (as Amended to 25 May 2006) Arts 30 and 31 (Lith); and Constitution of the Republic of Hungary: 18 April 2011 (as Amended to 26 September 2013) Art. XXVIII (Hung)).

18. Similarly, the influence of international human rights instruments on the wording of younger constitutions beyond Europe is clear to see. By way of example, the 1973 Constitution of Pakistan was amended in 2010 under the influence of Article 10 of the UDHR so as to include the right to a fair trial. The newly incorporated Article 10-A of the Constitution explicitly guarantees the right to a fair trial for the determination of one’s civil rights and obligations (Constitution of the Islamic Republic of Pakistan: 12 April 1973 (as Amended to 19 April 2010) (Pak)). The constitutional significance of this right was emphasized in a decision by the Pakistan Supreme Court, who stated that ‘the right to a fair trial was a long recognized right, now constitutionally guaranteed and by now well entrenched in our jurisprudence’ (Suo Motu Case (2012) para. 27 (Pak)). Similarly, in the
context of the Islamic legal tradition, it has been claimed that Islamic law has long incorporated most of the elements of the ‘fair trial’ provisions of the UDHR (Baderin 98).

19. The Constitution of the Republic of Kenya: 6 May 2010 (Kenya) contains an explicit mention of the right to a fair trial in Article 50. However, this provision distinguishes (albeit not very clearly) between the guarantees for a fair hearing in civil cases (Art. 50(1)), and the right to a fair trial in criminal proceedings (Art. 50(2)). This distinction was clarified by the Court of Appeal at Nairobi in Judicial Service Commission v Gladys Boss Shollei and another (2014) (Kenya), stating that ‘[a] careful perusal of the Constitution shows that Article 50(2) ... applies to criminal trials and not to civil litigation or disciplinary proceedings’ (para. 73).

(b) Jurisdictions in Which the Right to a Fair Civil Trial Has Been Inferred from Other Constitutional Principles

20. In other European jurisdictions, the right to a fair trial has been inferred from various constitutionally-guaranteed procedural rights, such as the right to judicial protection, ie right of access to justice (in the Czech Republic: Article 36(1) Charter of Fundamental Rights and Freedoms of the Czech Republic (Czech), see Holländer 27; in Spain: tutela efectiva de los derechos, the Constitution of the Kingdom of Spain: 6 December 1978 (as Amended to 27 September 2011), Art. 24 paras 1 and 2 (Spain), Judgment 46/1982 (1982) (Spain); in Portugal: the Constitution of Portugal, Arts 20, 32 and 268 paras 4 and 5, tutela jurisdicional efetiva), and the right to be heard (in Germany: Anspruch auf das Gehör, Basic Law of the Federal Republic of Germany: 23 May 1949 (as Amended to 13 July 2017), Art. 103 para. 1 (Ger); see eg BVerfG, Beschluss des Plenums des Bundesverfassungsgerichts (2013) (Ger)). In absence of a written constitution in the United Kingdom (UK), the 1998 Human Rights Act (UK), which renders the ECHR directly applicable in the UK courts, is of comparable significance (1998 HRA Section 1(3), Schedule 1).

21. As regards the Anglo-American legal cultures, the examples of Canada and South Africa are worth mentioning in this context. The fundamental requirements of procedural fairness are guaranteed under Section 7 of the Canadian Charter of Rights and Freedoms (‘principles of fundamental justice’) (Sharpe and Roach 228). While a civil proceeding in Canada does not explicitly engage a Charter right (Section 11 thereof guarantees the right to a fair trial solely to the accused in criminal proceedings), it is emphasized in literature (Bamford 476) and in the case law of the → Supreme Court of Canada (Cour suprême du Canada) that a right to a fair trial is a fundamental principle of justice in the Canadian constitutional system, and that the general duty of fairness is applicable to judicial proceedings in general (Nicholson v Haldimand-Norfolk (1979) 324 (Can)). A similar guarantee is contained in the Bill of Rights of the South African Constitution (Constitution of the Republic of South Africa: 16 December 1996 (as Amended to 1 February 2013), Chapter 2, Bill of Rights, Section 34 (S Afr)), albeit providing more detail as to procedural requirements.

22. Exceptionally, in some jurisdictions, eg China, neither the notion of ‘due process’ nor ‘fair trial’ is recognized by the constitution (Fu 175; cf Wang 18). Instead, citizens are entitled to the basic right to complain against officials and/or government branches under Article 32 of the Constitution of the People’s Republic of China: 4 December 1982 (as Amended to 14 March 2004) (China).

(c) Systems with a Due Process Clause
23. In the US, the guarantees of the right to a fair trial are contained in the constitution—however, under the term ‘due process of law’ (Fifth Amendment and Fourteenth Amendment). In 1791, the first ten amendments to the Constitution of the United States of America (also: the Bill of Rights) made certain fundamental individual rights a part of the constitution. Of particular relevance here is the right not to be deprived of ‘life, liberty[,] or property without due process of law’ contained in the Fifth Amendment. In 1868, with the adoption of the Fourteenth Amendment and its ‘due process’ clause, this right became directly applicable in respect of individual states as well (Dimitrakopoulos 111). The ‘due process’ clause has been found to encompass both ‘procedural’ (Wasserman 8 et seq) and ‘substantive’ aspects, whereby the former correspond to the right to a fair trial as commonly understood. Notwithstanding the difference in terminology, it has been established in that a ‘fair trial in a fair tribunal is a basic requirement of due process’ (In re Murchison (1955) 136 (US)). In other words, the right to procedural due process as laid out in the US Constitution applies to both civil and criminal proceedings and encompasses minimum procedural requirements that must be fulfilled: essentially, the person concerned must be notified and be given opportunity to be heard by an impartial court (eg Joint Anti-Fascist Refugee Committee v McGrath (1951) 163 (US); Goss v Lopez (1975) 577 (US); also Settem 8). In Fuentes v Shevin (1972) 80 (US), where the petitioners challenged the constitutionality of the Uniform Commercial Code provisions of Florida and Pennsylvania, the → Supreme Court of the United States clarified:

[f]or more than a century the central meaning of procedural due process has been clear: [p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.

24. In fact, this notice-and-hearing model is often referred to as a ‘civil’ model of due process, since it is in civil settings that this test is clearly established as the ‘single constitutional approach to procedural due process’ (Kuckes 9).

25. In a similar manner, the Brazilian Constitution explicitly guarantees ‘due process of law’ (Art. 5(LIV)); this guarantee is, however, implicit in many other provisions of Article 5 of the Constitution (Constitution of the Federative Republic of Brazil: October 5, 1988 (as Amended to September 15, 2015)) which encompasses a series of principles of fundamental importance within the Brazilian legal system.

26. Although the Constitution of Japan: 3 November 1946 (Japan) does not contain the due process clause, as its inclusion was deliberately avoided by the principal drafters of the constitution, the basic idea contained in the American concept of the due process clause is said to be enshrined in Article 31 of the Constitution (Okudaira 519). In Japan, however, due process was institutionalized as a narrower concept, especially concerned with criminal justice.

(d) Jurisdictions in Which the Right to a Fair Civil Trial Has Been Inferred from the Fair Criminal Trial Guarantee

27. In some countries, the right to a fair trial is explicitly guaranteed solely to the accused in criminal proceedings (eg the Constitution of the Republic of India: 26 January 1950 (as Amended to 28 May 2015) Part III, Art. 21 (India)); yet, the courts in these jurisdictions have interpreted these constitutional guarantees extensively and found them to also be applicable in civil law cases (eg Brij Mohan Lal v Union of India and Ors (2012) para. 137
28. A similar example of extensive interpretation of a constitutional right is to be found in Japan. Born out of criminal procedural protections, Articles 31 and 32 of the Constitution of Japan which guarantee due process and the right of access to courts (saiban wo ukeru kenri; alternatively: the right to obtain justice in courts) respectively, now not only command a consensus in understanding that they include the right of every person to bring a suit in the courts with regard to civil matters, but are also understood as encompassing the duty of fairness of the procedure (Levin 295).

2. Components of the Right to a Fair Civil Trial

29. The broader concept of the right to a fair trial in civil cases is generally said to encompass the following constitutive elements: (a) access to court (or access to justice); (b) institutional guarantees, providing for the necessary qualities that the deciding judicial bodies shall possess in order to provide proper justice; and (c) procedural guarantees, which define the characteristics of the proper handling of the case and constitute the right to a fair hearing (eg Settem 53–75; Bårdsen 118).

(a) Access to Court

30. It is safe to say that the right of access to a court (also: access to justice) is globally constitutionally guaranteed (eg the Constitution of the Arab Republic of Egypt: 18 January 2014, Art. 68 (Egypt); the Constitution of Japan, Art. 32; the Constitution of Italy, Art. 24 para. 1; the Constitution of the Russian Federation: 12 December 1993 (as Amended to 21 July 2014), Art. 46 (Russ); the Constitution of the Republic of Kenya: May 6, 2010, Art. 48; the Constitution of the Republic of India: January 26, 1950 (as Amended to May 28, 2015), Arts 14 and 21; the Constitution of the United States, Seventh Amendment (US); the Federal Constitution of the Swiss Confederation: April 18, 1999 (as Amended to March 15, 2012), Art. 29(a) (Switz); the Constitution of the Republic of Turkey: 7 November 1982 (as Amended to 16 April 2017) Chapter XIII, Part A, Art. 36 (Turk); the Constitution of the United Arab Emirates: 18 July 1971 (as Amended to 10 February 2009) Art. 41 (UAE)). At the same time, the understanding of its scope and content diverges considerably.

31. In the European context, the fair trial guarantee has come to cover the right of access to the courts, the landmark decision being Golder v the United Kingdom (ECtHR) (1975). This case involved an applicant, a prisoner in England, whose petition to consult a solicitor in relation to defamation proceedings against a prison officer was refused under the English Prison Rules. The ECtHR found that it would be inconceivable that Article 6(1) of the ECHR should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees—that is, access to a court. The fair, public, and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings (para. 35). It further established explicitly that it follows that the right of access constitutes an element which is inherent in the right to a fair trial (para. 36).

32. Such interpretation of the guarantee paved the way for a radical change in the perception of the fair trial compared to the traditional perception of it as a ‘negative right’, ie as freedom from unlawful interferences by the public authority (Article 39 of the Magna Carta Libertatum). With the inclusion of the right of access to the courts within the notion of a fair trial, this guarantee has moved from the area of negative rights into the area of positive rights, which impose positive obligations on the state to ensure the mechanism for effective access to justice (Caponi 511). In contrast, the current implementation of the US due process clause still bears traces of the traditional meaning, ie a negative right, not covering access to a court and the right to remedy: these have been granted in the US by
“those distinctive features of the system of civil litigation that characterise it as a ‘plaintiff’s heaven’” (Caponi 512).

33. Consequently, one way in which the effective right of access to courts is protected is the institution of legal aid, generally provided for by the state authorities. In the European context, this idea is supported in Article 47 of the EU CFR, which explicitly prescribes the duties for the states to provide for legal aid in order to ensure effective access to justice. The duty to make legal aid available is also supported by the ECHR case law (Airey v Ireland (ECHR) (1979)). In this case, the ECHR made a crucial distinction between criminal and civil proceedings, stating that legal aid is required in civil cases under the notion of access only in those situations where a person cannot plead his case effectively (para. 26). In the European Union, the existence of legal aid is undisputed. However, the concepts taken into account when deciding on a legal aid application, as well as the forms in which it appears, diverge (European Commission (2017) 79–91) notwithstanding a certain degree of harmonization in this respect (Legal Aid Directive 2002/8/EC). In the US, the provision of legal aid in order to invoke one’s constitutional right to counsel has been reserved to criminal cases by the Supreme Court (Gideon v Wainwright (1963) 337 et seq (US)) despite a growing debate and the pursuit of a ‘civil Gideon’ (eg Davis 156 et seq; Pollock 12).

34. In contrast to the US Supreme Court’s traditional approach to the issue of legal aid in the civil context, the importance of equal access to justice, regardless of economic resources and the potential importance of public legal aid schemes to reach this goal, is emphasised in a general comment on the right to fair trial as laid out in the African Charter by the → African Commission on Human and Peoples’ Rights (ACommHPR) (ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) Sections G, H, K; Settem 402).

35. In India, for example, legal aid is protected under the Constitution of India (Part III, Art. 39A). In Brij Mohan Lal v Union of India (2012) (India), the → Supreme Court of India confirmed the constitutional duty of the state to provide the citizens with such judicial infrastructure and means of access to justice so that every person is able to receive an expeditious, inexpensive, and fair trial. It further stated that the plea of financial limitations or constraints can hardly be justified as a valid excuse to avoid performance of this duty. Similarly, in Hussainara Khatoon v State of Bihar (1980) (India), the Supreme Court also pointed out that Article 39A made free legal service an inalienable element of reasonable, fair, and just procedure and that the right to such services was implicit in the guarantee of Article 21 of the Constitution.

36. On the other hand, a different approach is adopted by Kenya, which also provides for a constitutional guarantee of access to a court: while allowing for the filing of cases in court free of charge, there is no known state legal aid in civil cases through legal representation (Bwonwonga 22).

37. Notably, the Supreme Court of Canada has interpreted the ‘fundamental justice’ clause to entitle a party to civil proceedings to legal aid in the form of subsidized legal assistance (New Brunswick (Minister of Health and Community Services) v G (J) (1999) (Can)). This case concerned a constitutional right to be provided with a state-funded counsel at a custodial hearing when a government seeks a judicial order suspending such parents’ custody of their children. In its decision, the Court held that for the hearing to be fair, the parent must have an opportunity to present his or her case effectively and that such effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. The Court stated that this right, however, is not absolute: the duty of the state will depend on
the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent.

38. Access to justice also concerns the right to a proper preparation of a case, which corresponds to the duty of the authorities to keep people duly informed of measures taken concerning their civil rights and allowing them to institute civil proceedings against such measures if they interfere with their rights (De Geouffre De la Pradelle v France (ECtHR) (1992)). A number of these limitations are examined in a series of cases brought by individuals against the UK; an example of a permissible restriction to access was the availability of the defence of privilege in an action for defamation (Fayed v the United Kingdom (ECtHR) (1994)), while an example of an unacceptable restriction is the blanket immunity against being sued in civil proceedings (Osman v the United Kingdom (ECtHR) (1998)).

39. Finally, a particular aspect of the access to a court is the right of the parties to be present during civil proceedings. While this principle is generally accepted as being of universal application in criminal proceedings (Leanza and Pridal 102), the presence of a party at the proceedings in the context of civil proceedings is considered necessary only in certain circumstances. The ECtHR has, for instance, established that any right to be present during the civil proceedings is not guaranteed by the right to a fair trial provision as such; such a right has a rather general meaning and encompasses the right to present one’s case effectively before a court and enjoy equality of arms with the adversary (Pashayev v Azerbaijan (ECtHR) (2012) para. 64).

40. It is important to note that these rights—although fundamental—are not absolute. This relativity was confirmed in Snyder v Massachusetts (1934) 116–117 (US), where the US Supreme Court famously stated: ‘[d]ue process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept . . . What is fair in one set of circumstances may be an act of tyranny in others’. The challenge underlying compliance with the requirements of the right to a fair trial is finding the balance between access to the courts and effective protection of individual rights on one hand, and the right to be heard on the other. This is particularly true in the context of civil proceedings. The decision in Hryniak v Mauldin (2014) (Can) is illustrative of this tension. In this case, which concerned a civil fraud application, the Supreme Court of Canada recognized the necessity to dispense with a trial where there is no genuine issue requiring one: ‘undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes’. The Court further held that summary judgment motions must be granted whenever there is no genuine issue requiring a trial, ie when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment.

(b) Institutional Guarantees

41. The fair trial guarantees are not merely concerned with procedure in the formal sense; there is a strong emphasis on the institutional dimension of the administration of justice contained therein. Features of these institutional guarantees are mainly concerned with the manner in which the courts and other tribunals are established; their affiliation with other governmental bodies; the procedure of the appointment of judges; and mechanisms of securing → independence of the judiciary and → impartiality of the judiciary.

(c) Procedural Guarantees

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42. In addition to having effective access to an impartial and independent civil court, there are certain requirements pertaining to the proceedings themselves that ought to be met in order to comply with the fair trial principle. These guarantees are numerous and diverse. In this respect, the usual reference is made to the generic notion of a ‘fair hearing’, ie the concept of ‘procedural fairness’, as a component of the broader ‘fair trial’ notion (eg Bårdsen 119; Gomien, Harris, and Zwaak 157).

43. A civil proceeding is generally considered fair if the parties have been given the opportunity to be heard (right to be heard; principio del contraddittorio; adversariality principle), when it is conducted within a reasonable time (the right to a speedy trial), and in such a way that parties are given a reasonable opportunity to present their case to the court under conditions which do not place one of them at substantial disadvantage vis-à-vis the other (the principle of equality of arms). Finally, it is considered that the fundamental constitutional guarantee of a fair civil trial is the requirement that the proceedings take place in public, ie the open court requirement (→ public conduct of court proceedings; see also → right to a fair hearing in civil law cases).

D. Conclusions

44. As demonstrated above, the concept of the ‘right to a fair trial’ remains a complex notion even when limited to the context of civil procedure. In fact, it is considered a ‘matrix’ principle which combines several rights and which can, at the same time, produce new ones (Rousseau 160). It has been hereby shown that the right to a fair trial in civil proceedings is generally constitutionally recognized. While the actual determination and implementation of the right to a fair trial will depend on each country’s legislation, case law, and legal traditions, certain common denominators do emerge.

45. Firstly, there is a general consensus that it is not enough to have a theoretical access to justice; in any socially advanced legal system, effective access must be sought (Cappelletti 740). The exigency of making justice accessible to all is an important facet of a trend which has been reflected most clearly in the constitutions of the twentieth century as well as in the case law of those countries where no new constitutions have been adopted (eg the extensive interpretation of the due process clause by the US Supreme Court: Boddie v Connecticut (1971) (US)). Secondly, the constitutional law of most of the countries studied provides for some guarantees of independence and impartiality of the judiciary, which are generally further developed in their respective statutory acts and constitutional jurisprudence. Finally, the guarantees of procedural fairness seem to encompass those ‘essentials’ of justice, such as the audiatur et altera pars (the right to be heard), the right to a public hearing, and the right to a speedy trial, together constituting the broader notion of the ‘fair hearing’. In some countries, the right to a fair hearing would additionally encompass the right to a cross-examination of witnesses (eg in England; Jolowicz (1973) 163) or the right to a civil jury (the Constitution of the United States, Seventh Amendment).

46. Although the individual fundamental procedural guarantees have been long embodied in practice (eg oral proceedings in the Roman Empire) or even recognized as legal rights and principles (eg Magna Carta), the codification thereof is a more recent phenomenon. While constitutions and bills of rights have existed for many years, it was not until the post-Second World War epoch that the meaning of those constitutions changed from being political-philosophical declarations to legally-binding enactments.
This trend of the ‘constitutionalization’ of the fundamental procedural principles, including those that make up the right to a fair civil trial, has been paralleled by that of ‘internationalization’. In addition to the aforementioned numerous international and regional instruments that proclaim to right to a fair trial in civil proceedings, it is necessary to mention the joint project of the American Law Institute (ALI) and International Institute for the Unification of Private Law (UNIDROIT) on the ‘Principles and Rules of Transnational Civil Procedure’ (2004), which aims to provide for a balanced distillation of best practices of common law and civil law in the area of civil litigation. Finally, the right to a fair trial plays a crucial role at the stage of recognition and enforcement of foreign decisions obtained in civil proceedings. In this respect, the harmonization projects in the European Union are exemplary (Hess 159).

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