

**Fair trial: illusions and reality**

**Abstract:** It is considered correlation of the principle of adversarial character of the parties of criminal process with other principles and terms of fair trial.

There are studied separate aspects of fair trial.

**Keywords:** court proceedings; criminal process; adversarial character; court; parties; justice.

History of adversary criminal process in its various interpretations and varieties goes back to primitive kinds of human communities and accompanies their development and formation from the first types of state and law till our days. This is still the best that humanity created in chase for a chimera of justice. However, as it seems, humanity has had no any choice as existence of conflict supposes mandatory presence of the parties, and its solution – a certain form of controversy and referee.

An elementary single combat of two opponents, who are not coming down opinions about their rights and duties in the split up, has acquired with new members and rules of its conducting, distinguished of professional referees, the terms and types of the decisions that made by them.

Depending on the vicissitudes of commodity-money relations, geographical conditions and the balance of class forces adversarial of criminal process either is made in principle or is camouflaged with ephemeral concepts about establishing of objective truth, moved away, and sometimes excluded from legal usage,

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nevertheless existed, being continued to remain an integral element of system of criminal procedural relationships.

Adversary process like single combat of opponents has modified but its gist remained to be untouched. In course of development it has been supplemented with notion of justice, truncheons and spears were replaced in words (testimonies), items (material evidences) and opinions of versed people (experts and specialists), has changed the rules of adversarial, there were defined its objectives, procedures, rights and duties of participants, the ways of assessment of controversy, grounds and kinds of solutions made etc. Naturally, that all enumerated structural elements of adversary process depending on some objective and subjective reasons have modified, but continued to exist, the gist of controversy remained to be untouched.

In all stages of adversary process the main matter was and still remains a status (rights and duties) of the referees, which now led to passive observance for contested persons now provided them with right of organization and conducting of single combat now allowed to assist of the both parties, and now join to one of them.

In similar kind the adversary process came to our days and found its half-faced fixation as the principle of criminal proceedings of Azerbaijan Republic.

As was mentioned above, all the vicissitudes of its existence the criminal process endured due to efforts of humanity to provide it with criteria of justice. There were undertaken attempts to give to parties the equal rights and opportunities, to determine common rules of controversy and its objectives, to exclude subjective beginnings in activity of referees and from process of evaluation of the grounds and results of controversy etc.

According to postulated of philosophy, justice is common moral sanction of joint life of people, examined in most part under angle of sight of colliding desires, interests, duties; it concerns human relationships in all socially significant varieties [10, p. 611]. Specific object of justice is good and evil of co-existence in frame of common social space.

Aristotle distinguished common and private (special) justice. Under common justice he understood conformity of law, reasonableness of city-state life; like a common moral denominator all socially ordered relationships between people. It coincides with morality in its projection onto social sphere, replies in question about mission and sense of joint, united, and socially ordered existence in society and state. In its comprehension there formed two philosophic traditions, for which stand different social practices [1, p. 201-222].

The first tradition proceeds from idea of cooperation. Differentiated inside and publically arranged society is more than simple condition of surviving and safety existence of individuals; this is a way of virtuous life, concrete form, in which individuals can realize themselves and achieve of the perfection. The way from natural individual to moral virtuous personality lies through reasonably constructed community, which, the first, owing to separation of labour makes possible an existence of various sciences and arts creating a subjective nature for self-realization of individuals as virtuous persons; the second, allows to separate an intellectual labour from physical one, to create a leisure, which is a condition for development of inner forces of person, space for human eudemonia. State in its adequate forms presented to be like an incarnate mind, objective expression of human rationality. Accordingly the good of state is stood higher the good of separate individuals. Ethic hypostasis of society and state as objectified justice correlated with understanding the fact that a guarantee of the latter is an individual virtue, fair person. Main and specific feature of fair person is unconditional following to the duty. It is guided with conviction “everybody has his own path” and in this base it is able not only to limit itself but also recognize a primacy for others owing to their human features [1, p. 220].

The second tradition of substantiation of justice sees in society and state only a way of limitation, restraint of conflicts, and foreign environment of safety existence of man. Comprehensively it has been embodied in the concepts of social treaty. These concepts proceed from hypothesis of natural state, in which

individuals have an unconstrained freedom therefore they being mutually collided, are got into situation of total dangers. Right to all is turned out with absence of any right. State is a reasonable way out such condition; its goal is to guarantee safety of individuals through mutual equilibration of their rights. In this instance, fairness of state is measured with wellbeing of individuals. “The greatest happiness of the most number of people” is morally sanctioned social aim [1 p. 221]. Moral justification of state is simultaneously its limitation, reduction to acceptable for everybody of all necessity minimum of internal frames.

This tradition the justice is mainly understood as objective principle, combination of requirements, often codified, performance of which is guaranteed with encouraging and punishments. Being institutionalized combination of the requirements, justice supposes and forms in individuals certain subjective abilities (first of all, ability to follow to the norms), but in ideal is presupposed that it has to function independently on goodwill of people [4, p. 98].

The first of considered models of common justice is called cooperative holistic (Platoon, Aristotle, Hegel, Marx); its main shortcoming is an absence of the response on question who establishes and is a subject of justice [9, p. 11]. The second model is called a conflict individual one (Hobbes, Locke, Kant and others); its main shortcoming is that a sensible free individual, who is a result of historical development, is considered to be in it as its precondition [7, p. 192].

Special (private) justice is morally sanctioned proportionality in distributing of the goods in frame of social, state-organized space, a level of perfectness of the way of cooperating of activities and mutual balancing of conflicting interests in society and state. In this meaning the justice coincides with the law. It is a subject of studying mainly the social sciences, whereas a common justice – the subject of moral philosophy.

For designing of justice’s theory is sufficient to consider individuals like equal and living of joint life. “Fair to other is, a proper speaking, equality (to ision)” – this formulated by Aristotle provision is moral legal basis of justice [3, p.

116]. In this aspect the justice acts like equality in dignity to be happy and have necessary goods for that. Therefore, any social practice of justice presupposes some, every time concrete and historically variable set of goods, to which all citizens, initially with fact of their existence, have an equal access. Here, a starting point and primary normative basis of justice seems to be reciprocity of the golden rule of morality.

In legal aspect the justice acts as a formal equality, sameness of a scope of requirements, laws, rules, norms through of which “are measured” individuals like an equal subjects of law. Both in moral and law the justice seems to be equality, but significantly different.

Moral (ethic) justice is equality of infinity, here people is equal each other, as each of them is the single, unchangeable, non-exhausted in his pretensions and aspirations; they are equal as can be equal perfected worlds, i.e. equal (identical) in its non-identity [3, p. 201].

Legal justice is equality of the units; it fits into canons of the arithmetic equality, in a certain sense only it might be regarded as equality. People are equal as “co-founders” of social space, but the fact of establishing consists in legitimacy of inequality of activities and positions, which form a structure of established social space. Problem is in combination of equality and inequality. Extraordinary difficulty of its solution is a main source of social unrests, occurring under a banner of the struggle for justice. According to Aristotle, “ones believe that if they are relatively equal then they have to be equal in general; others recognizing themselves unequal lay claim to the same inequality in all relations” [1, p. 401].

First of typified by Aristotle cases implies a position of poor people, who their civil, human equality to everybody uses as an argument to achieve equality in all other. Second case covers position of privileged social strata, which are tried to bring their privilege up to receiving civil and human privileges as if they were privileged prior, on human assignation. Both that and other are equality in moral

and civil aspect and inequality in all other relations are the two fundamental basis of socially ordered space.

There are two forms (kinds) of special (private) justice, distinguished by Aristotle and being constituted a supporting structure of all further theories: distributive justice and retributive justice. They are the ways of dissemination of scarce goods. The latter should be called private goods, unlike common goods, which on its nature cannot be divided between individuals. Therefore, the justice is a way of attitude one person to other one, mediated with attitude to goods, in which they both are pretend. Formula of justice always presented to be a proportion between four members, where a ration of persons 'A' and 'B' is the same like the ratio of the goods received by them. Fair man and fair society are such, which may find a moral measure in dissemination of goods, which satisfy for everybody and on which is received consent of those, who have much troubles [7, p. 201].

Disseminative justice is concerned to distribution of the goods, and correspondingly, of duties with considering of dignity of persons, i.e. depending on their contribution on common cause. There are three main historically developed principles of distribution justice: "to each – the same (to everybody is equal)", "each according to his deserts", "to each according to his need" [9, p. 11]. The first principle is archaic and as egalitarian equality was main beginning in primitive societies relationships, the third directed in future and is a priority in social utopias (e.g. communistic).

Defining for modern societies is the principle "each according to his deserts" (typical samples – salaries depending on quantity and quality of a labour, distribution of rewards depending on feat of arms). Other principles, as secondary, are also effective today and in some areas are unchangeable: so, for example, distribution so named basic values (human rights) is carried out on principle "everybody equally", and social help or tax privileges depending on number of children fit under the principle "to each according to his need".

Equalized justice is a distribution of the goods carried out without considering dignity of persons. Here we are mainly talking about main two types of social relationships, named by Aristotle as arbitrary and non-arbitrary exchange: about exchange of items and punishments. Exchange of the items is considered to be justice, when it carried out in compliance with real value; such, e.g. exchange in market, where is not important who buys, and it important only how much he pays. Fair assessment in punishments consists in their inevitability and impartiality of sentencing [10, p. 201].

Distributive justice provides moral regulative basis of social relations mainly in their communal, personally expressed aspect, and equalizing one – in business-like objectified aspect. Specific societies usually give preference that of those forms of justice, but in each of them are presented both these forms. Optimal, appropriate to achieved level of development of human forces combination of these forms in total and to separate fragments of interpersonal relationships in particular, have crucial significance to define the measures of society justice.

In centre of modern ethic discussions concerning justice is the theory of J. Rolls, which has synthetic nature and supposes ideally typical model of justice in liberal democratic societies.

Its normative basis is two principles: 1) everybody has to have equal rights in attitude of wider scheme of equal fundamental freedoms that compatible with similar schemes of freedoms for others; 2) social and economic inequalities should be designed such way that they will be a) to the most expected benefit of the least succeeded individuals and will be done b) access to the posts and positions opened for everybody in the terms of honest equality of possibilities [6, p. 71-79].

Reflection concerning justice like an ethic basis of social communication, scientific and public discussions around this notion, and the comprehension of joint life of people in the terms of justice is a characteristic particularity of European philosophy that associated with civilized cultural particularities of the European development.

Legal or procedural juridical justice is based on that strict observance in the process legally significant activity of procedural legal norms provide achievement of morally substantiated and lawful result. And vice versa, violation of established with law procedure (law making, law enforcing, supervising etc.) enable to become violation of legality and immoral actions.

Value of procedural justice consists on that it provides a technology of achievement of the true and correctness of acts of the participants of legal relationships. It services a procedure of equal usage by the parties of their rights and obligations; guarantees a control over a process of legal activity; makes predictable the results of legal behaviour; neutralizes possible prejudices of the subjects; provides an opportunity to complain actions and acts; unifies behaviour of individuals in typical legal situations; evenly informs the subjects about legal technique of achievement of legal and moral results. Despite that some norms of procedural law are morally neutral, common directness of legal procedure for ensuring of legitimacy of legal regulation allows assessing it from position of justice [5, p. 66-67].

In general, the detailed development of procedural legal form and noticeable in history of development of national legal systems the trends of its complexity and simplification should be considered as aspirations and attempts of humanity to find optimally and socially sensible legal ways of ensuring of justice in sphere of law.

As was mentioned above, it has been presupposed to ensure the justice with adversarial nature of proceedings, when in contest (process) equal in rights and equally armed opponents (parties) will be prove before impartial referees (court) their rightness, and the court makes verdict ... in favour of strongest.

Just of strongest but not those who was right, as at in course of contest apart of equal rights and standard arms, the main role plays ability to use this arm, experiences and skills in knowledge, mind, trick, endurance, strength and other physiological and psychological particularities of an individual-participant of the contest.



In this plane equal rights and obligations are not a guarantee of equal possibilities, and therefore, a victory of the strongest individual does not mean the victory of justice.

In this case, the decision of referees (court), which fixed a victory of the strongest person, will be fair only in procedural aspect, but not on a core of contest.

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