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THE RIGHT TO A FAIR TRIAL AND USE OF UNLAWFULLY OBTAINED EVIDENCE AND GUILTY PLEAS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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INTRODUCTION

Article 6 § 1 of the European Convention on Human Rights (hereafter – "Convention") is one of the document's most frequently cited provisions establishing "framework" protection in the area of judicial proceedings. The article is probably the best known conventional provision and the one which the European Court of Human Rights (hereafter – "Court") refers to most often in practice. So, it is not unusual that the focus of this research is related to the right to a fair trial.

The purpose of this research is to define the concept of "fairness" in the context of criminal proceedings, provide specific examples of practices running contrary to principles of fairness (examples of unfair assessments of evidence, including evidence obtained through ill treatment, and simplified trials of criminal cases based on questionable guilty pleas). Another task is to reflect on the most recent case-law related to the fairness of criminal proceedings, reaching conclusions as to how standards of fairness have developed in the Court's jurisprudence.

The aforementioned practical examples of unfair assessments of evidence in the course of full trials and simplified criminal trials were not chosen by accident. They largely relate to case-law with re-

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gards to countries that have introduced new procedures previously unknown to their legal and criminal justice systems. This concerns countries aiming to strengthen the adversarial context of criminal trials on the domestic level. Thus, the experience from these countries evaluated in the Court's case-law could serve as a useful indicator of the compliance of the current similar domestic judicial practices and the relevant legislation with the requirements of fairness ensuing from Article 6.

THE COMPLEX TASK OF DEFINING FAIRNESS OF CRIMINAL PROCEEDINGS

The well-known wording of Article 6 § 1 reads "in determination of criminal charges ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Originally, the establishment of the "fair trial" standard was based on the idea of "drafting a text which held good in international law [as] the Universal Declaration of Human Rights[2] lacked precision ... and there was a need for elaboration of a text elaborated which should be binding in a legal sense"[3]. However, as we can see, being unrealistic from the very outset, this idea was not implemented, which leaves a great deal of space for the Court's legal creativity in establishing a standard and further developing its meaning. One might only suggest that this was the original intention of the Convention's drafters, as the reasons behind drafting the aforementioned text of Article 6 using this wording are not clearly shown in the Convention's preparatory works.

Most possibly, one of these reasons was that this provision, like many of the Convention's substantive provisions, established a standard that should have been applied flexibly, thus allowing the Court to define the provision and to develop its definition by means of forthcoming jurisprudence. Another reason worth mentioning might be that this provision was in a certain sense a compromise agreed upon by the drafters, which reflected their differing approaches to the settlement of criminal cases originating from continental and common law traditions[4]. The provision was also a compromise between different understandings of what is fair and what is not in the context of criminal proceedings based on traditions of various European countries.

One has to admit that the concept of fairness cannot be easily defined standing alone. It has an extremely wide and, one might say, deep philosophical and theoretical meaning on its own. There are many meanings that could be given to the notion of fairness. For instance, the dictionary

[2] See more specifically Article 14 of the International Covenant on Civil and Political Rights, 1966 (999 UNTS 171, 6 ILM 383 (1967)). It states there are many differences between the two provisions.

[3] Janis, Kay and Bradley. *European Human Rights Law: Text and Materials.* OUP, 1990, p. 13.

[4] D.J. Harris, M. O'Boyle, C. Warbrick. *The Law of the European Convention on Human Rights.* London, Dublin, Edinbourg: Butterworths. 1995. p. 164; D.J. Harris, M. O'Oboyle, E.P. Bates, C.M. Buckley. Law of the European Convention on Human Rights. OUP, 2nd Edition. 2009. p. 203.

definition of fair in the context of a trial is "having qualities of impartiality and honesty being free from prejudice, favouritism, and self-interest; it also defines fair as just equitable; even-handed; equal, as between conflicting interests"[5].

Fairness in the context of law is frequently related to social justice issues or distributive law. In the United Kingdom, fairness is also associated with the law of equity. It is also frequently raised in the context of natural law doctrine due to the fact that a great deal of influence on the interpretation of fairness can be found having its roots in natural justice theories[6]. However, once again, fairness does gain a legalistic meaning when applied in the context of the administration of justice and more specifically within the context of the administration of justice in criminal cases. A number of attempts have been made to define fairness in this context and to give it a procedural meaning[7]. These attempts were of mere theoretical and philosophical nature and were mostly derived from the main ideologies of the adversarial system[8]. As an example, socialist countries ideologically opposed to the modern system of the administration of justice used the concept for their own purposes, sometimes defining fairness as the social equality of the participants in trial[9]. However, this appeared from the classical pre-Soviet approach of an object of criminal procedure as a process of establishing the State's right to punish[10]

Looking at the notion of fairness in the context of the administration of justice, one has to ask whether we are talking about so-called *firstly* "substantive fairness" / "fairness of the outcome of the proceedings" (otherwise fairness of the result of the proceedings) or *secondly* of procedural fairness. It is quite obvious that the outcome of a criminal procedure may not always seem fair or just (in particular for certain participants in trial proceedings, such as, for instance, the defendant, who complains about the unfair outcome of the proceedings, i.e. his conviction, or for a civil plaintiff who might consider insufficient and unfair the compensation ordered by the court's verdict). Thus, fairness may be perceived as a philosophical or moral value[11]. Therefore, once again, from a theoretical point of view, any kind of "determination of criminal charges" requires that both substantive and procedural aspects of fairness be respected.

The concept of procedural fairness might be said to involve the following elements:

- Fairness of the existing procedure itself, which is centred around a view that the parties are the ones for whom the procedure is established and any procedure giving advantage to one party over the other inevitably leads to an unfair decision;

[5] Black's Law Dictionary, 6th Edition. (St. Paul, Minnesota: West Publishing Co.). (1990).

[6] Gerry Maher. *Natural Justice as Fairness. In The Legal Mind. Essays for Tony Honore.* Ed. Neil MacCormick and Peter Birks. (Claredon Press: Oxford). (1986). pp. 103-121.

[7] See, for instance, John Rawls. Theory of Justice (Cambridge, Mass.) (2nd Ed.). (1972). pp. .83-89.

[8] Stephan Trechsel. *Why Must Trials Be Fair?* Israel Law Review. Vol. 31. 1997. p. 98.

[9] M.S. Strogovych. *On Adversariness and Procedural Functions in the Soviet Criminal Procedure.* //Pravovedeniye. -1962. - № 2. - pp. 106 – 114.

[10] Foynitsky I.Ya. *The Course of Criminal Procedure*. 4th Ed. St. Petersburg, 1912. p. 4.

[11] Stephan Trechsel. Supra. p. 95.

- "Fairness of the system as a whole", including a wide understanding of the principle of the *rule of law* basis of the administration of criminal justice by the State, which *inter alia* includes the quality of the criminal procedure legislation regarding the issue on hand and its fair application in practice by the law enforcement authorities and the courts[12].

However, all of the aforementioned theoretical underpinnings do not satisfy the conceptual scope of fairness envisaged in Article 6 as it has gained its own special meaning in this context, becoming a value that is of the common moral, ethical and legal heritage of European states. This approach, which underscores the importance of the right to a fair trial is reflected in the Court's well-known case-law dating back to the late 1980s. At that very time, the Court highlighted that the right to the fair administration of justice holds such a prominent place in a democratic society that it cannot be sacrificed to expediency, neither can its breach be justified by the need to combat dangerous criminals or to investigate serious criminal acts that endanger the public or society as a whole[13], disregarding lawful means of gathering evidence.

In one of the more recent cases, *Rowe and Davis v. the United Kingdom*[14], the Court's Grand Chamber restated the previous jurisprudence and reiterated that the right to a fair trial guarantee, "reads as a whole, guarantees the right of an accused to participate effectively in a criminal trial". The Court stated that the fundamental aspect of the right to a fair trial is that criminal proceedings, including the elements of such proceedings relating to the procedure, should be adversarial, and there should be equality of arms between the prosecution and the defence. The applicant should not be placed at a serious disadvantage *vis-à-vis* the prosecution in regards to the examination of the case-file or its most important parts, decisive for conviction.[15]

However, referring to another case, the Court concluded that to reach a finding on whether there was a breach of the principle of fairness in the course of criminal proceedings one must consider whether the proceedings in their entirety, including the appeal proceedings, as well as the way in which evidence was taken, were fair. Eventually the Court's only task would be to ascertain whether the proceedings considered as a whole were fair, including the way in which the evidence was taken[16].

Thus, "fairness", according to the Court's case-law and in the context of criminal proceedings, can be said to include the following aspects: the equality of arms, the adversarial nature of the procedure[17], the public appearance of the administration of justice, the independent and impar-

[12] Nico Jorg. *Are inquisitorial and adversarial systems converging?* In Harding, Fennel and Jorg. Criminal Justice in Europe. A Comparative Study. (Clairdon Press). (1995). pp. 42-43.

[13] See *Delcourt v. Belgium*, judgment of 17 January 1970, Series A No. 11, p. 15, § 25; *Kostovski v. the Netherlands*, 20 November 1989, § 44, Series A No. 166.

[14] See Rowe and Davis v. the United Kingdom [GC], No. 28901/95, § 34, ECHR 2000 II.

[15] See *Mirilashvili v. Russia*, No. 6293/04, §§ 228 - 229, 11 December 2008 (This judgment discusses evidential value of various types of evidence, including evidence resulting from telephone tapping and treatment of expert evidence).

[16] See *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A No. 247-B.

[17] In pre-revolutionary (pre-1917) theory of criminal procedure, the adversarial nature of the procedure meant the split of the criminal procedural functions into three – prosecutor's, defence's and judicial – functions, which theoretically were not supposed to overlap. This

tial judicial examination of the criminal charges, the effective participation in proceedings, including the adequate and proper exercise of the defence's rights, the reasonable period of examining the case, etc[18].

One might conclude that a general approach adopted in the case-law is that the Court rather evaluates what is unfair rather than defines what a fair procedure should resemble[19]. However, to apply the principles established above it is necessary to assess specific circumstances in which the Court makes a finding that particular criminal proceedings were unfair. Based on the above, let's contrast the above principles of fairness with certain jurisprudential examples of how the Court assesses criminal cases with complaints that evidence has been obtained unlawfully.

UNFAIRNESS OF CRIMINAL PROCEEDINGS BASED ON THE FAILURE TO PROPERLY ASSESS EVIDENCE

Can criminal proceedings be said to be unfair as a result of an alleged failure to correctly assess evidence? As a general rule – no. Such a conclusion arises from the fact that matters relating to allegations of the improper assessment of evidence, the admissibility of certain evidence and its evidential weight, or matters similar to the incorrect application of the domestic procedural or substantive law, fall outside the Court's scope of review. The Court's case-law does not establish any rules as to how evidence should be assessed, or which evidence should be given more evidential value and should be more favoured. For the Court, these are matters that are clearly inadmissible for further examination on merit and which are generally regarded, if earlier raised in the applications, as matters relating to so-called "fourth instance nature" complaints. In this respect, the Court has stated on a number of occasions that its subsidiary nature does not allow it to take the place of a first instance tribunal and to replace judicial authorities on matters of assessing evidence or fact-finding domestic, which, according to the Court's constant jurisprudence, are better placed for performing these obligations[20]. An example of how the Court deals with fourth-instance complaints and explanations as to why they are normally declared inadmissible can be seen in a judgment given by the Court upon an application lodged by *Gia Patsuria Against Georgia*[21].

However, notwithstanding the aforementioned general approach, which is based on its constant case-law, the Court's judicial practice clearly states that it will look into issues of how evi-

theory was supported by Professor D.G. Talberg of Kyiv's St. Volodymyr University in 1889 and such scholars as I.Ya. Foynitsky. The same approach was followed in Soviet criminal procedure; however, only in theory.

[18] Karen Reid. *A Practitioner's Guide to the European Convention on Human Rights*. London: Sweet and Maxwell. 1998, p. 51; Karen Reid. A Practitioner's Guide to the European Convention on Human Rights. 3rd Edition. London. 2008, p. 66.

[19] Karen Reid, supra, 3rd Ed. p. 67 - 69.

[20] See *Koval v. Ukraine*, No. 65550/01, § 118, 19 October 2006.

[21] See *Patsuria v. Georgia*, No. 30779/04, §§ 86 - 87, 6 November 2007.

dence was obtained, especially if such evidence was obtained by means claimed to be unlawful and more specifically if the evidence constitutes a decisive element of proof in establishing the applicant's guilt. The Court also cautiously approaches incriminating evidence obtained in unclear circumstances, which was the only evidence substantiating a defendant's conviction.

Referring back to the Court's jurisprudence, as a general rule, the case-law states that the right to a fair trial presupposes that all the evidence must normally be produced at a public hearing in the presence of the accused with a view to adversarial argument, with the defendant being given an adequate and proper opportunity to challenge and question a witness against him or her either when the statements were made or at a later stage of the proceedings. The conviction, to be compatible with Article 6 § 1 guarantees, must not rely solely or decisively on the depositions of a witness whom the accused has had no opportunity to examine or more generally on evidence not examined during the investigation or at trial. This includes evidence based on submissions of *agents provocateurs*[22] and anonymous witnesses[23], which were not subject to review in trial court.

There were several recent examples of such approaches in the Court's case-law, relating to the countries of the continental and inquisitorial criminal justice tradition.

For instance, in a recent case against Russia lodged by *Vladimir Romanov*[24], the applicant's conviction was based on evidence given by a victim who failed to appear at trial, and thus the applicant was not able to challenge his witness' statements, which were of decisive importance for the applicant's conviction. On the basis of these findings the Court concluded that the applicant's trial was unfair. In the same case the Court noted that because other statements given by the co-accused on admitting their guilt were later retracted in the trial stage of the proceedings by the co-defendants who alleged coercion on the part of the investigator, they could not be admitted as evidence at the applicant's trial or did not have evidential value important enough to support the applicant's conviction[25]. In relation to a guilty plea by the co-accused, the Court noted that such a plea should only be admitted to establish the fact of a commission of a crime by a pleading person, and not the applicant, as a guilty plea raised by the co-accused by itself did not prove that the applicant was involved in that crime.

Another issue arises from the use of evidence obtained by physical coercion used as key evidence for the applicant's conviction. In one of the Court's most recent cases against Germany, *Jalloh v. Germany*[26], the Grand Chamber found a breach of Article 6, stating that the proceedings as a whole were unfair on the basis of the applicant's complaint that he had been administered an emetic by force and that the evidence thereby obtained (a package of drugs that he swallowed) –

[22] See *Teixeira de Castro v. Portugal*, 9 June 1998, Reports of judgments and Decisions 1998-IV (For some additional considerations on the case. See the dissenting opinion attached to this case).

[23] See *Taxquet v. Belgium*, No. 926/05, § 68, ECHR 2009-… (The case referred to the Grand Chamber).

[24] See *Vladimir Romanov v. Russia*, No. 41461/02, 24 July 2008.

[25] See case of *M. H. v. the United Kingdom* (No. 28572/95, Commission decision of 17 January 1997), which describes in more detail the test for admitting guilty pleas given by the co-accused as evidence in the trial of other persons.

[26] See *Jalloh v. Germany* [GC], No. 54810/00, ECHR 2006-...

in his view, illegally – had been used against him at his trial. The Court found that the authorities had subjected the applicant to a grave interference in his physical and mental integrity against his will. They had forced him to regurgitate, not for therapeutic reasons, but rather in order to retrieve evidence they could equally have obtained by less intrusive methods contrary to the absolute prohibition of ill-treatment arising from Article 3 of the Convention. Thus, the Court further ruled that the evidence was obtained by measures in breach of the core prohibition enshrined in the Convention and this evidence obtained was decisive in securing his conviction. Accordingly, the use as evidence of the drugs obtained by the forcible administration of emetics to the applicant was contrary to public interest and had rendered his trial as a whole unfair.

A similar, probably more straightforward, issue of admitting evidence obtained as a result of ill-treatment was discussed in the case against Ukraine lodged by Oleksandr Yaremenko[27], who was arrested on suspicion of being involved in several murders. The applicant complained that he was ill-treated in police custody and that the authorities failed to carry out an adequate investigation into his allegations of ill-treatment. While being detained, on several occasions, the applicant waived his right to be represented by a counsel and confessed of the crimes as charged. However, later, after obtaining legal aid and in the course of the trial, the applicant denied his involvement in the crimes. He changed his position again, admitting his guilt, after his lawyer was disqualified from participating in the proceedings by a decision of the investigator. In the course of the judicial authorities' examination of his case, the applicant's retraction of his confessions and his allegations of ill-treatment were found to be groundless. In this case, the Court concluded that the State authorities had failed to conduct an effective and independent investigation into the applicant's allegations of ill-treatment in violation of Article 3. The Court further ruled that the applicant's lawyer had been dismissed from the case by the investigator after having advised his client to remain silent and not to testify against himself. It further considered that there had been serious reasons to suggest that the statement signed by the applicant had been obtained against the applicant's will[28]. In regards to findings that there had been no adequate investigation into the applicant's allegations of the confession having been obtained by illicit means, the Court found that its use at the trial impinged on his right to silence and his right not to incriminate himself in violation of Article 6 § 1. It also found a breach of the right to be represented by a lawyer of his own choosing guaranteed by Article 6 § 1(c).

A similar decision in relation to the proceedings' breach of the requirement of fairness was taken by the Court in the case of *Harutyunyan* lodged against Armenia[29], where the Court found that the applicant's right not to incriminate himself and his right to a fair trial were breached by the use at his trial of statements obtained by torturing the applicant and two witnesses who testified against him. The Court found that the applicant and the witnesses had been coerced into making confessions and that that fact had been confirmed by domestic courts when the police officers concerned were convicted of ill-treatment.

[27] See *Yaremenko v. Ukraine*, No. 32092/02, 12 June 2008.

[28] A similar breach of Article 6 § 1 was found in the case of *Shabelnik v. Ukraine* (No. 16404/03, § 59, 19 February 2009), where the Court ruled that the applicant's testimonies were obtained in defiance of his will.

[29] See *Harutyunyan v. Armenia*, No. 36549/03, ECHR 2007-VIII.

Judging from the above case-law one might conclude that any use of unlawfully obtained evidence would lead to a breach of Article 6. However, it is not so. The Court's case-law clearly states that, as such, certain unlawfully obtained evidence may be admissible if the proceedings as a whole are fair. In such cases, the Court would look into whether the rights of the defence were respected and more specifically at whether the applicant was given an opportunity to challenge the way this evidence was obtained and whether the applicant opposed its use in the course of the trial[30]. The Court would normally not find an issue arising under Article 6 § 1 as to the conviction on the basis of available evidence, taken as a whole[31], especially where the applicant was given the proper opportunity and adequate time and facilities to present submissions on the case and to object to the admissibility of certain available evidence[32].

This turns us to the Court's case-law on Article 6 with regard to cases where an applicant waives his rights to a full trial and thus his right to have a full and proper opportunity to defend himself, including a waiver of the right to question the admissibility of certain evidence. These are cases generally related to simplified procedures for settling criminal cases, which recently were given attention in several cases examined by the Court, including the case of *Scoppola v. Italy*[33] examined by the Grand Chamber, which we will discuss below. In its case-law relating to the admission of guilt and in relation to summary trials, as in its jurisprudence on the issues arising from the assessment of evidence, the Court establishes certain tests and standards that should be applied to assess how fair the criminal proceedings were.

UNFAIRNESS OF CRIMINAL PROCEEDINGS ENSUING FROM SIMPLIFIED AND ABRIDGED TRIAL PROCEEDINGS

The absence of full trial does not automatically mean that it has been unfair. We have seen that from the case-law relating to the assessment of evidence in the course of a full trial. The Court's case-law shows that having a "full trial" as such does not always prevent miscarriages of justice, judicial errors, mistakes, etc. Full trial does not always ensure that evidence is examined thoroughly, equality of arms is respected, and, for instance, all relevant witnesses are heard. Nevertheless, it is normally perceived that a full trial procedure in a court of law or tribunal is a place where fair justice in criminal cases is being administered[34], as the full procedure before the court has specific inalienable features, which are distinct from other non-judicial procedures for the settlement of criminal cases. In particular, full trial procedures seem to satisfy the substantive and procedural fairness. One of these features, for instance, is trial publicity, i.e. compliance with

[30] For instance in the case of *Melnik v. Ukraine* (No. 72286/01, 28 March 2006), the applicant failed to challenge admissibility of evidence obtained through operative purchase of drugs conducted by an undercover police agent.

[31] See *Schenk v. Switzerland*, 12 July 1988, Series A No. 140 and *Satık v. Turkey* (No. 2), No. 60999/00, 8 July 2008.

[32] See *Koval* judgment, cited above, § 117.

[33] See *Scoppola v. Italy* (No. 2) [GC], No. 10249/03, 17 September 2009.

[34] Osborn's Concise Dictionary, 8th Edition (Sweet & Maxwell). (1993).

the principle that "justice must be seen to be done". Thus, one might argue that a full trial cannot be seen as an ultimate solution for ensuring that all criminal charges are determined in a "fair manner", without breaches of Article 6.

Furthermore, the Court frequently finds in its judgments that unreasonable delay in the settlement of a criminal case means that "justice had been denied" to the applicant, even though we might arguably admit that the proceedings were unreasonably long, but not "unfair" within the meaning of Article 6[35]. In such cases, the governments frequently argue that the criminal case had been complex and the judicial and law enforcement authorities acted without delays in trying to ensure that the proceedings were conducted in a fair manner. Thus, in such cases, we examine the eternal conflict between the need to ensure that justice in criminal cases is administered sufficiently thoroughly and fairly (the procedural and substantive outcome of the proceedings is fair), but on the other hand efficiently (without undue delays). In this respect, a number of the Council of Europe's legal instruments encourage the use of simplified and abridged procedures for settling criminal cases mainly by means of setting priorities in the work of the prosecution authorities, who should focus on dealing efficiently with complex and publicly important cases and not with minor offences, which should be examined in a simplified way. For instance, Recommendation No. R(87)18 of the Committee of Ministers on the Simplification of Criminal Justice suggests that criminal cases should be dealt with by means of the maximum possible procedural economy. The recommendation refers to ever-increasing delays and the mounting number of cases that criminal justice systems have to deal with. Taking into account these problems, the Committee of Ministers suggests that the following methods should be encouraged for resolving these problems: the use of discretionary prosecution and alternatives to prosecution, the application of summary procedures and so-called simplified procedures and the simplification of ordinary judicial procedures where necessary. One of the procedures suggested by the recommendation is a simplified procedure for criminal cases by means of the admission of guilt in exchange for certain favours on the part of the prosecution authorities (dropping certain charges, the re-qualification of the offence, offering sentence discounts, etc.). So, let's look into the simplified procedures for settling criminal cases based on the admission of guilt and discuss their compatibility with the requirements of Article 6, the rights under which may in principle be waived.

One of the first cases on this subject, the judgment in the case of Deweer v. Belgium[36], concerned the applicant's friendly settlement agreement with the local prosecutor admitting his guilt and his agreement to be subjected to a fine from the local tax authorities for fixing the selling price on beef and pork. This agreement was based on the choice the applicant had between being subjected to a higher sanction, including the possible closure of his shop, resulting from a full procedure with an unknown outcome, or paying a certain "fine by way of settlement" – "a kind of compensation to the community for his reprehensible conduct". Referring to the specific

[35] Notwithstanding simplification certain cases involving admission of guilt are also not settled within a reasonable time. See for instance, *Nikolova v. Bulgaria* (No. 2), *No. 40896/98,* 30 September 2004 (Examination of a guilty plea must be conducted within a reasonable time).

[36] See *Deweer v. Belgium*, 27 February 1980, §§ 53-54, Series A No. 35.

circumstances of the case, the Court found a violation of Article 6, finding that the waiver of the right to a full trial attended by all the guarantees required in the matter by the Convention was tainted by constraint. This case might be characterised as an instance of psychological pressure to plead guilty, in a certain sense admitting the stressful situation in which the domestic authorities put the applicant. In this case a person was put in a situation where he had no other choice, but to plead guilty. One of the actual examples of such undue pressure was established by the Court in the case of Rytsarev v. Russia[37]. More specifically, the Court established from the records of the applicant's questioning that he had not eaten anything for a certain period of time and had not been given any water before being questioned by the investigator, who had offered to give him food in exchange for a guilty plea. Such an instance of pressure might lead to the conclusion that the plea was involuntary.

The Court's case-law further states that a tribunal hearing a guilty plea must be independent and impartial[38], the person pleading guilty has a right to be represented in the course of simplified or abridged proceedings[39] or have an interpreter so as to understand the charges against him and appreciate the consequences of the guilty plea[40]. In any case the Court's constant jurisprudence recognises that any confession must be accurate, factually and legally reliable (based on relevant facts and proper classification of the criminal act in domestic law), voluntary and without the denial of the necessary legal advice[41]. Thus, one might conclude that in cases where the guilty plea is the central element of proof, the domestic authorities should take it with caution, checking whether it complies with the requirements of fairness enshrined in the case-law of the Court under Article 6. This includes: intelligence, voluntary nature and the existence of legal and factual grounds for the guilty plea.

In this respect it would be useful to refer to a partly dissenting opinion on the *Meftah* case given by Judge Zagrebelsky[42], relevant extracts from which can be sited as follows:

"…it is necessary to reassert here that even if a simplified procedure does not offer all the guarantees required by Article 6 it will not necessarily be contrary to the Convention if another form of procedure is available under the system to the appellant that is fully compatible with the requirements of a fair trial and the appellant is able to make a free and informed choice between the two. Otherwise, were it necessary for every alternative procedure to comply with all the requirements of Article 6, such simplified forms of procedure as the Italian summary judgment (*giudizio abbreviato*) or, *a fortiori*, the procedure on a guilty plea would have to be regarded as being contrary to the Convention. As a result, procedures that are essential for the administration

[37] See *Rytsarev v. Russia*, No. 63332/00, 21 July 2005 (The Court ruled in this case that the situation was resolved at the domestic level and the applicant was no longer a victim of the violations alleged).

[38] See *Findlay v. the United Kingdom*, 25 February 1997, Reports of Judgments and Decisions 1997-I.

[39] See *Whitefield and Others v. The United Kingdom* (dec.), nos. 46387/99, 48906/99, 57410/00 and 57419/00), 12 April 2005.

[40] See *Cuscani c. Royaume-Uni*, nº 32771/96, 24 September 2002.

[41] See *Magee v. the United Kingdom*, No. 28135/95, ECHR 2000-VI.

[42] See *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, ECHR 2002-VII.

of justice could no longer be used. However, the Court has previously found the choice of the summary judgment procedure in Italy to be compatible with Article 6 of the Convention … and the Commission reached a like conclusion with regard to the procedure on a guilty plea [existing in the United Kingdom] ... For these reasons, I conclude that there has been no violation in respect of either complaint".

Somewhat similar reasoning to the one proposed by Judge Zagrebelsky was adopted in the recent Grand Chamber case of *Scoppola Against Italy*[43], where the Court found a breach of Article 6 by the State's failure to respect promises given to the applicant in exchange for his request to be tried in the course of summary procedures. The applicant asked to be tried under the summary procedure for murder and other crimes, a simplified process which entailed a reduction of his sentence in the event of a conviction, including the possibility of a 30-year sentence instead of life imprisonment. The judge agreed to his request. However, the legislation changed on the day of his conviction, and the authorities were obliged to consider his offence under the new provisions of the law and their obligation to impose a lighter sentence on the applicant. However, they still followed summary procedures. In the present case, the applicant complained that although he had opted for a simplified trial – the summary procedure – he had been deprived of the most important advantage stemming from that choice under law by force when he made the decision – namely the replacement of life imprisonment with a 30-year sentence. In this particular case, the Court observed that the summary procedure on the issue had undoubted advantages for the defendant, but also a diminution of some of the procedural safeguards inherent in the concept of a fair trial. By requesting the summary procedure, the applicant waived his right to a full public hearing, but the authorities have unilaterally reduced the advantages attached to waiving fair trial safeguards. The Court concluded in this case that there had been a violation of Article 6 on these grounds. Thus, we can see from this case that the fairness of criminal proceedings in the context of summary procedures implies that where simplified procedures have been adopted, the principles of fair trial require that defendants should not be deprived arbitrarily of the advantages attached to these summary procedures.

CONCLUSIONS

It is not doubtful that judgments of the European Court of Human Rights finding a breach of the rights of the accused for effective participation in criminal trials contribute to changes on the domestic level, sometimes leading to the retrial[44] of victims of fair trial breaches, changes to

[43] See *Scoppola v. Italy* (No. 2) [GC], No. 10249/03, 17 September 2009.

[44] Such a retrial occurred in the aforementioned case of Yaremenko (cited above), where the Supreme Court of Ukraine reviewed the case in light of the European Court's judgment.

domestic laws[45], or national courts and law enforcement agency practices[46]. Through the years, the Court has affirmed the importance of the right to a fair trial and reiterated the need to ensure that domestic judicial and law enforcement systems operate in compliance with the requirements of Article 6. With the emergence of new issues and new procedures in the context of settlement of criminal cases, the guarantees developed by Article 6 become more rigid and stronger, requiring the national authorities to observe strictly the requirements that proceedings must be adversarial and that the prosecution authorities are not given any preferences over the accused / defendant. The Court's case-law under Article 6 reaffirmed the important place the Convention holds at the European level in ensuring that the aims of criminal justice are complied with, i.e. that justice is delivered for all, the guilty are convicted and punished and are being helped to stop their offences, victims' rights are restored to the maximum possible extent and the rights of the innocent are protected. The court's case-law under Article 6 continues to serve as a useful indicator of how judicial practice should develop at the domestic level. It also closely follows the most recent tendencies in the practice of the examination of criminal cases by international criminal tribunals, which have incorporated the requirements of fairness of criminal trials into day-to-day practice. As a general conclusion, the Court's practice is useful food for thought, and a source of research for bringing changes to perfect the domestic legal and criminal justice systems – aiming to improve their functioning. It is a useful tool of studies, further research and application at the domestic level, so as to ensure that domestic human rights standards are effective and, as one might suppose, even higher than the ones established in Article 6 and the Court's case-law.

[45] Such a ruling was made in the case of *Scoppola v. Italy* (cited above), where the Court ruled that the government was obliged to replace the penalty at issue with the one consistent with the principles set out in the Court's judgment.

[46] See *Gülmez v. Turkey*, No. 16330/02, §§ 60 63, 20 May 2008, where the Court ruled that the government had to deal with systemic and structural issues identified by a finding of a breach of Article 6.