



**CONFLICT BETWEEN
PARTICULAR ASPECTS OF
THE RIGHT TO A FAIR
TRIAL**

JUDr. Ondřej Přidal, Ph.D.

CONFLICT BETWEEN PARTICULAR ASPECTS

- ❖ Ideal situation: The individual aspects of the right to a fair trial are mutually supportive
- ❖ Conflict occurs if the actions of the court fulfil one or more aspect and at a same time weaken or even violate the other – The Judge must then decide which of the aspects (**principles**) prevails.
- ❖ The conflict was foreseen by the drafters of the Convention – Article 6, para. 1, last sentence: excluding publicity (other interest prevails)

INDIVIDUAL CONFLICTS

- ❖ Aspects of the right to a fair trial are codified in legal norms to give all parties the opportunity to make use of such principle. Also the duty of the court to instruct the parties helps participants to use there rights.
- ❖ This often costs time and thus detrimentally affects swiftness of the proceedings.
- ❖ Judges task: To find appropriate balance.

EXAMPLES OF CONFLICT

I. Hearing vs Economy of Proceedings

- ❖ Article 6 does not guarantee the right to attend a civil court in person but rather a more general right to present one's case effectively (*pashayeva v. Azerbaijan*, Judgment of 28 February 2012, paragraph 64) – it is up to the State
- ❖ Empirical point of view – increased caseload
- ❖ Systemic Argument – Fair trial (hearing) is a general instrument for the protection of fundamental rights

EXAMPLES OF CONFLICT

- ❖ Contextual Argument - not having a hearing might lead to a infringement of the right to a fair trial
- ❖ Claims based on personal experience of claimant – hold hearing, i.e. ill-treatment in police custody – *Kovalev v. Russia*, Judgment of 10 may 2007
- ❖ Claims based on technical questions – possible without hearing – i.e. Benefits under social security schemes – *Miller v. Sweden*, Judgment of 8 February 2005

EXAMPLES OF CONFLICT

II. Directness vs Swiftsness

- ❖ Principle of Directness – evidentiary proceeding just before the judge who will pass the Judgment: It is not the case in:
 - Letter of request to another court
 - Appellate panel when evaluates witness testimony according to a minutes
- ❖ Both principles are *prima facie* of same value, however we cannot sacrifice the principle of Directness – there is always alternative – to interrogate witness directly before respective judge

EXAMPLES OF CONFLICT

- ❖ Letter of request to another court – hearing the witness through a junior judge – accelerates proceedings while might burden by error because „other information, which – although important for the assesment of the credibility of testimony- cannot be expressed in the minutes“ – see decision of the Supreme Court of the Czech Republic, R 92/68.

EXAMPLES OF CONFLICT

- ❖ Appellate panel when evaluates witness testimony according to the minutes: “if a Court of Appeal intends to deviate from the fact-finders made by the Court of First Instance on the basis of interpreting evidence produced by the Court of First Instance, it has to require the repetition of testimony of witnesses, and so provide itself a basis for the possibly different assessment to the witnesses’ testimony” – Constitutional Court of the Czech Republic of 29 May 2000, sp. No. IV. ÚS 275/98

EXAMPLES OF CONFLICT

III. Reasoned Judgment vs Economy of Proceedings

- ❖ Petty civil cases – lawmakers makes exceptions from lengthy reasoning, however participants may have problems to comprehend decisions
- ❖ Empirical Argument: Increasing case-load
- ❖ Systemic Argument: Right to a fair trial serves as a general instrument for protection of fundamental rights

EXAMPLES OF CONFLICT

- ❖ Contextual Argument: Not receiving reasoned Judgment might infringe the right to a fair trial – preferable for the parties is to receive reasoned judgment
- ❖ *Klemeco Nord AB v. Sweden*, Judgment of 19 December 2006: Courts and tribunal should adequately state the reasons on which they base their decisions. The extent to which this obligation applies may vary. However it cannot be understood as requiring a detailed answer to every argument.

EXAMPLES OF CONFLICT

- ❖ Therefore the extent of the reasoning depends on the nature and circumstance of the particular case.
- ❖ Shorter in petty cases, even limited to the very substance of the case, tailored according to the participants and their submissions = balancing between fully reasoned judgment and the principle of the economy of proceedings.

A decorative border with intricate scrollwork and floral patterns surrounds the text. The border is white on a dark background, with a central floral motif at the top and bottom.

METHODS OF SOLVING A CONFLICT OF PRINCIPLE

- ❖ Judge must decide which group of aspects/principles is to be given priority.
- ❖ Weightening principles – which one is more appropriate.
- ❖ First: to avoid the conflict. Can a solution to be found to keep principles intact? If so, that solution should be taken. Find a balance.
- ❖ Second: Preference is given to one of them = thin ice/appeal.

WRITTEN AND UNWRITTEN PRINCIPLE

- ❖ If an unwritten legal principle is in conflict with the principles enshrined in a legal norm, then the norm takes precedence because legal principles have the character of *praeter legem* – ‘outside of the written law’.
- ❖ Exception „Radbruch Formula“ – against legalized criminality: The positive law, guaranteed by laws and power, has precedence even if the content is unfair and ineffective, only, if the discrepancy between positive law and justice reaches so intolerable an extent that the law must as ‘non-law’ [unrichtiges Recht] justice withdraw.

UNWRITTEN PRINCIPLES: LEX SPECIALIS

- ❖ The special principle for the case at hand takes precedence over the general one.
- ❖ Example: the principle of obligation of the State to provide functional criminal-law protection (the need to perform a forensic autopsy) is special to the principle of protection of personality, and therefore forensic autopsy may be performed even against the will of relatives of deceased.

A decorative border with intricate floral and scrollwork patterns in white, framing the central text on a dark background.

THE PRINCIPLE OF PROPORTIONALITY

1. Suitability
2. Necessity
3. Gravity

Judgement of the Plenum of the Constitutional court of the Czech
Republic of 12 October 1994, sp. No. Pl. ÚS 4/94

A decorative scrollwork border in white on a black background, framing the central text. The border features intricate floral and leaf patterns, with a central crest-like element at the top and bottom.

THE PRINCIPLE OF PROPORTIONALITY

1. Suitability – whether a principle allows one individual to achieve his goal (protection of other fundamental rights) and to contribute to a fair trial.
2. Necessity – whether for achieving the goal this or that principle is needed or whether the goal can be achieved by other means.

A decorative border with intricate floral and scrollwork patterns in white and light gray, framing the central text and list. The border is symmetrical and features a central crest-like element at the top.

THE PRINCIPLE OF PROPORTIONALITY

3. Gravity – i.e. the importance and significance of this or that principle within the
 - a) Empirical argument – factual importance of the social phenomenon being protected by the principle
 - b) Systemic argument – considering the meaning and the position of each principle in the legal system
 - c) Contextual argument – another negative effect from the limitation of one principle thus to the preference of another
 - d) Value argument – considering the positive aspects of the conflicting principles according to the generally accepted hierarchy of values

ARBITERS

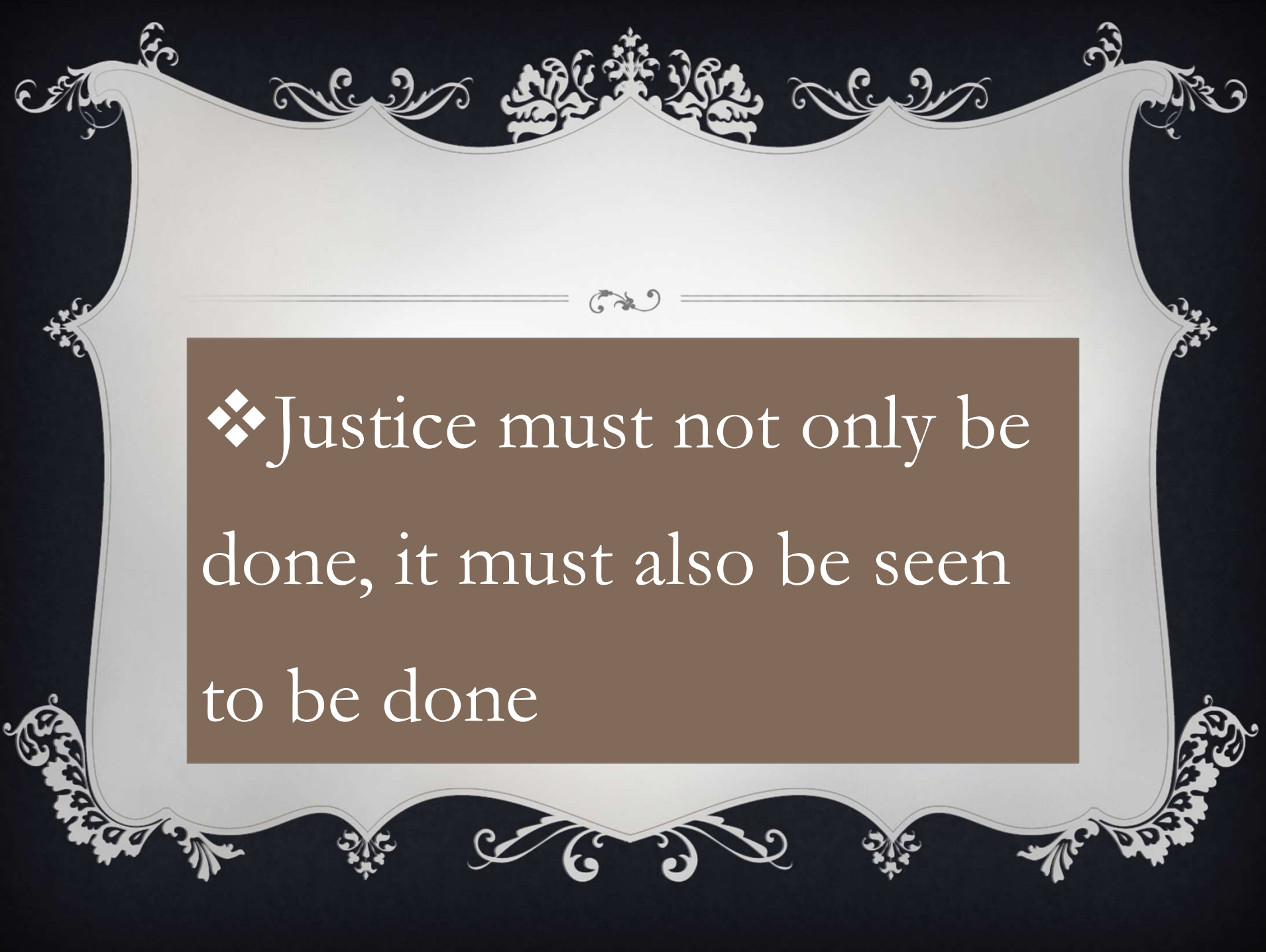
- ❖ Other principle or method works as an imaginary adjudicator which is called „arbiter“
- ❖ Argumentum ad absurdum
- ❖ Constitutionally conforming interpretation

CONCLUSIONS ABOUT CONFLICTS

- ❖ Legally sophisticated society increases frequency of conflicts
- ❖ Proliferation of fundamental rights and conflicts
- ❖ Broad discretion of national legislators
- ❖ Danger of cutting procedural right of winning party
- ❖ Wrongly giving preference leads to the remittal
- ❖ Fair judgment not only has to be **correct in merits**, but it must be **preceded by fair proceedings**.



QUESTIONS?



❖ Justice must not only be done, it must also be seen to be done