

ABSTRACT

In this dissertation, the author analyzes certain fundamental aspects of the right to a 'fair hearing' in civil proceedings according to the European Convention on Human Rights (ECHR) Article 6(1). The focus is on the implications of the 'fair hearing' right for the conduct of the court proceedings. The question which this dissertation sets out to answer is what it takes for such proceedings to be 'fair' according to ECHR Article 6(1).

The author attempts to answer this fundamental question both by elaborating a general theory of how the 'fair hearing' right (or the 'fair hearing' norm, or the fairness standard) can be conceptualized, and by applying this general theory to the elucidation of various procedural issues to which the 'fair hearing' right gives rise. When discussing specific procedural issues, the focus is on the balance which has to be struck, when applying the 'fair hearing' right, between procedural safeguards on the one hand, and the objectives of efficiency and economy on the other.

The author conducts an in-depth examination of the case law of the European Court of Human Rights (the Strasbourg Court) concerning the 'fair hearing' right. The author also conducts a critical analysis of this case law, and considers both how internally consistent this case law is, and how well the various strands of this case law fit with certain fundamental interpretive principles of general reach in the ECHR context.

In chapter 1, the author introduces the topic. Chapter 2 is devoted to historical and comparative perspectives. In chapter 3, the author focuses on some methodological issues of significance for the subsequent analysis of the 'fair hearing' right. In chapter 4, the author provides a brief overview of the other components of ECHR Article 6, so that the 'fair hearing' norm is placed in its proper context.

Chapters 5 through 10 constitute the main part of this dissertation, and provide an in-depth analysis of a selection of issues to which the 'fair hearing' right gives rise.

Chapter 5 is devoted to the elaboration of a general theory of what type of norm the 'fair hearing' right in ECHR Article 6(1) constitutes. Chapter 5 aims at laying the foundation for the analysis of specific procedural issues in chapters 6 through 10.

In chapter 5, the author shows that a number of ideals and competing objectives may be referred to in order to elucidate the fairness standard of ECHR Article

6(1). In view of these ideals and the corresponding competing objectives, the right to a 'fair hearing' is most appropriately conceptualized as a right to *proper participation* in the national court proceedings.

There are three fundamental principles which serve to elucidate what is meant by proper participation, and thus a 'fair hearing', in this context: the adversarial principle, the 'equality of arms' principle and the principle of respectful treatment. These principles may be referred to as 'participation principles'. These fundamental principles must always be respected in the context of civil proceedings, but their exact implications will vary according to the circumstances of the individual case.

The question of whether the 'fair hearing' right has been violated comes down to an assessment of whether the proceedings in their entirety had been 'fair', in the sense that they had been adversarial, had been conducted in accordance with the 'equality of arms' principle, and the parties had been treated with sufficient respect in other ways as well. The question of whether the proceedings as a whole had been 'fair' does, however, often come down to a question of whether a *specific procedural deficiency* (such as the lack of a particular safeguard) impaired the fairness of the proceedings. The Strasbourg Court's approach to this question varies significantly according to the specific procedural issue to which the individual application gives rise.

The fact that the Court's approach differs indicates that the *discretion* of the contracting states, when it comes to the details of the procedure, varies according to the procedural safeguard that is involved. In addition, the contracting states are accorded a *margin of appreciation*, in a structural sense, but the width of this margin will also vary according to the circumstances.

In chapters 6 through 10, the author makes use of the theoretical framework outlined in chapter 5 to elucidate the Court's approach to various procedural issues to which the 'fair hearing' right gives rise.

The main question in chapter 6 is when is there a right to comment on submissions to the court; the main question in chapter 7 is when is there a right to an oral hearing; the main question in chapter 8 is when is there a right to be present and participate in person at the oral hearing if such a hearing is held; the main question in chapter 9 is when is there a right to present specific evidence; the main question in chapter 10 is when is there a right to public legal aid.

In connection with each of these issues, or each of these safeguards, the author considers three different types of problems that an application of the 'fair

hearing' right may give rise to. This categorization serves to highlight different methods for differentiating the 'fair hearing' right in view of the circumstances.

It is possible to distinguish between three broad categories in this regard, or three methods for differentiating the 'fair hearing' right in view of competing considerations.

One such method is to differentiate, in view of the circumstances, what procedural safeguards which had to be afforded, and which actions in respect of the various safeguards had to be admitted. The safeguards that must be afforded at various stages of civil proceedings may be made dependent upon a concrete assessment of the necessity of the safeguard in question for the overall fairness of the proceedings. The author refers to this as the *proportionality perspective*.

Another method is to make the necessity of the procedural safeguard in question dependent on whether any of the parties to the dispute want to make use of it or specifically request it. This may be seen as a question of whether a specific safeguard has been *waived*. A *waiver perspective* manifests itself.

The third main method for a differentiation of what procedure the 'fair hearing' right entails is to differentiate, in view of the circumstances, *the manner in which various safeguards must be afforded*. The overarching perspective is that the proceedings must be conducted in a way which makes the various safeguards, or the party's general opportunity to be heard, *practical and effective*. An *effectiveness perspective* manifests itself.

In connection with each of the specific issues under consideration in chapters 6 through 10, the author considers each of these three different perspectives.

In chapter 11, the author sums up the main findings of the dissertation as follows: first, the general perspectives elaborated in chapter 5 can contribute to the elucidation of several specific procedural issues to which the 'fair hearing' right gives rise; second, the Strasbourg Court's approach to several of these issues could have been more consistent and sound than it has in fact been.

In chapter 11, the author also attempts to connect the findings of the dissertation to the debates over the last years as to whether the Strasbourg Court should play either a more *constitutional* or a more *subsidiary* role, or both.