

# THE JURIDICAL NATURE OF THE RIGHT TO A FAIR TRIAL

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## Abstract

*The present study is a theoretical approach to the legal principle regarding the right to a fair trial, particularly to the juridical nature of this right. The importance of guaranteeing the fairness of the procedures – in which the litigants are involved – has considerably increased especially after the European Convention on Human Rights was adopted in 1994. At the same time, the jurisprudence of the European Court of Human Rights played a significant role in observing the fairness of trials, especially in those causes that implied the breach of Article 6 of the European Convention on Human Rights. Under these circumstances and in conformity with the modifications brought to legislation the fair trial started to be perceived as a constitutional principle and it has become an essential rule for justice, hence the necessity to define the juridical nature and character of the right to a fair trial.*

**Keywords:** *right to a fair trial, human rights.*

## Introduction

The right to a fair trial, even if it has only recently been perceived as an essential right, in contrast to most of the fundamental human rights and freedoms, can certainly be included in the latter category. Thus, by guaranteeing the fair pursuance of a judicial procedure, the conditions for exercising fundamental human rights and freedoms have been met. At the same time, the right to a fair trial is a fundamental institution for the good organization and functioning of justice. Special literature frequently makes reference to the fair trial as an essential premise for the state governed by the rule of law, particularly in the jurisprudence of the European Court of Human Rights.

Under these circumstances, we are going to analyse the right to a fair trial from a triple perspective: as a fundamental human right, as a principle of organization and functioning of justice and as a premise for the existence of the state governed by the rule of law.

### 1. Fundamental human rights

The concept of “human rights” appeared in ancient Greece and Rome where it was especially referred to by the phrase “natural rights”. From this perspective, it was supposed that there existed natural, universal and immutable rights, as well as divinely inspired or man created rights and that these rights were meant to ensure the free exercise by the humans of the rights which they were granted thanks to their natural free statute.

The concept of “fundamental human rights” was created for replacing the phrase “human inborn rights”, as well as the phrase “individual fundamental freedoms”. No matter what phrases

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we may use, thanks to the importance that these terms have acquired so far, they underline the fact that in relation to the body of general rights which individuals enjoy in society, there is a category of rights which are considered fundamental for the human material and cultural existence.<sup>1</sup> Thus, laws exist for confirming and protecting the rights which a human being is naturally granted<sup>2</sup> and for applying sanctions if these rights are aggrieved.

The theory on fundamental rights derives from the doctrinarian source of the natural right theory, according to which human rights lie at the centre of the legal phenomenon. Human rights are inherent to the human being, they are beyond and above positive law; human rights have a transcendental nature, they are universal and have been the same from the beginning and will remain unchanged for good.<sup>3</sup>

According to natural law, human rights have been defined as fundamental, inalienable and essential for life, dignity, happiness, as well as for the free development and safety of every person.<sup>4</sup>

Considering the existing possibilities for consolidating and accomplishing the final goal of the regulations regarding the present topic, fundamental rights have been considered as a body of rights and freedoms which are granted to natural and legal persons (both public and private law legal persons) by the Constitution and international legislation and which are protected both against the executive and the legislative by the constitutional or international judge.<sup>5</sup>

In French special literature<sup>6</sup>, “fundamental rights”, understood as human rights (mainly studied by constitutional law) are distinguished from “public freedoms”, understood as citizen rights (studied by the similarly named discipline - “Les libertés publiques”). Thus, human rights, in conformity with the theory of natural law, which was briefly presented above, are inherent to the human being; they are universal, immutable, imprescriptible and inalienable. By contrast, public freedoms are provided by the law, they represent guaranteed prerogatives and belong to positive law. Public freedoms ensure the individual’s security and they are duties which individuals must assume in their relation to the state. They imply that the state recognizes the exercise of an established number of activities by the individuals, who are protected from any external threat. Thus, freedoms correspond to actual legal realities and are different from human rights which imply, rather from a philosophical point of view, the existence of rights that are inherent to human nature.

The statement regarding the distinction existing between the concept of “fundamental rights” and the concept of “public liberties”, though difficult to support<sup>7</sup>, has been critically revised in the doctrine of Romanian constitutional law.<sup>8</sup> Today this differentiation, which was more or less

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<sup>1</sup> Tudor Drăganu, *Declarațiile de drepturi ale omului și repercursiunile lor în dreptul internațional public* (București: Lumina Lex, 1998), 21.

<sup>2</sup> M. Freedon, *Drepturile* (București: Du Style, 1998), 23.

<sup>3</sup> Ion Deleanu, *Instituții și proceduri constituționale în dreptul comparat și în dreptul român. Tratat* (Arad: Servo-Sat, 2003), 138.

<sup>4</sup> Corneliu Liviu Popescu, *Solutions modernes de consécration et de garantie des droits de l’homme par les normes du droit international public et de leur réception dans l’ordre juridique interne des états*, Revista Analele Universității din București (1995), 59.

<sup>5</sup> The Colloquium at Aix, January, 1981, in L. Favoreau, *L’élargissement de la saisine du Conseil Constitutionnel*, Revue française de Droit constitutionnel, 1990, p. 588.

<sup>6</sup> Jean Rivero, *Les libertés publiques*, 6<sup>e</sup> edition (Paris: Presses Universitaires de France, 1991), 16-18; also see Jean Morange, *Libertés publiques* (Paris: Presses Universitaires de France, 1986), 10; Jean Morange, *Libertățile publice* (București: Rosetti, 2002), 6; G. Lebreton, *Libertés publiques&droits de l’homme*, 4<sup>e</sup> edition (Paris: Armand Colin, 1999), 2.

<sup>7</sup> Fr. Terré, *Sur la notion des droits et libertés fondamentaux*, în R. Cabrillac, M.A. Frison-Roche, Th. Revet (sous la direction), *Libertés et droits fondamentaux*, 8<sup>ème</sup> edition (Paris: Dalloz, 2002), 7.

<sup>8</sup> Deleanu, *op. cit.*, 138 and the next pages; also see G. Vrabie, *Organizarea politico-etatică a României* (Iași: Virginia), 420-421.

covered in practice until the legal guarantees for observing human rights were created, can no longer be invoked. The main international legal documents on human rights – The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The European Convention on Fundamental Human Rights and Freedoms – are legally supported by international bodies and considered as being legally relevant by domestic regulations. Thus, the most accurate phrase used by domestic and international law is “fundamental rights and freedoms”, which corresponds to the national and international frame that was created with a view to protecting and guaranteeing these rights and freedoms.

Moreover, terminology used in the contents of the Romanian Constitution, Title II, “fundamental rights and freedoms”, reveals the opinion shared by the founder of the fundamental law as to the inexistence of any difference between the two concepts. Thus, “the right is freedom, and freedom is a right.”<sup>9</sup>

For defining the concept of fundamental human rights it is compulsory to point out the distinct features of this concept in relation to the other subjective rights. Fundamental rights occupy a well defined place within the category of subjective rights even if differences are not made as to their legal nature or object.

Thus, first of all, fundamental rights do not have to be understood as a category of rights which are different through their nature from other subjective rights.<sup>10</sup> Fundamental rights are considered as powers which are guaranteed by the law for the will of the active subject implied in the juridical relation and thanks to which the subject can, in one’s own direct interest, adopt an established behaviour or oblige the passive subject to adopt a certain behaviour, which, if necessary, may be imposed to the latter, through the sanctioning power of the state. According to this point of view, fundamental rights are not different from subjective rights, in general. The theory is in contrast with the principles adopted by the school of natural law, which proclaims fundamental rights as being inborn and having a special nature since they are acquired through the simple quality of a human being and not by a legal regulation. So, fundamental rights have not existed ever since immemorial times and they are not supposed to exist for ever, no matter how advanced a society is, because regulations adopted in the field of human rights cannot be contested and they also imply specific differences from one country to another and from one historical period to another one. The concept of “fundamental rights” continuously develops as a consequence of the fact that democratic ideas are more and more numerous; this is different from the first human societies which disregarded or ignored these rights.

Secondly, the difference is not relevant as to the object of fundamental rights in relation to the object of subjective rights. From this point of view, under the influence of the existing specific social relations, certain fundamental rights have the same object as subjective rights which are determined by the labour law relations (the right to work, the right to strike) and are found in criminal processual relations (the right to defence, the inviolability of the domicile, any person’s right to freedom) and in civil juridical relations (the right to a private property) etc.

Hence it results that fundamental rights do not have a different nature or object considering the category of subjective rights. Yet, fundamental rights, the nucleus around which all the other subjective<sup>11</sup> rights gravitate, justifies its statute of a distinct category in relation to the other subjective rights, thanks to their economic, social and political importance. Like some real planets around which all the other subjective<sup>12</sup> rights gravitate as satellites, fundamental rights represent

<sup>9</sup> Ioan Muraru, Simina Tănăsescu, *Drept constituțional și instituții politice*, vol. I, Editura a XI-a (București: All Beck, 2003), 140.

<sup>10</sup> Tudor Drăganu, *Drept constituțional și instituții politice. Tratat elementar*, vol. I (București: Lumina Lex, 1998), 151.

<sup>11</sup> Vrabie, *op. cit.*, 423.

<sup>12</sup> Drăganu, *Drept constituțional și instituții politice. Tratat elementar*, vol. I, *op. cit.*, 152.

the legal foundation of the citizens' rights, the main support for the constitutional law of any state.<sup>13</sup> Fundamental rights are provided by the states Constitutions and are invested with special juridical guarantees. At the same time, fundamental rights – which are regarded as human rights – are provided by the most important international instruments in the domain.

For these reasons, we consider that fundamental human rights are subjective rights and that they are essential for the life, freedom and dignity of human beings; they are also indispensable for the free development of human personality and they are provided and guaranteed by domestic and international legislation.<sup>14</sup>

In the next lines, taking into consideration the various classifications suggested by constitutional law doctrine, we are going to notice the fact that the right to a fair trial is, from this point of view, approached differently, either as a fundamental first generation right or as a fundamental social and economic right.

## 2. The right to a fair trial and the category of fundamental human rights

According to special literature on constitutional law and political institutions, fundamental rights were classified in relation to several criteria, such as the historical period in which their importance, content and object was recognized etc. However, authors have also recognized the relativity of this attempt which is determined by the fact that the borders drawn between the existing different categories of law are so imprecise that it is impossible to accurately lay them off. The importance of making these classifications consists in the fact that the right to a fair trial has been dealt with either as a right which belongs to the category of social fundamental rights or as a right which belongs to the category of civil and political fundamental rights. In the next lines we are going to revise all the tendencies that exist in the attempt to conceptualize the right to a fair trial in relation to fundamental rights and freedoms.

Taking into consideration their object<sup>15</sup>, fundamental rights have been classified as *individual freedoms* (rights which have as an object the protection of the human being and his/her private life from any illegal outer interference<sup>16</sup>), *social-economic rights*<sup>17</sup>, *political rights* (rights whose object is to ensure participation in ruling the state)<sup>18</sup>, *social-political rights* (rights which ensure material and cultural development, as well as participation in ruling the state)<sup>19</sup>.

<sup>13</sup> Ion Deleanu, *Drept constituțional și instituții politice* (Iași: Fundația "Chemarea", 1993), 81.

<sup>14</sup> According to the public international law norms, human rights are subjective individual rights, they are essential for the existence, dignity, freedom, equality, happiness and free development of the human being and they are also recognized internationally, as pointed out by Corneliu Liviu Popescu, *Protecția internațională a drepturilor omului. Surse, instituții, proceduri* (București: All Beck, 2000), 5.

<sup>15</sup> T. Drăganu, *Drept constituțional și instituții politice. Tratat elementar, vol. I, op. cit.*, 171.

<sup>16</sup> The right to life, the right to physical and psychical integrity, the right to live abroad, as well as the right to freely move on the territory of our state and abroad, to right to the safety and inviolability of the domicile, residence the secret of correspondence, as well as of other means of communication, the freedom of consciousness and religion, the right to information etc.

<sup>17</sup> The right to work, healthcare protection, the right to strike, the right to private property, the right to inheritance, the right to study, the right of the person aggrieved by a public authority or by an administrative act or by not settling a claim in a reasonable term etc.

<sup>18</sup> The right to elect representatives in the National Parliament, the right to elect representatives in the European Parliament, the right to elect the President of the Republic, the right to vote in a referendum, the right to initiate, under the conditions of the supreme law, the passing, altering or repealing of an ordinary or organic law, the right to initiate, under the conditions of the supreme law, the revision of the Constitution, the right to elect representatives in local and county councils, the right to elect mayors in communes and towns etc.

<sup>19</sup> Freedom of speech and opinion, as well as of belief, no matter if it is expressed verbally or in writing, through images, sounds or other communication means, freedom of religion, freedom of assembly, freedom of association, the right to petition, etc.

According to this classification, the right to a fair trial belongs to the category of fundamental social-economic rights and it is a faculty of will which is guaranteed by the constitutional law. In this respect, the state is under the obligation to ensure the fair implementation of the judicial procedures and equal treatment for the parties brought before an independent and impartial court that was set up by the law. This obligation is permanent because, otherwise, the right to a fair trial is aggrieved by national jurisdictions<sup>20</sup>.

In time human rights have evolved from the statute of essential concerns, such as the right to life, to secondary concerns, such as economic or cultural rights. In approaching this historical evolution, fundamental rights have been classified as follows<sup>21</sup>: **civil and political rights, 1<sup>st</sup> generation rights** (rights which are essential for the individual in his/her relation to the state power; these rights protect the individual through specific measures from violence and the arbitrary command of the governors<sup>22</sup>); **economic, cultural and social rights, 2<sup>nd</sup> generation rights**, which are granted to individuals not thanks to their quality of human beings, but because they are members of socially determined categories; these rights imply an active intervention on the state part, not only for guaranteeing them but also for ensuring their actual accomplishment, by creating adequate juridical regimes or specialized institutions<sup>23</sup>; **solidarity rights, 3<sup>rd</sup> generation rights**, which – due to their content – cannot be acquired by each state separately but only by state cooperation<sup>24</sup>.

According to this classification, the right to a fair trial belongs to the category of civil and political rights, the 1st generation rights. In this respect, for exercising this right, the litigant does not need a certain authorization from power representatives.

Taking into consideration the triple dimension of the human being (man is a biological, psychological and social being), fundamental rights and freedoms have been classified as follows: **rights and freedoms which protect the human being as a biological entity** (right to life, right to protection of one's intimate, family and private life, etc.), **rights and freedoms which protect the human being within a social relation**, as a consequence of the fact that the human being belongs to a state (hence the right to social protection, the right to free movement, the right to have access to any information of public interest, the right to citizenship, etc.).

According to this classification, the right to a fair trial guarantees the proper environment for the social relations in which the individual is involved. The fairness of the procedure ensures trust in state institutions and it thus gives substance to the principle of social trust.

From another perspective, fundamental rights have been divided<sup>25</sup> into: **individual rights** (the right to physical and psychical integrity, the right to consciousness and action, the rights regarding private life, social, economic and cultural rights and, last but not least, a right that is corollary to all the other ones: equality of rights) and **collective rights** (the right to dispose of oneself, the right to development, the right of permanent sovereignty over natural resources, etc.). According to this

<sup>20</sup> M.P. Garonne, *Allocution d'ouverture*, în *Le droit à un procès équitable* (Strasbourg: Consiliul European, 2000), 8.

<sup>21</sup> Antonie Iorgovan, *Drept constituțional și instituții politice. Teorie generală*, (București: Galeria J.L. Calderon, 1994), 77; also see Muraru, Tănăsescu, *Drept constituțional și instituții politice, vol. I*, ediția a IX-a, 143-146; Stelian Scăunaș, *Dreptul internațional al drepturilor omului* (București: All Beck, 2003), 11.

<sup>22</sup> Equality of rights, individual freedom, freedom of consciousness, freedom of expression, of association, freedom of assembly, etc.

<sup>23</sup> The right to a decent living standard, the right to work, the right to education, the right to strike, the right to property, etc.

<sup>24</sup> The right to peace, the right to a proper environment, etc. The doctrine holds the existence of fundamental rights that are specific for the fourth generation, such as the right to intimacy, the right to be left on one's own, the right to nostalgia, access to culture, economic freedom.

<sup>25</sup> Ion Cloșcă, Ion Suceavă, *Tratat de drepturile omului* (București: V.I.S. Print, 2003), 46-47.

classification, the right to a fair trial (which is subordinated to the right to bring cases before the court) is inherent to the human being and it is, thus, an individual right.

Accordingly, the right to a fair trial is a fundamental subjective right. From a juridical point of view, the right to a fair trial is a public subjective right, which means that the citizens are entitled to fair judicial procedures that the state must ensure. Thus, judicial authorities are obliged to take into consideration all the particular aspects of a fair trial, while complying with a set of safeguards that are going to be analysed in this study.

### 3. The right to a fair trial and the state governed by the rule of law

The right to a fair trial is a structurally essential characteristic of the state governed by the rule of law due to the obligation of the authorities to apply the principle of law pre-eminence. From this point of view, the concept of *state governed by the rule of law* inevitably implies a discussion about the necessity to observe fundamental rights and, implicitly, the fairness of the judicial procedures.

The state governed by the rule of law, as a set of means that guarantee individual rights and freedoms<sup>26</sup>, is organized according to the principle of separation of powers and it attempts, through the adopted legislation, to promote rights and freedoms that are inherent to human nature ensuring the observance of these regulations by the bodies which were set up for this purpose<sup>27</sup>.

Similarly, one has appreciated that the state governed by the rule of law is a political and legal concept which defines a form of government that is specific for the democratic regime, thanks to the relations which exist between the state and the law, power and the law, and to the fact that the rule of law, as well as the fundamental human rights and freedoms, are ensured in the exercise of power<sup>28</sup>.

There are three fundamental aspects as regards the state governed by the rule of law: a) effective legitimization and guarantee of human rights; b) strict subordination of state authorities to the national and international legal rules (if the treaties which provide them are ratified) and c) separation of powers in the state and the existence of a mutual control exercised by the existing powers<sup>29</sup>.

Under these conditions, the right to a fair trial, as a fundamental right of the human being, has to be legitimized, protected and effectively promoted in the state governed by the rule of law, a premise for the pre-eminence of law.

*The state governed by the rule of law* is a phrase which associates two terms, *state* and *law*; this association helps us identify a complex unity and an indissoluble link between the two components: the law depends upon the state, which creates its norms and facilitates the setting up of the juridical system, in order to accomplish the final goal and efficiency of the juridical norms. If these norms are not observed, penalties are applied; b) the state depends upon the law for expressing power and for making it effective by imposing a general and compulsory behaviour.

### 4. The right to a fair trial principle and the organization and functioning of justice

**Introductory approaches to the principle of “justice”.** Justice, as an intangible legal ideal, as well as the last and utmost expression of law<sup>30</sup>, was created out of the necessity to separate

<sup>26</sup> Jean Chevallier, *L'etat de droit* (Paris: Montchrestien, 1992), 11.

<sup>27</sup> Drăganu, *Drept constituțional și instituții politice. Tratat elementar, vol. I, op. cit.*, 290; also see Tudor Drăganu, *Introducere în teoria și practica statului de drept* (Cluj-Napoca: Dacia, 1992), 5-12.

<sup>28</sup> Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului* (București: All, 1993), 152.

<sup>29</sup> Genoveva Vrabie, *L'etat de droit, principe d' aménagement et de fonctionnement des autorités publiques de Roumanie*, in *Etudes de droit constitutionnel* (Iași: Institutul European, 2003), 178-179.

<sup>30</sup> Eugen Herovanu, *Principiile procedurii judiciare* (București: Institutul de Arte Grafice „Lupta”, 1932), 303-304.

equity from inequity, to differentiate the legal from the illegal, the good from the evil. That is why ever since antique times, the concept of *justice* has been associated with the idea of *fairness*, with the prevention of abuses and the possibility to grant citizens free access to the correct distribution of justice.

The antique world approached the concept of *justice* differently. The Romans defined *Justitia* as the sharing of goods in accordance with each person's merits, a philosophy which inevitably led to different accumulations of goods. The ancient Greeks defined *Dike* as the necessity to equally share goods for all the members of the polis, no matter the contribution they brought to it<sup>31</sup>.

Socrates considered that there exists a superior form of justice which should not be exclusively expressed in writing and/or sanctioned by a positive confinement<sup>32</sup>.

Aristotle<sup>33</sup> differentiates distributive justice from corrective or restorative justice. The role of distributive justice is to ensure a proportional distribution of goods. Thus, persons, who are not equal, cannot have equal merits; if an equal distribution was applied to unequal merits, the equality principle would be aggrieved<sup>34</sup>. Restorative or compensatory justice attempts to establish an accurate correspondence between the offence and the penalty. Thus, according to this definition, the meaning of this type of justice refers to the compensation of the incurred loss.

Differently from the Romans' legal approach and the Greeks' philosophical approach, Christian society defines justice through a deeply prophetic perspective. Laws are divine and God is seen as the supreme embodiment of justice. At present, the concept of justice is vertically defined: from the supreme Divinity to the ruler of society, which, in its turn, exercises its authority through a divine right. That is why those who do justice are considered to be responsible before God<sup>35</sup>. St. Augustine considers that justice is love of the supreme good or of God.

The emergence of democratic regimes has legitimized the principle according to which justice is administered in the name of the people. This different way of perception does not however lead to the modification or loss of the sacred character as long as justice is linked to the infallibility of the popular will<sup>36</sup>. To Montesquieu justice is a fight; thus, unless injustice existed, the very name of justice would be ignored. In the spirit of corrective justice, Kant considers that the juridical sanction is a reward for the committed evil, i.e. the already committed evil. Stammler notices that, finally, the idea of justice means the exclusion of those contradictions which exist between the general and individual goals of the human society.

According to contemporary special literature the concept of *justice* has more meanings as a consequence of the fact that doctrinarian attempts to define this concept are relatively uniform.

First of all, *justice* is an ethical value<sup>37</sup>. According to this perspective, which is very loose, justice is perceived as a virtue and as equity; this is basically a biased approach. Thus, as a moral value, justice is interpreted in a free and subjective way by each person<sup>38</sup>. Justice is meant to

<sup>31</sup> P.C. Solberg, Guy-Ch. Cros, *Le droit et la doctrine de la justice* (Paris: Alcon, 1936), 83.

<sup>32</sup> I. Rosetti Bălănescu, *Curs de enciclopedia dreptului* (București: 1947-1948), 71.

<sup>33</sup> Aristotel, *Politica* (București: Editura Științifică și Enciclopedică, 1974), 76.

<sup>34</sup> G. Del Vecchio, *Justiția* (București: Cartea Românească, 1936), 55-56.

<sup>35</sup> P. Chaïm, *Ethique et Droit*, (Bruxelles: Editions de l'Universite de Bruxelles, 1990), 184-185.

<sup>36</sup> Ion Alexandru, *Politică, administrație, justiție* (București: All Beck, 2004), 105-106.

<sup>37</sup> Vrabie, *Organizarea politico-etatică...*, *op. cit.*, 369; also see G.I. Chiuzbaian, *Sistemul puterii judecătorești; organizare și funcționare* (București, Continent XXI, 2003), 11-13. Justice-virtue relationship has been theoretically approached ever since immemorial times. Plato, in *Republica*, states that justice is a virtue which coordinates and harmonizes both the activity performed by the individual and also by the masses. Aristotle, in a similar way, considers that justice is a perfect virtue, which comprises and encompasses all virtues.

<sup>38</sup> R. Perrot, *Institutions judiciaires* (Paris: Montchrestien, 2000), 21. Justice, as an ethical value, is differently perceived by every person and it is suggestively illustrated by the following statement: „rars sont les plaideurs qui n'ont pas le sentiment d'avoir la justice pour eux”.

produce the necessary balance for inter-human relations, as its old symbol, *the balance scales*<sup>39</sup>, suggests. If this attribute is lost, the phenomenon known as “the balance crisis of justice”<sup>40</sup> will emerge.

Secondly, from a technical point of view, *justice* represents a state function, by which competent authorities are asked to utter the just/fair (*juris dictio, a dire de droit*). This judicial function is accomplished by the state and it implies the solution of civil, criminal, administrative, commercial, etc. trials, of applying sanctions, as well as of re-establishing legitimate rights and interests. According to this point of view, the concept of *justice* overlaps the concept of jurisdiction. Thus, jurisdiction consists in the power of the state to decide insofar as the incurred conflicts are concerned, conflicts that emerged between different legal subjects, natural or legal persons, by enforcing the law<sup>41</sup>.

Thirdly, in a limited sense, *justice* denotes a system of public institutions whereby the judicial function is exercised<sup>42</sup>. In this respect, *justice* represents a public service, a state monopoly. The function of justice accomplishment is entrusted to an authority (power) which is distinct and invested with state prerogatives which make it efficient. This is provided by Article 124 in the Constitution, according to which *justice is accomplished in the name of the law* by judges who are *independent and subject only to the law*. In a wider approach of the term, one can appreciate that *justice* denotes the courts of law themselves or a larger category of bodies, which includes, besides courts of law, the bodies by which justice is accomplished (The Public Ministry, The Superior Council of Magistracy)<sup>43</sup>.

According to another approach, justice is the act by which a magistrate, who was notified about an existing litigation in which the parties involved have contrary interests, delivers judgements according to the legal procedure. By the act of justice, the magistrate re-establishes the aggrieved rights and sanctions the guilty one in accordance with the law<sup>44</sup>.

The definition may be subject to criticism. Thus, when defining the concept of *justice*, it is advisable to use the term *judge* instead of *magistrate*. At the same time, the terms *just* respectively *unjust* particularly indicate a moral and ethical behaviour. This does not mean that the concept of *justice* does not imply these concepts, because justice is accomplished in the name of the law and judges are independent and subject only to the law; judges establish only what it is *legal* and *illegal*. Only when the Constitution or other normative acts make reference to morality or good manners, etc., the judge is entitled to assess *the fair* or *unfair* character of certain behaviour. Even

<sup>39</sup> *The balance scale*, the most common symbol for justice, is also accompanied by the *sword* which, held by the hand of justice is not only a symbol for power but also for accuracy; the sword is rather meant to cut and not to strike the object of litigations into two equal parts. Justice is also depicted as a *maid*, a symbol for incorruptibility, adopting a severe attitude: it pays equal consideration to the two litigating parties, in the absence of any passion or bias (G. Del Vecchio, *op. cit.*, 99).

<sup>40</sup> V. Cioclei, *Despre nevoia de echilibru în justiția penală*, in *Analele științifice ale Universității din București*, Series Drept (2001), 15.

<sup>41</sup> M. Costin, I. Leș, M.Șt. Minea, D. Radu, *Dicționar de drept procesual civil* (București: Editura Științifică și Enciclopedică, 1983), p. 287. In special literature, one has noticed the fact that adding similar meanings to the concepts of “jurisdiction”, respectively “competence” represent an error. Thus, the following arguments are brought to support this: 1) the cause falls within the competence of a certain body; 2) the cause is within the jurisdiction of a certain body. The use of the concept of “jurisdiction”, with the meaning of “competence” is not scientifically accurate. In reality, “competence” is a component of “jurisdiction”. Any judge is invested with a jurisdiction, but his/her competence is limited to those causes provided by the law (Ioan Leș, *Sisteme judiciare comparate* (București: All Beck, 2002), 3).

<sup>42</sup> Leș, *op. cit.*, 3.

<sup>43</sup> Vrabie, *Organizarea politico-etatică...*, *op. cit.*, 369. According to the same interpretation, justice is defined as the totality of bodies whereby the state administers justice (Leș, *op. cit.*, 3).

<sup>44</sup> Cristian Ionescu, *Drept constituțional și instituții politice*, vol. al II-lea (București: Lumina Lex, 2001), 344.



under these conditions, judges take into consideration legal provisions and not their convictions or beliefs<sup>45</sup>.

**The right to a fair trial principle and the organization and functioning of justice.** Justice, as a safeguard for the effective exercise of the citizens' rights and freedoms, has to prove its efficiency. From this point of view, it is essential for justice to identify the fundamental rules upon which jurisdiction is organized and its functions.

The general principles for the organization and functioning of justice comprise a set of essential rules, which are provided by the Constitution and several organic laws and which constitute the basis for the organization of justice, with a view to ensuring the role played by justice, i.e. to settle litigations arisen between legal subjects or to solve the claims submitted by the legal subjects under the provisions of the law – for protecting persons from any abuses that might be committed by public authorities and to defend, by specific means, legal order<sup>46</sup>.

The implementation and observance of these rules ensures the crystallization and foundation of the jurisdictional activity which, in accordance with its role and final goal, must lead to *juris dictio*.

On the basis of these considerations, the right to a fair trial has been considered as a ***fundamental principle whereby justice is accomplished***, besides other principles such as: legality, good administration of justice, free access to justice, the public character of the trial, the impartiality of the judge and proportionality in applying sanctions<sup>47</sup>.

Justice, on the other hand, can be approached from two perspectives: as regards its organization and as regards its functioning. Thus, the organization of justice implies the setting up of principles such as: deciding cases by the votes of the judges in courts, the temporary reduction of the workload performed by the courts during holidays, the continuous activity pursued by courts, the specialized jurisdictions and the independence of judges.

The functioning of justice implies free access to justice, the public character of the judgement, contradiction and the two-level jurisdiction<sup>48</sup>.

From this perspective, the fair trial can be defined as an application principle both insofar as the organization of justice is concerned (particularly as regards the judges' independence) and also as to the functioning of justice (by ensuring free access, the public character of the proceedings, the principle of contradiction and the two-level jurisdiction)<sup>49</sup>.

## Conclusions

The right to a fair trial, regarded as a fundamental right of the human being or as a principle of organization and functioning for justice or as a premise for the existence of the state governed by the rule of law, represents a processual institution whose importance has increased and has been recognized not only at national level but more and more within international jurisdictional procedures.

The increasing importance of the analysed institution has determined the Romanian law maker to set up a legal frame by which the right to a fair trial has been regulated within the system of fundamental principles of the judicial procedures. Thus, after the Romanian Constitution started

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<sup>45</sup> I. Vida, în M. Constantinescu, I. Muraru, I. Deleanu, F. Vasilescu, A. Iorgovan, I. Vida, *Constituția României, comentată și adnotată* (București: Monitorul Oficial, 1992), 277-278.

<sup>46</sup> Deleanu, *Tratat de procedură civilă, vol. I*, 60.

<sup>47</sup> Muraru, Tănăsescu, *Drept constituțional și instituții politice, ediția a IX-a ...*, op. cit., 588.

<sup>48</sup> M. L. Rassat, *La justice en France* (Paris: Presses Universitaires de France, 1987), 23-25.

<sup>49</sup> I. Leș, *Organizarea sistemului judiciar românesc. Noile reglementări* (București: All Beck, 2004), 58.

to be revised, the fairness of the used procedures has been regulated in the laws on the organization of the judiciary as well, i.e. in the criminal and civil processual norms. At the same time, the right to a fair trial is more and more frequently present in the defenders' pleadings or in the reasoning of the judges' decisions and the role that this principle has played in the organization and functioning of justice is more and more significant.

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