Fairness, Criminal Proceedings, European Law. Notes of a Civil Law Scholar

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1. An ancient model becomes new again.

Contemporary law, and for our purpose criminal procedure, are facing a moment of complex transition. The multiplicity of sources and their strict intertwining, their various legislative and case-law nature, their multilevel character, domestic, European, international, the hybridization between the two cultures of civil law and common law they produce pose great challenges. In this juridical Babel there is a strong need to find minimum common grounds. Such grounds will be inevitably more and more represented by European law, today also in criminal proceedings, at least for the binding strength of European law towards domestic legal systems and for the consequent harmonizing effect that it can derive, directly or indirectly.

Among the most significant principles of European law regarding criminal proceedings, the principle of fairness has hold a central role. It is a concept that is new for our modern culture, but that it seems to be also a very ancient one, as from different points of view it recalls Aristoteles's *eipeikeia* and foremost the *aequitas* of the classic and medieval ages. Conversely, such a concept is abandoned in civil law systems for the whole modern age[1], while it flows through the *aequitas canonica* to the English common law[2]. Finally, common law values have inspired the conventional fairness.

In the ECHR system fairness is considered a fundamental principle from which, also through the case law of the European Court, a multiplicity of procedural safeguards has developed. For its part, EU law requires compliance with procedural fairness in all its recent harmonization directives on procedural safeguards[3]. The central role of fairness places this principle as a key landmark also for civilian jurists. Nevertheless, it must be highlighted that these jurists were grown in the cultural *mileu*, represented by modern legal positivism, which has always rejected the idea of fairness being applied in criminal proceedings. Therefore, it is clear that these jurists could have some difficulties to

[1] Of course, separately the revolutionary soviet law and the concept of "socialist juridical conscience", that there was fixed as judgment criteria for courts, should be considered (see. V. Frosini, *Equità (nozione), Enc. dir.,* XV, 1966, 75 fol.).

[2] J.L. Barton, *Equity in the Medieval Common Law*, in (R.A. Newman ed.) *Equity in the World's Legal Systems. A Comparative Study dedicated to R. Cassin*, Bruylant, Brussels, 1973, 139 fol.

[3] See Article 2.2 of Directive 2010/64 *on the right to interpretation and translation in criminal proceedings*; Article 6 of Directive 2012/13 *on the right to information in criminal proceedings*; Article 8 of Directive 2013/48 *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*; Article 10 of Directive 2016/343 *on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*; Article 2.6 of Directive 2016/800 *on procedural safeguards for children who are suspects or accused persons in criminal proceedings.*

manage the implications of this approach, which requires a radical change of paradigm compared to the traditional one.

2. Legal forms conceived as procedural safeguards in modern codes of criminal procedure.

It is useful to start precisely from this traditional way of thinking to discover its cultural roots.

For the modern civilian criminal procedure jurist – even if I refer especially to the Italian jurist –the couple fairness and criminal procedure appears to be almost an oxymoron. Criminal proceedings must be conducted in strict compliance with the rules provided for in the code; undoubtedly, these rules are expression of values considered by the legislator worth of safeguard; but, such values are crystallized in these rules from the moment in which the latter are created by the law. Therefore, these procedural rules must be applied strictly, as they represent a value as such. A legislator that would make room for fairness into a criminal trial would conflict with such a logic, because he would allow these rules not to be complied with, even if only partially. Such legislator would open to discretional choices of the judge, and would entrust his wisdom qualities. However, in doing so – whether considering fairness with regard to decisions on the merits or with regard to the procedure itself – he would contradict to a duty of safeguard.

In fact, while fairness can be acceptable in private law, where economic interests, which are naturally subject to negotiations and compromises, are at stake, and where an approach to reliance (as the concept of good faith shows) and to a balanced management (as the concept of reasonable and prudent man demonstrates) is applied, and where the figure of the "arbiter" plays a role of growing importance, criminal trial must firmly exclude any application of fairness. It is easy to understand why. Criminal trials deal with future and freedom of the person. It is here that the relationship between State authority and citizen freedom becomes more conflictual, as it is here that is exercised one of the highest expression of state sovereignty with its charge of violence, which is represented by the power to punish. Therefore, in this context, the safeguard of the accused person must be realized only through a strict compliance with the law; indeed, only in this way the person can be effectively safeguarded against abuses[4], which could be conversely the result of fairness assessments.

This way of reasoning substantially summarize the Enlightenment thinking, which, heir of natural law doctrine in promoting the human persons, promoted also the accused person, who in the inquisitorial system of the *Ancien Règime* had almost no protection[5]. However, such conferral of rights to him was carried out in the context of the typical abstract approach of the Enlightenment philosophy, which postulated an abstract person in an abstract 'state of nature' and an abstract law that regulates his life and relationships[6]. And an abstract law led to abstract legal forms. It was a general phenomenon, common to every area of law, but which with regard to criminal procedure assumed a peculiar meaning. Indeed, compliance to legal forms had the

[4] C.L. de Secondat de Montesquieu, *L'esprit des Lois* (1748), IV, II

[5] R.E. Kostoris, *Le fonti*, in R.E. Kostoris (ed.), *Manuale di procedura penale europea*, 2° edizione riveduta e ampliata, Giuffrè, Milano, 2015, 2 fol.

[6] P. Grossi, *L'Europa del diritto*, Laterza, Roma/Bari, 2007, 100 fol.

significance of a safeguard of the accused's freedom, because, by granting equality of treatment and procedural legality, it determined a marked reversal of perspective compared to the judge's despotism in the *Ancien Règime*[7]. It is a remarkable concept, which continues to be invoked as an achievement of civilization, even if intermittently, in the history of criminal proceedings over the last two centuries in continental Europe. Of course it must be stressed that such a concept recalls a precise image of law, grounded, according to the canons of modern positivism, on the state law (the code), which is posed on the top of the sources and has the monopoly of legal production; a law that represents the highest expression of the State sovereignty and which the judge must passively and scrupulously execute[8]. Law is considered as a *scientia iuris*, or, in other words, a theoretical science, dominated by formal rationality, syllogism reasoning, deductive method, binary choices (true-false, all-nothing, legal-illegal). However, such a legal model appears self-referential, as it limits any reasoning on the law and on the proceedings to problems linked only to legal provisions, without any consideration for the particularities of the case to which they are applied[9]. Therefore, this model implies a clear break between the world of law and the world of facts.

Undoubtedly, it must be added that over time the purity of this model has been strongly compromised by various elements: by the acknowledgment of the creative role of case law; by the enactment of modern post-war constitutions, which are sources of law establishing 'principles', contrary to the codes that establishes rules[10], but to which those rules must comply with; and in addition, by a series of reforms and of new provisions included in contemporary criminal procedure codes that led to non-formalistic views of justice. Let's think about the Italian Criminal Procedure Code of 1988, the first European code that has abandoned the Napoleonic model of mixed proceedings and has embraced an adversary structure, but which can be considered at the same time still a product of modern culture, as it is nonetheless conceived with a logic-abstract view. Well, one of its central aspects is represented by the principle of adversarial evidence gathering, that revitalized the ancient instruments of rhetoric aimed to the search of a probable truth, which replaces the idea of the search for the material truth typical of inquisitorial systems. In addition, that code, mostly in the more recent reforms on the mechanisms allowing anticipated settlement of proceedings, contains instruments that are characteristic of fair justice such as dismissal for irrelevance of the fact, probation, and, above all, criminal mediation, where the State even waives to exercise criminal jurisdiction by promoting out-of-court restorative justice mechanisms.

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[7] It is important not to forget that during the French revolution period the English experience was looked at with high interest to adopt ideas and institutions of common law accusatory trial, going as far as importing jury in France: see. F. Cordero, *Procedura*, Giuffrè, 9° edition, 2012, 50 fol.

[8] It is the Enlightenment concept of the judge considered as the "*bouche de la loi*": See C. Beccaria, *Dei delitti e delle pene* (1764), IV, *Interpretazione delle leggi*

[9] R. Dworking, *Taking Rights Seriously*, Cambridge (Mass.), Harvard University Press, 1977, Italian edition, *I diritti presi sul serio*, Il Mulino, Bologna, 1982, 83 points out that for positivism the complex of valid legal rules represents the whole law, and, therefore, if a case is not regulated by them, such case cannot be decided by the "application of law".

[10] R. Dworking, *ib.,* 93 fol. Points out that the difference between rules and principles is represented by the fact that rules apply in the form of all-or-nothing and provide legal consequences that follow automatically when the provided conditions are met, while principles are direction indicators that do not provide immediate legal consequences and are measured, differently from rules, for their weight and importance.

3. Law as a 'practical science' and Middle Ages *aequitas*.

However, it is necessary to highlight that this modern concept of criminal trial, even if sometimes hybridized as we have just mentioned, does not represent the immanent features of trial, but it is the result of a specific culture that belongs to civil law systems and concern a specific historical period. Indeed, there is a different concept of law that is opposed to this approach, which roots in the classic and early Middle Ages antiquity, and that today revives again and is imposed to the contemporary jurist: the one, already conceived by Aristotle, which considers law as a practical science[11], that concerns a human action (*praxis*), and has as his object a good act, namely, an act according to justice (*eû prattein*). In this view, knowledge is no more considered an objective by itself, an objective of 'truth', as it happens in theoretical sciences that belong to the world that does not change and cannot change[12], and to which law was linked during the modern era as we have already seen. This knowledge is aimed to the perspective of the action. This means – and this is the key aspect – that law becomes a kind of knowledge always oriented toward values; therefore, we have to call it *fronesis* and not *episteme,* or, in Latin, *iuris-prudentia*, and not *scientia iuris*.

In this view, law can no longer represent something extraneous or impenetrable to facts, as claimed by modern positivism, exactly because it completes itself in contact with the facts. Therefore, law consists not only in legislative rules, even if it cannot be reduced to a mere collection of cases either; instead, it represents a moment of connection between rules and facts, meaning that rules remain the non-removable starting point but they concretely live only when they are considered in relation with the cases, which represent the problematic matters that request to be solved by the law[13]; in other words, this happens when the cases discover new possibilities of application for the rules[14]. But, as we said, this contact between law and facts must be oriented by values. In the Aristotelian doctrine, such a basis of the action according to justice (the *eu prattein*) is represented by the *eipeikeia*; for early Middle Ages law it is represented by the *aequitas*. This latter is named in the ancient sources as '*rerum convenientia*', meaning 'harmony', mutual order and substantial equality. Middle age civilization aspires to establish itself in an order of which God is the guarantor and the *aequitas* is the ordering tool. In the Middle Ages this harmony is not considered a result of human mind, but '*in rerum consistit*' and from them it reflects itself on human beings. Therefore, law presents a strong factual imprinting, is grounded on a continuous exchange between the world of facts and the world of legal forms, whose vehicle is *aequitas*, which grants harmony between facts and rules, and factual basis for each rule[15].

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[11] Aristoteles, *Nicomachena Ethics*, 1095 to 6.

[12] Aristoteles, *ib.*

[13] G. Zagrebelsky, *Il diritto mito. Legge diritti giustizia*, Einaudi, Torino, 1995, 187 fol.

[14] G. Zagrebelsky, *ib*. clarifies well how the case relates to the legal rule, specifying how the case by itself, in its simple historical-material reality, is mute; and that, therefore, it is first and foremost necessary to understand its 'meaning', to categorize it. This is achieved by relating it to the consequences that it is considered suitable of adjudicating in a specific social context. Once determined its sense and value, the case presses on the law so that the appropriate solution is achieved: this could require legal reforms, or even only new interpretative reconstructions of the existing law, even if legal formulas would remain unchanged.

[15] For all these considerations see P. Grossi, *L'ordine giuridico medievale*, Rome/Bari, Laterza, 2003, 176 fol.

From the point of view of criminal procedure, the Middle Age *aequitas* is at the basis of forms of reparative negotiable justice[16]. Indeed, by repairing the damage and the offence caused by the crime to the victim or to the group, to the community to which it belongs through transaction, reconciliation, mediation, expiation instruments, the natural order is re-established. But even trial by ordeal and judicial duel, submitting the outcome of the judgment directly to God, show, finally, the same aim to the re-composition of a superior order violated by the crime.

Such an image of the criminal trial is gradually undermined with the development of inquisitorial proceedings starting from the XIII century, which promote an authoritative vision of criminal justice, where it is important no longer the re-composition of the violated order, but conversely the punishment of the guilty[17]; therefore, the value of truth replaces the value of *aequitas*. And, at the same time, the idea of criminal trial as a practical science, whose purpose is to act according to justice (i.e., obtaining the reconciliation between the victim and the offender, the re-composition of the violated order, in line with the beliefs at that time) is abandoned; the method of theoretical sciences is applied to the criminal trial, given that its purpose becomes the ascertainment of truth, considered in its objective character, which therefore can rightly be achieved through torture[18].

4. European law and procedural fairness: the hybridization of criminal trial between rules and principles.

Let us now relate this reasoning that is here only briefly summarized, but that would require a more in-depth analysis, to the contemporary framework.

As we have already noted, the first great institutional event of our time that we can call "post-modern"[19], to distinguish it from legal modernity, was the enactment of Constitutions after the second world war. In them, law is built by principles. In the Italian Constitution there are numerous principles dedicated to criminal trial. Fairness is not expressly included among them, but it can be somehow implicitly derived from the concept of 'reasonableness', that the Italian Constitutional court derived from the principle of equality established in Article 3 of the Constitution. Reasonableness means reasonable balance of values, adjustment between multiple needs. And this is by itself a suitable method to achieve a renewed practical dimension of law.

The second great event of post-modern time is represented by the more and more massive and pervasive advent of European law, even in the area of criminal justice. In

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It has been highlighted how factual issues and legal issues were so strictly linked that it wasn't possible to distinguish the former from the latter, as there wasn't a division between proof of facts and interpretation of law, i.e. between establishing fact and rule: A. Giuliani, *Il concetto di prova. Contributo alla logica giuridica*, Giuffrè, Milano, 1971, 223 fol.

16 On negotiated justice in middle-age criminal proceedings, see M. Sbriccoli, *Giustizia negoziata, giustizia egemonica. Riflessioni su una nuova fase degli studi di storia della giustizia criminale*, in M. Sbriccoli, *Storia del diritto penale e della giustizia. Scritti inediti (1972-2007)*. Giuffrè, Milano, 2009, 1236 fol.

17 M.Sbriccoli, *ib*, 1240.

18 A. Giuliani, *ib*, 185 observes that the issue of legal torture was substantially conceived as a "logic" issue, whose content was the suitability of torments as a tool to find out the truth.

19 P. Grossi, *Novecento giuridico: un secolo pos-moderno*, in P. Grossi, *Introduzione al novecento giuridico*, Roma/Bari, Laterza, 2012.

this context, a special focus must be reserved, in our perspective, to the role played by the European Convention of Human Rights, given that it expressly includes in Article 6.1 ECHR the principle of trial fairness, conceived as the key of a new European 'order'. The ECHR adopts the name fairness in order to underline that this principle does not especially concern decisional aspects (which are obviously implied therein, but that are not its main object) as much as correctness, integrity in conducting the trial, considered as values by themselves. Fairness in ECHR must be intended as an issue of method; the method to which States parties through their legislative and judicial bodies must conform to, both in regulating and in managing concretely national criminal trials. In the Middle Ages, *aequitas* was intended as an order that was immanent in the nature of things, in an harmony which was reflecting a higher divine harmony. Today that order, that method, is represented by an ideal heritage of common values that roots in the enlightenment season, but that must be adapted to the needs of a pluralistic society such as the contemporary one. ECHR can be considered the interpreter of this heritage, that for its part even European Union has recognized both in a text of primary law, such as the European Charter of Fundamental Rights, and among its founding principles together with the safeguards originating from the common constitutional traditions of Member States (Article 6 TEU).

It remains still to clarify more precisely in what this method enshrined by the ECHR, represented by procedural fairness, consists.

In this view, it must be considered under two dimensions: for its content and for its application.

Focusing on its content, fairness consists – in Article 6 ECHR and moreover in a wide series of 'clinical cases' elaborated by the European Court of Human Rights[20] - in a plurality of 'methodological' safeguards that must characterize a criminal proceedings, as independence, impartiality and previous establishment of the judge, the right of the accused to a decision of a judge on the merits of the criminal charge against him, the right of equality of arms, the right to evidence and to adversarial proceedings, this latter to be intended as the right of the accused to the hearing of his claims, the right not to self-incrimination, the right of the reasonable time of the proceedings, and the right to legal certainty, that includes the duty of States to avoid and prevent as much as possible interpretative conflicts by the tribunals. In addition, presumption of innocence and the specific defensive safeguards regulated by Article 6 ECHR par. 2 and 3 shall be deemed a direct expression of trial fairness. In particular, with regard to the presumption of innocence a sort of convergence between fairness in proceedings and fairness in deciding can be seen, given that the rule of judgment imposing acquittal when guilt is not fully proven (i.e. proven beyond any reasonable doubt, according to the well-known common law formula) derives from it.

As we said, these are safeguards that are overall rooted in the common cultural heritage of European states, even if the numerous judgments of the European Court of Human Rights show that certain States are still far from respecting them.

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[20] Therefore, the contents of conventional fairness are the result of a 'normativization' in numerous aspects due to a 'source case law' (for this expression, see M. Donini, *Europeismo giudiziario e scienza penale. Dalla dogmatica classica alla giurisprudenza-fonte*, Giuffrè, Milano, 2011, 49 fol.). This phenomenon is recalled – now also by many acts of the European Union – when reference is made to conventional rules 'as interpreted' by the Court of Strasbourg.

But the real qualifying and original aspect of European trial fairness, which links it to a renewed practical dimension of law, is represented by its applicative profile, which can be considered by itself a method and a principle. We refer to the fact that fairness is conceived in a markedly factual dimension. And this under three aspects: first, because fairness must not be considered in abstract but must always be considered in relation to a specific judicial case. The safeguards mentioned above are general principles, but it is necessary to verify if they are respected in a specific context and in light of the specific features of that context. Second, because such an assessment must be made in a holistic and not fragmented way, meaning that, for a diagnosis in terms of fairness, the single judicial case has to be evaluated as a whole; so, for example, a violation of defensive safeguards in a specific procedural phase could be compensated by safeguards offered in a following phase.[21] Finally, because it is required that the violation is 'substantial'. This means that the person that claims to be victims of a violation must demonstrate to have suffered a significant disadvantage due to it. Well: it must be highlighted how much all these three aspects can conflict with a criminal trial designed on the strict respect of procedural forms as the ones regulated in modern criminal procedure codes.

This brings us back to the scenario we started from. We live in a difficult moment of transition where the legislative tools of the past must interact with the new tools of the European law, hybridizing strongly in contact with them, and where the order and certainties – often idealized – which remain from the modern age are subverted by the chaotic overlapping of legislative and case law sources of different origin. Certainly, a law more and more set up on principles is imposing itself on a law set up on rules, even in the sacred area of criminal justice. This has an important consequence: a law construed on principles grants more discretionary powers to the judge: he becomes again the custodian of an order of values. But higher powers open the door to the risk of an arbitrary use of them. It is the everlasting problem. And even the loss of a commonly shared framework of values in a pluralistic society as ours makes such a situation more difficult[22]. Will the spread of the culture of reasonableness, of reasonable balancing, of which European procedural fairness shows to be an intrinsic expression, be able to reduce the risks of an excess of interpretative pluralism?

[21] E.g. Eur. C. 9/6/1998, *Twalib v. Greece*. For some critical remarks based on the fact that '*fairness of the proceedings as a whole test*' would not always be used by the European Court, which, notwithstanding its statements, sometimes carries out fragmented assessments, see R. Goss, *Criminal fair trial rights. Article 6 of the European Convention on Human Rights*, Hart Publishing, Oxford and Portland, Oregon, 2014, 124 fol.

[22] G. Zagrebelsky, *ib.*, 201 fol.