

# Reflections on “Fair Trial” in Civil Proceedings According to Article 6 § 1 of the European Convention on Human Rights

Arnfinn Bårdsen

<b>1 Ideologies of Procedural Fairness</b> .....	100
1.1 The Rule of Law .....	100
1.2 Human Rights .....	101
1.3 Democracy .....	105
<b>2 Approaches to an International Norm of Procedural Fairness</b> .....	107
2.1 Contextual Approach .....	107
2.2 Autonomous Approach .....	109
2.3 Normality and Normativity .....	113
2.4 The Margin of Appreciation .....	114
2.5 Foreseeability versus Flexibility .....	116
<b>3 Attributes of Procedural Fairness</b> .....	117
3.1 Introduction .....	117
3.2 The Three Branches of Procedural Fairness .....	118
3.3 Procedural Fairness in Criminal and in Non-criminal Cases .....	121
3.4 Procedural Fairness and Supplementary Procedural Rights .....	123
3.5 Procedural versus Substantive Fairness .....	124
3.6 The Nature of the Assessment .....	127

## 1 Ideologies of Procedural Fairness

### 1.1 The Rule of Law

*The rule of law* – “la prééminence du droit” – may be described as the principle by which one’s dealings with governmental authorities, private corporations and fellow citizens should be governed by a framework of legal rules, whose interpretation and application are in the hands of independent courts.<sup>1</sup> Habitually it is associated, *inter alia*, with features as the government being under the law, independence of the judiciary, access to the courts, and that the law is general in its application, equal in its operation and certain in its meaning. Moreover, the law must be based on elementary ethical values and principles, *inter alia*, on respect for human rights.<sup>2</sup> Although conventionally associated with affairs at the domestic level, the rule of law – representing a *general principle of law* – even polices *international relations*.<sup>3</sup> It is moreover applicable to *international organisations* and *supranational institutions*, e.g. the European Community and the European Union.<sup>4</sup>

In any legal system based on the rule of law, the principle of *fairness in court-proceedings* – i.e. procedural fairness – is cardinal. The historical lines in this respect are often drawn to clause 39 of the Magna Charta (1215), and the succeeding development of principles on fair procedure in common-law, based on “natural justice” encompassing, *inter alia*, judicial impartiality (*nemo iudex in causa sua*), and the right to be heard (*audi alteram partem*).<sup>5</sup> In democratic states with a written constitution, due process of law has – although construed in quite diverse manners – typically been a part of the protection of individual rights and freedoms at national, constitutional level.<sup>6</sup>

---

1 Similar, admittedly simple, definition is used by Merrills, *The development of international law by the European Court of Human Rights* (2nd ed. 1993) p. 128.

2 The precise meaning to be attributed to the principle of rule of law is far from uniform. An extensive definition of the rule of law is given by the OSCE; see Reference Guide to OSCE Human Dimension Commitments (2001) pp. 61–67. See also Arnall, *The Rule of Law in the European Union*, in Arnall and Wincott (eds.), *Accountability and Legitimacy in the European Union* (2002) pp. 239–255 with further references.

3 Thus, the rule of law must be considered a *general principle of law* within the meaning of Article 38 § 1 c) of the Statute of the International Court of Justice, see Cassese, *International Law* (2001) p. 157.

4 See the judgement of the European Court of Justice in Case 294/83, ‘*Les Verts*’ v. *European Parliament* (judgment of 23rd April 1986, [1986] ECR 1339) § 23, with numerous subsequent approvals, *inter alia*, in *Unión de Pequeños Agricultores v. Council of the European Union* (judgment of 25th July 2002, Admissibility Case C-50/00 P) § 38. Moreover, the rule of law shall be one of the basic values for the European Union according to Article I-2 of the *Draft Constitution of Europe* (CONV 724 Vol. 1, 26th May 2003).

5 Clayton and Tomlinson, *The law of Human Rights*, vol. 1 (2000) pp. 554–556.

6 Janis, Kay and Bradley, *European Human Rights Law* (2nd ed. 1995) p. 403 with further references.

Adherence to the principle of procedural fairness is indeed not only a characteristic feature of such rule of law-systems. It is rather a constituent component of the concept itself: Rule of law without fairness in proceedings, is inconceivable. A legal system rejecting the principle would, as a matter of definition, not be based on the rule of law. Securing fairness in proceedings is accordingly imperative not only as such, in its own right. As a foundation stone for protection against the abuse of power, it is even decisive in order to establish and preserve the rule of law as a societal, democratic credo, i.e. to uphold the *Etat de droit*.<sup>7</sup>

This first section expounds on the linking of procedural fairness, human rights, the rule of law and democracy. The aspiration is not to unveil ultimately these ever so troubling matters, an objective mismatched with the nature of things; a quest akin to that of Sisyphus'. It is sufficiently challenging to portray impressionistically the fundamental ideologies of procedural fairness, as these become visible in the interplay of the indispensable legal and societal values of human rights, the rule of law and democracy.

## 1.2 Human Rights

It is well in line with the reasoning *supra* (1.1), to find the requirement of fairness in proceedings as an established key element, not only as a part of the protection of individual rights and freedoms at national level in democratic states, but moreover within *international, human rights instruments*. Prominent examples are Article 10 of the Universal Declaration on Human Rights, Article 14 § 1 of the UN Covenant on Civil and Political Rights, Article 6 § 1 of the European Convention on Human Rights, and Article 47 in the Charter of Fundamental Rights of The European Union.<sup>8</sup> Although the wording used in the various instruments differs slightly, the common core is a requirement of fair procedure in both criminal and civil cases. This study shall expound on the latter, i.e. the non-criminal cases; the right to a fair procedure in *civil* proceedings.

The case law of the European Court of Human Rights (ECHR) demonstrates that the conceptual and ideological bond between procedural fairness as a human right and the principle of rule of law is more than an oratorical allusion. It represents a practical, operative guideline for the interpretation and application of Article 6 § 1 of the European Convention on Human Rights. A salient example on how forceful this reasoning might be is the far-reaching conclusions drawn by the ECHR in the famous *Golder v. United Kingdom*.<sup>9</sup> The applicant, Mr. Sidney

---

7 Similar Soyer and Salvia, *Article 6*, in Pettiti, Decaux and Imbert (eds.), *La Convention Européenne des Droits de l'Homme* (1995) pp. 239–298 at p. 240 regarding the importance of procedural fairness within the European Convention on Human Rights: "La garantie du procès équitable est donc consubstantielle à l'esprit même de la Convention".

8 Non-European, regional parallels are Article 8 of the American Convention on Human Rights (1969) and Article 7 of the African Charter on Human and People's Rights (1981). The Arab Charter on Human Rights (1994) encompasses fair trial ("a lawful trial in which he has enjoyed the guarantees necessary for his defence") in criminal cases only (Article 7).

9 *Golder v. United Kingdom*, Series A no. 18, see especially § 34.

Elmer Golder, serving a sentence of 15 years imprisonment for violent robbery, was refused to consult a solicitor with a view to initiating libel proceedings against a prison officer, and maintained that this was in breach of his procedural rights according to Article 6 § 1, i.e. his right to have his case heard by a court. The British government contested that the Convention guaranteed the right of *access* to a court, *inter alia* because the wording of Article 6 § 1 does not explicitly prescribe such a right. It restricts itself to pronounce on the procedure *after* a case is brought to a court. The ECHR did not agree in the approach advocated by the British Government, and started its line of reasoning with a reference to the French wording and general principles of law and international law. The backbone of the Court's interpretation was, however, the principle of the rule of law as referred to in the Preamble of the Convention and in the Statute of the Council of Europe. The Court started by stating that according to Article 31 § 2 of the Vienna Convention on the Law of Treaties the preamble to a treaty forms an integral part of that treaty's context, thus being relevant for the interpretation and application of provisions within the treaty. Furthermore, the Court said, the Preamble could be useful for the determination of the object and purpose of the instrument to be construed, thus being of importance on a dual footing. The most significant passage in the Preamble related to the rule of law, is the signatory Governments declaring that they were:

“... resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration”.

The former European Commission on Human Rights had in its report to the Court attached great importance to the expression “rule of law”, which, in its view, elucidated Article 6 § 1. The ECHR agreed, and stressed that it would be a mistake to see in this phrase a merely “more or less rhetorical reference”, devoid of relevance for those interpreting the Convention: One reason why the signatory Governments decided to “take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration” was precisely their profound belief in the rule of law. Accordingly, the Court found it both natural and in conformity with the principle of good faith to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 § 1. This was even more so since the Statute of the Council of Europe refers in two places to the rule of law, see its Preamble and Article 3 § 3. According to the latter, every member of the Council of Europe must accept the principle of the rule of law. As to the concrete application of the principle of rule of law, the ECHR found that in civil matters one could scarcely conceive of the rule of law without there being a possibility of having access to the courts. Thus, albeit the lack of explicit provisions on access to court, such a right followed from Article 6 § 1 by *implication*. Hindering Mr. Sidney Elmer Golder access to a solicitor and – as a consequence – access to court proceedings, was accordingly in violation of that Article.

Both the vitality of the principle of the rule of law regarding human rights provisions on procedural fairness, and the persuasive strength of arguments

vested in it, are confirmed when looking into the practice of the European Court of Justice (ECJ) and – in some regards even more so – in respect of The Court of First Instance (CFI). One example is the ruling of the CFI in the case of *Jégo-Quééré & Cie SA v. Commission of the European Communities*.<sup>10</sup> The French company Jégo-Quééré & Cie SA brought an action under Article 230 § 4 of the EC Treaty for annulment of certain provisions regarding the fisheries of hake. The Commission raised an objection of inadmissibility, based on the argument that the regulation was not of individual concern to Jégo-Quééré & Cie SA within the meaning of Article 230 § 4 of the EC Treaty. Therefore, the company did not have *locus standi* to bring an action for annulment of the contested provisions before the CFI. The Court of First Instance agreed that the applicant could not be regarded as individually concerned within the meaning of Article 230 § 4 of the EC Treaty, based on the criteria already established by Community case law. This was especially due to non-fulfilment of the requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee. However, the CFI accentuated that access to the courts is one of the essential elements of a community based on the rule of law, and that such access is guaranteed in the legal order based on the EC Treaty. Therefore, the strict interpretation, applied until then, of the notion of a person individually concerned according to Article 230 § 4 of the EC Treaty, had to be reconsidered, making it possible to challenge effectively general provisions of community law which are of individual concern to an applicant. Accordingly, the number and position of other persons who are likewise affected by the measure, or who may be so, should be of no relevance in that regard. The objection of inadmissibility raised by the Commission was on this basis – i.e. straightforward rule of law-arguments – dismissed by the CFI.<sup>11</sup> So far, the ECJ has not been too enthusiastic on the approach chosen by the CFI regarding this particular issue.<sup>12</sup> This lack of approval is, however, rather inferior as to what is discussed here; i.e. the rule of law as a source of directly applicable, and potential decisive, arguments regarding what is considered fair administration of justice at national and international level.

The argumentative use of the rule of law connected to human rights provisions on fairness in civil procedure is probably most commonly seen regarding various aspects of the right of *access to court* and the right to *adequate legal and judicial control on administrative and legislative measures*, as e.g. in the judgment of ECHR in the *Golder-case* and the ruling of CFI in the case of *Jégo-*

---

10 *Jégo-Quééré & Cie SA v. Commission of the European Communities* (judgement of 3rd May 2002, Admissibility Case T-177/01), see especially § 41.

11 For a commentary, see Hanf, *Facilitation Private Applicants' Access to the European Courts? On the Possible Impact of the CFI's Ruling in Jégo-Quééré*, German Law Journal, vol. 3 no. 7 (July 2002).

12 See *Unión de Pequeños Agricultores v. Council of the European Union* (judgment of 25th July 2002, Admissibility Case C-50/00 P) §§ 32-45, where ECJ – although emphasising the importance of the rule of law – essentially confirms the established doctrine on *locus standi*, without even mentioning the ruling of CFI in *Jégo-Quééré*.

*Quéré & Cie SA*, respectively. This should come as no surprise; these features represent the heart of the rule of law, traditionally defined. However, the scope is far beyond these attributes. A striking example on the range of the rule of law as to fairness in proceeding according to Article 6 § 1 in the European Convention on Human Rights, is the judgment of the ECHR in *Brumărescu v. Romania*.<sup>13</sup> An administrative decision dated 1950 on the nationalisation of a house in Bucharest was by a judgment of 1993 declared illegal by the court of first instance, being unconstitutional, lacking legal basis and carried out under duress. The court ordered the administrative authorities – the mayor of Bucharest and a State-owned company, C., which managed State-owned housing – to return the house to the applicant, Mr. Dan Brumărescu. No appeal was lodged and the judgment became final and irreversible. In March 1994, the mayor of Bucharest ordered the house to be returned to the applicant and in May the same year, the C. company complied. Later, however, the government applied to the Supreme Court of Romania for the *reopening* of the case, because the court of first instance had exceeded its jurisdiction in examining the lawfulness of the decree allowing the house to be nationalised. In its judgement of March 1995 the Supreme Court agreed, and quashed the 1993-judgement of the court of first instance. Thereupon, the tax authorities informed the applicant that the house would be reclassified as State property with effect from April 1996. In its dealing with the application from Mr. Dan Brumărescu, the ECHR started by stating that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. Moreover, the Court emphasised that one of the fundamental aspects of the rule of law is the principle of *legal certainty*, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question. As to Mr. Dan Brumărescu's case the Court noted that at the material time the Procurator-General of Romania – who was not a party to the proceedings – had the power to apply for a final judgment to be quashed, a power not subject to any time-limit, so that judgments were liable to challenge indefinitely. By allowing the application lodged under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in a judicial decision that was irreversible by way of ordinary remedies and thus *res judicata* – and which had, moreover, been executed. Thus, the Supreme Court of Justice infringed the principle of legal certainty, and, accordingly Mr. Dan Brumărescu's right to procedural fairness under Article 6 § 1 of the Convention.

Looking beyond the legal and factual particularities of *Golder*, *Jégo-Quéré & Cie SA*, *Brumărescu* and analogous case law, one may observe that in the interplay between the principle of the rule of law and human rights provisions on procedural fairness, the rule of law has a *dual cause*: Firstly, it embodies the chief *historically and ideologically context* of the right to procedural fairness

---

<sup>13</sup> *Brumărescu v. Romania*, Report 1999-VII § 61.

enshrined in various human rights instruments. Secondly – partly a consequence of the first – the rule of law provides *momentum* and *direction* to the *dynamics* of international human right norms on procedural fairness.

### 1.3 Democracy

The rule of law is forcefully coupled with democratic values and principles, democracy being an “inherent element of the rule of law”.<sup>14</sup> Maintaining the rule of law is the true basis of democratic society, without it democracy is a misleading and empty phrase; the contrast between democracy and the totalitarian state lies essentially in the reliance, by a people wedded to the democratic ideal, upon the law. Thus, in the Preamble of the Statute of the Council of Europe, *political liberty* and *the rule of law* are listed as the two principles “which form the basis of all genuine democracy”. A working legal and judicial system based on the rule of law – including accessible courts that have the confidence of the population – is even one precondition for *political stability*, and moreover essential to the economical and social *welfare* of a society and its members.<sup>15</sup>

In accordance with these perspectives, ECHR has pinpointed on numerous occasions that due to the prominent position that the principle of fair administration of justice holds in a democratic society, a restrictive interpretation of Article 6 § 1 would not correspond to the aim and purpose of that provision. Unquestionably, this has been stated not only to prevent a restraint interpretation of Article 6 § 1, but moreover in order to motivate and legitimate an *evolutive* interpretation of the Convention, *inter alia*, to establish that Article 6 § 1 not only oblige a High Contracting Party to refrain for *hindering* access to court, as in *Golder v. United Kingdom*.<sup>16</sup> Depending on the circumstances, it even requires that the State *facilitates access* to court in practice, if need be by granting free legal aid, as in the illustrious *Airey v. Ireland*.<sup>17</sup> Thus, “democracy” serves as a reference for the dynamics of the Convention; the Convention being a living instrument “to be interpreted in the light of current conditions and of the ideas prevailing in democratic States today”.<sup>18</sup> Moreover, the democratic dimension of procedural fairness might be said to sustain and elucidate the *positive* obligations vested in Article 6 § 1, i.e. the state parties’ duty to *secure* the benefits of a fair trial to everyone within their jurisdiction, see Article 1 of the Convention. The conventional distinction as to the nature of the duty of domestic implementation

---

14 Report from the OSCE Conference on the Human Dimension, Copenhagen 1990 § 3.

15 Thus, establishing the rule of law has become a major part of the international fight against poverty, corruption and environmental degradation; see e.g. The World Bank Annual Report 2002 p. 77; Carothers, *The Rule of Law Revival*, Foreign Affairs, vol. 77, no. 2 (1998).

16 *Golder v. United Kingdom*, Series A no. 18, mentioned *supra* (1.2).

17 *Airey v. Ireland*, Series A no. 32 § 24. Such a right is, moreover, explicitly provided for in Article 47 in the Charter of Fundamental Rights of Europe, where it is stated: “Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

18 *Kress v. France* (7th of June 2001) § 70.

of civil and political rights on the one side, and social, economical and cultural rights on the other, is consequently blurred. Thus, in *Airey*, the ECHR emphasised that whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. Hence, the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention.<sup>19</sup> Akin to what must regularly be done in order to implement human rights of the latter kind, the right to a fair trial could not at all be fulfilled passively, or by incidental, individual measures. It requires structural, multifaceted, continuous and coherent governmental action.

Of course, the concept of democracy encompasses values and arguments beyond what might be rooted in the rule of law, and *vice versa*. In practice though, when discussing procedural fairness, the correlation between democracy and the rule of law is so intimate that a line of arguments based on the first in most incidents would seem indistinguishable from a line of arguments based on the latter. This is even more so when – as occasionally done by the ECHR – the two concepts are put together as elements in one, single phrase, as in “the rule of law in a democratic society”, or the equivalent French phrase of “au principe de la prééminence du droit dans une société démocratique”.<sup>20</sup> However, the reference to democracy adds some perspective, as the notion of democracy clearly presupposes the *separation of powers*, thus fortifying the respect for the *independence of the judiciary*.<sup>21</sup> Administrative or parliamentary interference with ongoing proceedings, or governmental non-acceptance of final court decisions, are indeed equally incompatible with democratic principles, the rule of law and the parties’ right to procedural fairness.<sup>22</sup> Thus, in *Stran Greek Refineries v. Greece*, the ECHR emphasised that the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference – other than on compelling grounds of the general interest – by the legislature with the administration of justice designed to influence on the judicial determination of a dispute.<sup>23</sup>

---

19 *Airey v. Ireland*, Series A no. 32 § 27.

20 E.g. *Ashingdane v. United Kingdom*, Series A no. 93 § 57; *Waite and Kennedy v. Germany*, Reports 1999-I § 58, both concerning the right of access to court according to Article 6 § 1.

21 Marks, *The European Convention on Human Rights and its “Democratic Society”*, 66 British Yearbook on International Law (1995) pp. 209–238 at p. 212.

22 As to the non-fulfilment of final judgments, see *inter alia*, *Burdov v. Russia* (7th May 2002).

23 *Stran Greek Refineries v. Greece*, Series A no 301-B § 49. See also *Van de Hurk v. Netherlands*, Series A no. 288 §§ 44–55; *Zielinski and Pradal & Gonzalez Others v. France*, Reports 1999–VII § 57; *Smokovitis and others v. Greece* (11th of April 2002) § 23; *Sovtrans avto Holding v. Ukraine* (25th of July 2002) § 80.

## 2 Approaches to an International Norm of Procedural Fairness

### 2.1 Contextual Approach

However easy to embrace as an intangible ideal, the precise requirements implied in the notion of procedural fairness is far from self-evident. One could even advocate that the very concept of “fairness” is useless for both academic and practical purposes, being – although appealing in appearance – betraying, self-referring and void: “Fairness” is not out there, as a divine given inculcated into the nature of things, waiting to be discovered by the right-thinking.<sup>24</sup>

Be that as it may. Transferred into express and operative *legal provisions*, the notion of fairness must in any case *be given substance* through *interpretation*. Whether it is at all possible to define procedural fairness on a theoretical, global level, is less important. The concept of procedural fairness must necessarily vary according to the *context*.<sup>25</sup> Rightly, the evident and striking coincidence of ideas, principles and ethics among the miscellaneous human rights instruments, has a bearing: It conveys the common ideological corpus of human rights instruments; embodying deeper layers of modern legal culture. As such, it might facilitate – although not legal universalism in the true and formal sense – *approximation* in the interpretation of the various legal instruments. This is, of course, also the case regarding the various provisions on procedural fairness in civil cases, where, *inter alia*, the principle of the rule of law provides a powerful, common historical and ideological reference. Nevertheless, according to the required contextual approach, one cannot discuss the right to a fair procedure as such, even when limiting the scope to procedural fairness according to international human rights instruments. Although there might exist quite extensive fields of ideological and material overlap, and even mutual exchange of arguments on the interpretation, in principle every instrument must be treated independently. The centre of attention here is the right to a fair procedure vested in *Article 6 § 1 of the European Convention on Human Rights*, as it materializes through the case law of the European Court on Human Rights, i.e. *the superior European legal norm on civil procedure*.

The application of the norm of procedural fairness in Article 6 § 1 of the Convention is, however, not limited to the domestic procedural systems of each High Contracting Parties of the Convention. It has, moreover, effect within the law of the *European Union*, although the Union as such is not a High Contracting Party to the Convention: Article 47 § 2 of the *Charter of Fundamental Rights of the European Union*, transforms Article 6 § 1 of the European Convention on

---

24 See, *inter alia*, the discussion and references in J. Tasioulas, *International Law and the Limits of Fairness*, *European Journal of International Law* 2002, vol. 13 no. 4 pp. 993–1023, especially at pp. 995–1006 on the problem of ethnocentrism. For an even more general approach, see Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, *Emory International Law Review* vol. 15 (2001) pp. 391–466.

25 The Vienna Convention on the Law of Treaties Article 31 acknowledges on a general footing the necessity of a contextual approach to the interpretation of treaties.

Human Rights into European Community and Union Law, the meaning and scope of the two provisions intended to be the same, see Article 52 § 3 of the Charter. According to the *Explanatory report* to this key interpretative provision of the Charter, the meaning and the scope of the guaranteed rights should be determined not only by the text of the European Convention on Human Rights, but also by the case law of the ECHR.<sup>26</sup> In substance, Article 47 of the Charter mostly repeats what has already been established by the *general* provision in Article 6 § 2 of the *EU Treaty* on the position of the European Convention on Human Rights within Community law.<sup>27</sup> Thus, even though the Charter as such must formally still be considered "non-binding" – *soft law* – it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order, reaffirming in an unequivocal manner that the European Convention on Human Rights Article 6 § 1 is not merely analogous to general principles of Community Law, but even *normative* within it.<sup>28</sup>

Due to the *autonomy* of the European courts and the current *a-hierarchical* relationship between ECJ on the one hand and ECHR on the other, expressed *inter alia*, by the lack of procedures for advisory opinions given, or review carried out, by the ECHR, incoherent interpretation and application of the right to procedural fairness according to Article 6 will inevitably occur.<sup>29</sup> Uniform interpretation and application is supported however, by arguments of a pragmatic nature: *Firstly*, one reduces the risk of conflicts between the obligations imposed on Member states by Community law or European Union law, on the one hand, and the obligations that arise for the States from the European Convention on Human

---

26 This is also stressed by the *EU Network of Independent Experts in Fundamental Rights*, in its report on the situation of Fundamental Rights in the European Union and its Member States in 2002 p. 21.

27 In Article 6 § 2 of the EU Treaty it is stated: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." An essentially similar provision is proposed in the *Draft Constitution of Europe* (CONV 724 Vol. 1, 26th May 2003) § I-7 § 3.

28 On the status of the Charter in general, see Brand, *Towards the Definitive Status of the Charter of Fundamental Rights of the European Union: Political Document or Legally Binding Text?*, German Law Journal vol. 4 no. 4 (April 2003); Jacobs, *The EU Charter of Fundamental Rights*, in Arnall and Wincott (eds.) op. cit. pp. 275–290; Rudolf, *Developments; European Union*, International Journal of Constitutional Law, vol. 1 (January 2003) pp. 135–141. The *Draft Constitution of Europe* (CONV 724 Vol. 1, 26th May 2003) presupposes that the Charter is incorporated into the Constitution of Europe, see the reference made in Article I-7 § 1.

29 E.g. on the question of protection against self-incrimination according to Article 6 of the European Convention on Human Rights, compare the ruling of ECJ in *Orkem v. Commission*, Case 374/89, [1989] ECR 3283 § 30 and the judgement of the ECHR in *Funke v. France*, Series A. no. 256-A § 44.

Rights, on the other. *Secondly*, one avoids the uniform application of European Union Law being jeopardised by states referring to conflicts with the European Convention on Human Rights that must be solved by giving precedence to the latter according to the EC Treaty Article 307.<sup>30</sup> *Thirdly*, one paves the way for the European Union to *accede* the European Convention on Human Rights, being one possible manner of permanently settling the current competing jurisdictions of the ECJ and the ECHR respectively, in the field of Human Rights protection in Europe.<sup>31</sup>

## 2.2 *Autonomous Approach*

Even though the notion of “fairness” used in Article 6 § 1 – and in other international human right instruments concerned with procedural fairness – historically evidently is construed upon national, procedural and constitutional traditions, it is – once placed within the context of the Convention – not referring to any particular, domestic norm of procedural fairness. On the contrary, it is – like most operative concepts of the Convention – *autonomous*. By this is meant that the different concepts used in the Convention have a substance on their own, and in principle operates independently from notions akin within domestic legal systems. Such an approach is unavoidable if the Convention rights are to become effective. Otherwise, a High Contracting Party could unilaterally free itself from the obligations stemming from the Convention simply by way of its own legislation. It is patently obvious that making the level of *international* protection of human rights reliant solely on *national* legislation in such a manner would be incompatible with the Convention’s *raison d’Etre* and tantamount to deprive the Convention rights their independent, normative supremacy over national law. Thus, it would be incompatible with the principle of *effectiveness*, guiding the interpretation of treaties generally, and the European Convention on Human Rights specifically.<sup>32</sup>

The core undertaking of the international norm of civil procedure in Article 6 § 1 of the European Convention on Human Rights – as of any other interna-

---

30 According to this provision, rights and obligations arising from agreements concluded before 1st January 1958 or, for acceding states, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the EC Treaty.

31 The issue of accession has been debated for 25 years, and was included in the agenda by the *Laeken Declaration* on the future of the European Union (December 2001). For details and references, see Pernice, *The Charter of Fundamental Rights in the Constitution of The European Union*, in Curtin, Griller, Prechal and de Witte (eds.), *The Emerging Constitution of the European Union* (2003). Accession is supported by Working group II “Incorporation of the Charter/Accession to the ECHR” in its final report to the *Laeken Convention* (22nd October 2002, CONV 354/02, WG II 16), and is incorporated into the *Draft Constitution of Europe* (CONV 724 Vol. 1, 26th May 2003), see Article I-7 § 2 which states that the Union “shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

32 On the effectiveness principle as to the interpretation of the European Convention on Human Rights, see Merrills, *op. cit.* pp. 98–124.

tional human rights instrument – is obviously to police the law and practices at national level, thus unavoidably creating a normative pressure on domestic, civil procedure. However, this is not a normative one-way track. On the contrary, national traditions, ideals and practices must be taken into consideration when interpreting the international norm on procedural fairness. Important to this end is that the autonomous approach to the international norm of procedural fairness, does not imply that the notion of procedural fairness within the domestic legal systems of Europe is without any relevance, or that a provable alike European procedural practice could not be taken into consideration when adjudicating on what must be considered a fair procedure according to Article 6 § 1. One must indeed draw on such established traditions and practices in order to attain an interpretation of Article 6 § 1 that is meaningful in the broader sense, acquirers legitimacy and acceptance throughout Europe, and serves the practical needs of modern, European procedural law.<sup>33</sup> Thus, one may speak of a *soft, normative comparatism*: The formulation of the norm of fairness in Article 6 § 1, might be inspired by – but need not by principle to coincide with – the concept of procedural fairness within domestic procedural systems, and demonstrable similar practices in the domestic legal systems of the High Contracting parties. Additionally, established and emerging principles of *transnational* civil procedure might indeed be illuminative, as a possible expression of a common core (*trunc commun*).<sup>34</sup> Moreover, in the case of *Kress v. France*, the majority of the ECHR sitting in a *Grand Chamber* attached confirmative weight to certain procedural features regarding the *Advocate General’s* position within the European Court of Justice, thus broadening even further the perspectives of this soft normative comparatism.<sup>35</sup> This potential impact of European Community and Union law on the interpretation of the European Convention on Human Rights is even verified at a general level in subsequent case law.<sup>36</sup>

---

33 This might be seen as a variation of Article 38 § 1 c) of Statute for the International Court of Justice, according to which “general principles of law recognised by civilized nations” are sources of law. On “general principles of law” as a source in international law, see Brownlie, *Principles of Public International Law* (5th ed. 1998) pp. 15–18; Cassese, *International Law* (2001) pp. 155–159. A similar approach is applied by the CFI and the ECJ, see the judgment of CFI in *Roderick Dunnett, Thomas Hackett and Mateo Turró Calvet v. European Investment Bank* (judgement of 6th March 2001, Case T-192/99) § 86 on an employers duty to carry out consultations with staff representatives before abolishing a financial advance. See also Leanerts, *Le droit compare dans le travail du judge communautaire*, *Revue Trimestrielle de Droit Européen*, 2001 pp. 487 et sec.

34 E.g. the joint initiative of UNIDROIT and The American Law Institute on *Principles and Rules of Transnational Civil Procedure*. The draft are reproduced and commented in *Uniform Law Review* 2001, vol. 6 no. 4.

35 *Kress v. France* (7th of June 2001) § 86. A minority of seven judges found this approach “inappropriate”, see partly dissenting joint opinion of judges Wildhaber, Costa, Pastor Ridruejo, Küris, Birsan, Botoucharova and Ugrekhelidze § 11.

36 See particularly *Christine Goodwin v. the United Kingdom* (11th July 2002) § 100; *L v. the United Kingdom* (11th July 2002) § 80, both regarding transsexuals right to marry according to Article 12 of the European Convention on Human Rights, where the ECHR drew attention

As there are certain substantial differences amid the national procedural traditions and regimes in civil cases, as to the underlying philosophy and systemic principles, there will, however, inevitable exist a certain structural tension between national procedural regimes, that must even be dealt with by the international human rights instruments on civil procedure. The core issue being how the international norm of procedural fairness in civil cases according to Article 6 § 1 of the European Convention on Human Rights should relate, not to the particularities of a certain procedural system, but to the fundamental differences amid the two dominating national, procedural *traditions* roughly denominated as *common-law* and *civil-law*, respectively.<sup>37</sup> It should at this point suffice to pinpoint two essential differences between these two traditions: *Firstly*, the judge in civil-law systems, rather than the advocates in common-law systems, has responsibility for the development of the evidence and articulation of the legal concepts that should govern the decision. *Secondly*, civil-law litigation in many systems proceeds through a series of short hearing sessions for reception of evidence, which is then consigned to the case file until an eventual final stage of analysis and decision. In contrast, common-law litigation has a preliminary or pre-trial stage (normally written), and then a trial (normally in the form of an oral hearing) at which all the evidence is received consecutively. Certainly, there are important nuances, variations and far-reaching reservations as to exactly where a specific procedural system should be placed on the *axis* between common-law and civil-law. The distinction between common-law and civil-law (procedure), is moreover losing terrain, as the two traditions definitely approximate through the continuing process of European legal integration.<sup>38</sup> Still, certain reflections on how the international norm of procedural fairness in Article 6 § 1 should address the two procedural traditions on a more general level are indeed due.

One could possibly perceive the very concept of procedural fairness as inherently rooted in common-law, thus advocating a certain precedents to a "common-law approach". Admittedly, the abstract normative structures of procedural fairness – the law being based on some hazy general legal principles clarified in practice on a case-to-case basis – could perhaps fit the best within the common-law tradition. However, it would be misconceived to treat the concept of procedural fairness within Article 6 § 1 of the European Convention on Human Rights as a straightforward adaptation of a common-law concept, thus not acknowledging its *sui generis* character. The importance of distancing the norm of proce-

to the fact that Article 9 of the Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to "men and women".

37 For an overview of these two historical lines in civil procedure, see Cappelletti and Garth, *Policies, Trends and Ideas in Civil Procedure*, International Encyclopedia of Comparative Law, Vol. XVI, Chapter 1 (1987) pp. 5–11.

38 This fading division has also been acknowledged by the ECHR, see e.g. *Kruslin v. France*, Series A no. 176 A § 29 regarding the concept of "law" in Article 8 § 2, 9 § 2, 10 § 2 and 11 § 2.

dural fairness in Article 6 § 1 from the battle of common-law and civil-law traditions, is even more manifest when it comes to the interpretation and application of the Convention. It is to be understood that there would be no justification for abandoning one of the two traditions altogether, declaring the other the only fair procedural regime. As a matter of principle, of policy and of practical considerations, the international norm established by Article 6 § 1 must evidently accept them both as being able of manufacturing procedural fairness. Thus, one should not advocate an interpretation of that norm tantamount to declaring the systemic organizing principles of the common-law or civil-law procedural regime *as such*, incompatible with Article 6 § 1 on the European Convention on Human Rights.<sup>39</sup> The international norm of procedural fairness must operate on another level, beyond these historical characteristics of certain procedural regimes: It presupposes redistribution of legal categories, with focus on policing the procedure according to general standards and principles defined autonomously.<sup>40</sup> The possible classification of a procedural system as primarily based on common-law or civil-law, as a hybrid or whatever, should thus not have any immediate normative impact as to the interpretation of the international norm of procedural fairness enshrined in Article 6 § 1 of the European Convention on Human Rights. It should rather work as a historical, factual reference as to the systemic context in which the particular procedural feature operates, thus aiding the understanding of the pertinent procedural feature, and, accordingly, facilitating a right balance to be struck when applying the international norm of procedural fairness to a particular feature within a particular procedural system.

The need to construct and define the norm of procedural fairness according to Article 6 § 1 of the European Convention on Human Rights on a level beyond domestic terms and traditions, moreover applies to the division of *civil* and *administrative* proceedings respectively, employed in numerous European legal systems, particularly in those civil-law systems where disputes of an administrative nature are allocated to specialised *administrative courts*, as *inter alia*, in Belgium, Finland, France, Germany, Italy, Netherlands and Sweden. Customarily the procedure followed by such courts has been under the strong influence of administrative traditions, *inter alia* as to the election of judges, as to the inquisitorial and written procedure followed, and as to the existence of what may appear to be certain procedural advantages for governmental agents. Historically, the jurisdiction of such courts to adjudicate on acts of the administrative authorities was not accepted without a struggle, and the special features of the way in which the system of administrative justice works, indeed show how difficult it was to the executive to accept that its acts should be subject to review by the courts. These historical facts furnish an *explanation* as to the particularities of

---

39 Compare with the reasoning in *Sunday Times v. The United Kingdom*, Series A no. 30 § 47 as to the acceptance of unwritten law in common-law as "law" within the meaning of Article 10 § 2: The Convention would otherwise "strike at the very roots of that State's legal system".

40 On the notions of "standards" and "principles", see *infra* (2.3).

administrative disputes and the working of administrative courts. Yet, they could not justify exclusion of the right to a fair trial in administrative proceedings, or validate the acceptance of less strict requirements in such cases compared to other civil disputes. Thus, the right to procedural fairness enshrined in Article 6 § 1 of the European Convention neither prohibits the use of particular procedures in administrative disputes, nor the use of specialised administrative courts. Any such dedicated procedure or tribunal must, however, work in accordance with the requirements of a fair trial in Article 6 § 1.<sup>41</sup>

### 2.3 Normality and Normativity

Legal norms demonstrate great variation as to structure and operation. Such differences might be due to both context and tradition, but might also be inherent in the very concept of norms. The current subsection examines the abstract configuration of procedural fairness according to Article 6 § 1 of the European Convention on Human Rights *vis-à-vis* some basic conceptual models for legal norms in general, the aim being equally to illuminate certain qualities of the concept and norm of procedural fairness, and to facilitate proper terms for the subsequent enquiry.

One may label legal norms, *inter alia*, as respectively *rules*, *standards* and *principles*, according to specific characteristics or attributes. It seems not at all fit to speak of the "rule" or "rules" of procedural fairness. This would suggest a normative level of minutiae precision that is neither attractive nor attainable in the context of this norm. In contrast, the notion of procedural fairness, and the various features of it, is *vague*, *multilayered*, and partly dependent on *extra-legal norms* that must be incorporated in the course of interpretation and application.

Norms equipped with such flexible, differentiated or open-ended attributes, are regularly referred to as *standards*. Such standards might be explained as a mixture of law and fact, whereby the norm cannot be finally determined without taking into account a given criteria on *normality*, e.g. the Roman law standard of *bonus pater familias* as parameter for civil liability, or English law's multiple references to "the reasonable man". Applied on an international level, such standards go beyond divergences between national legal systems, facilitating exchange through shared references to normality criteria.<sup>42</sup> Moreover, the sum of domestic legal traditions and practices within Europe could indicate precisely such normatively relevant normality criteria. The concept of *soft normative comparatism* introduced *supra* (2.2), is in fact an alternative construction of the same idea.

*Principle* is another term used to mirror the elastic or unfixed norm. Similar to the standard, the principle is vague, multilayered and referring to the extra-legal. However, in contrast to standards, principles convey *normativity* rather than normality, being a mixture of law and *meta-legal values*, thus making the interpretation and application of the norm dependent on principled *choices* and

---

41 *Kress v. France* (7th June 2002) § 70.

42 Delmas-Marty, *Towards a Truly Common Law* (2002) pp. 81–97.

ethical *valuation*, e.g. as in *the rule of law-principle*. The impact of preference and judgment ascend, according to whether the pertinent notion at the outset is poorly determined.

It is to be understood that vague legal norms – e.g. the right to procedural fairness according to Article 6 § 1 of the European Convention on Human Rights – habitually are characterised by both the standard- and the principle-approach. It is actually rather a question of where the pertinent norm has its *centre of gravity*. Moreover, the normality referred to by the standards, must always be *normatively filtered*, and the meta-legal values referred to by the principles must – *vice versa* – be tested towards the *factual limitations* demonstrated by normality. As to procedural fairness within the context of Article 6 § 1 of the European Convention on Human Rights, it is suggested that the major elements are appropriate regarded as principles, yet with a considerable impact of a standard-approach. An example as to the latter could be the right to a decision within a “reasonable time” according to Article 6 § 1. Ultimately, whether this time limit has been exceeded in a specific case, is decided by a normative evaluation, and a decision as to whether the relevant time is acceptable, i.e. a principle-approach. However, this could hardly be carried out justly without making at least an implied or indirect reference to what is considered reasonable time within European domestic law, i.e. a standard approach.

#### **2.4 The Margin of Appreciation**

Being based on standards and principles, the interpretation and application of the norm of procedural fairness in Article 6 § 1 of the European Convention on Human Rights calls for copious *valuations* and *judgements*. According to the very structure of the European Convention on Human Rights, the ultimate supervision even as to these matters of *discretion* is vested in the ECHR; see Article 19 of the Convention. However, this *supervisory, unity-oriented* approach to the various assessments embedded in Article 6 § 1, does not stand alone. There is need for some *domestic leeway* as to the application of the Convention in each particular case, especially regarding the principled balancing and practical considerations that the norm on procedural fairness necessitates.

The need for such a domestic latitude, is not particular to the application of Article 6 § 1. There is a *general doctrine on the margin of appreciation*; the key issue being to what extend the ECHR shall accept the assessments and choices done by domestic authorities as to the domestic application of vague and open-ended Convention norms, when adjudicating whether the pertinent Convention right has been violated necessitates an estimation of what is necessary, adequate or expedient, when balancing conflicting interests etc. In short, this doctrine – developed in the case law of the ECHR, inspired by national law concerning judicial review of governmental action – reflects the principle of *subsidiarity* and governs the affiliation between national authorities on one side and the ECHR itself on the other, prescribing that certain matters regarding the application of the Convention are to be decided by national authorities, without their considera-

tions being called into question by the ECHR, or at least not fully scrutinised or reviewed.<sup>43</sup> The margin of appreciation shall assure cultural diversity and respect for domestic autonomy while ensuring that the essence of a right is never encumbered. It is the primary tool for accommodating variety, national sovereignty, and the will of domestic majorities, while enforcing effective implementation of rights under the European Convention. Thus, the margin of appreciation distinguishes *harmonisation* – i.e. the gathering around common principles – from *unification* – i.e. imposing the same rules to everyone; it “makes room for pluralism by laying out a sort of state’s right to be different, and replaces classical, binary logic with a logic of gradation that calls on fuzzy sets”.<sup>44</sup> The doctrine, moreover, rests upon the primacy of national implementation of rights and the notion that state authorities are often better situated to judge local conditions and the various public interests that inevitably compete with the claims of individuals.<sup>45</sup> Thus, when a state’s choices fall within a predictably amorphous range of acceptable alternatives, the ECHR will uphold the state’s actions as being within its margin of appreciation. One may thus say that the margin of appreciation – within the limits of its scope – *inverts the normative hierarchy*, giving priority to domestic law and the considerations done by national authorities.<sup>46</sup>

In general, the space for national freedom of action created by the principle of margin of appreciation will vary considerably, depending on factors such as the nature of the right or of the activities of the individual, the aim pursued by the contested measure, the terms in the Convention etc. Moreover, it is vital whether there exist a *European consensus* on the pertinent issue, a common ground creating a presumption against certain alternatives, and stipulating the choices normally preferred within the European (legal) culture and tradition collectively represented by the High Contracting parties to the Convention.<sup>47</sup> The margin of appreciation is thus directly connected with both the idea of *soft, normative comparatism* and the *standard-approach* to procedural fairness, discussed *supra* (2.2 and 2.3), as they all let consensus, common ground and comparable practice

---

43 Generally, see Van Dijk and Van Hoof, *op. cit.* pp. 82–95; Greer, *The margin of appreciation: Interpretation and discretion under the European Convention on Human Rights*, Human right files No. 17 (2000); Mahoney, *Marvellous Richness of Diversity or Individous Cultural Relativism*, Human Rights Law Journal, vol. 19 no. 1 (April 1998) pp. 1–6; Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, Human Rights Law Journal, vol. 19 no. 1 (April 1998) pp. 30–36; Yourow, *The Margin of Appreciation doctrine in the Dynamics of European Human Rights Jurisprudence* (1996).

44 Delmas-Marty, *op. cit.* p. xvi.

45 See, e.g. *Handyside v. United Kingdom*, Series A no. 24 § 48; *Brannigan and McBride v. United Kingdom*, Series A no. 258 B § 59; *Otto-Preminger-Institut v. Austria*, Series A no. 259 A § 56.

46 Delmas-Marty, *op. cit.* pp. 70–74.

47 Compare, e.g. the cases of *Handyside v. United Kingdom*, Series A no. 24; *Socialist Party v. Turkey*, Reports 1998-III; *Dudgeon v. United Kingdom*, Series A no. 45.

within Europe provide limitations and guidance to the interpretation and application of the Convention.<sup>48</sup>

As to procedural fairness according to Article 6 § 1 of the European Convention on Human Rights, the doctrine generally seems to decline the importance of the margin of appreciation.<sup>49</sup> This view seems partly based on a parallel mistakenly drawn between civil cases and cases involving a "criminal charge", the latter calling for a narrower margin due to a more comprehensive regulation and the nature of the proceedings. Moreover, it seems to be based on the assumption that the margin of appreciation only comes into play where the pertinent Convention right in expressed terms allows *exceptions* to be made, e.g. Article 8–11. Rightly, the doctrine of margin of appreciation has been of specific significance in case law involving such rights. However, there are no theoretical or formal limits as to the application of the margin of appreciation.<sup>50</sup> On the contrary, it is understood that the principle of margin of appreciation applies even to the requirement of fair trial in Article 6 § 1.<sup>51</sup> The vague, ambiguous wording of Article 6 § 1 as to civil proceedings, coupled with the varieties of domestic legal traditions as to civil procedure – i.e. the lack of a common ground on certain basic issues – may even support a *considerable* margin of appreciation in civil cases.

### 2.5 *Foreseeability versus Flexibility*

The aim of Article 6 § 1 being nothing less than to secure the proper administration of civil justice within Europe, one could perhaps criticise the extensive use of vague, legal standards and principles: The provision embodies half-done work, giving too little guidance at a practical level, leaving too much discretion to the national judge in first instance, and the ECHR in the last. Both the parties to the dispute for the national courts and the High Contracting Parties to the Convention are left in uncertainty regarding their rights and duties, respectively.

However, the approach chosen was the only feasible, if one – during some hectic months of negotiation in 1949 – was to reach an agreement on how to formulate the provision. Moreover, there is indeed no need to seek an apology for sloppy language, as there is plenty of justification for an open-ended construction of the international norm of procedural fairness in Article 6 § 1 of the

---

48 For some general perspectives on this, see also Heifer, *Consensus, Coherence and the European Convention on Human Rights*, 26 Cornell International Law Journal (1993) pp. 133–165.

49 Thus, Van Dijk and Van Hoof, *op. cit.* p. 86: "[T]he margin of appreciation plays hardly any role in regard to the detailed requirements spelled out in Article 5 and 6 of the Convention. As is generally born out by the case-law, the margin is of little relevance in regard questions of purely procedural nature ..."

50 Similar MacDonald, *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights*, Essays in Honour of Robert Ago (1987) pp. 187 et seq., at p. 192; Clayton and Tomlinson, *op. cit.* p. 276.

51 See e.g. the explicit reference to the doctrine in *Ashingdane v. United Kingdom*, Series A no. 93 § 57 regarding the right to access to court.

European Convention on Human Rights: The aim was not to adopt a full-fledged procedural system, giving detailed answers to every procedural issue at national level, achieving the approximation of national civil procedure to the greatest possible extent. It was far less ambitious, although even more fundamental, namely to establish some common basics, the bedrock-principles of civil procedure. Hence, one had to formulate the norm on a sufficiently abstract and general level, in order, *inter alia*, to enable absorption of the diverse legal and procedural cultures and traditions within Europe. Such an approach would in addition endow the Convention with the leeway required to secure that its rights maintain *up to date*, through the adjustment of case law according to the present-day conditions. In line with this perspective, the ECHR has frequently stated that the Convention is designed to be a *living instrument*, and should be treated as such regarding the interpretation and application.<sup>52</sup> Thus, in *Kress v. France*, the ECHR stated that the mere fact that special procedural features had existed for more than a century, could not justify a failure to comply with the present requirements of European law. The Court reiterated in this connection that the Convention is to be interpreted “in the light of current conditions and of ideas prevailing in democratic States today”.<sup>53</sup>

Hence, related to Article 6 § 1 – as for greater parts of the remainder of the Convention – there was really only one reasonable outcome of the classic, unavoidable and irresolvable tension between the need for stability and foreseeability on the one hand, and the desire for evolution and flexibility on the other hand: In order to initiate law that continuously could address the contemporary needs of society – i.e. *effective* and *sustainable* law – one had to favour an indefinite provision and then pass the ball on to theory and practice, for rationalisation, clarification and development.

### 3 Attributes of Procedural Fairness

#### 3.1 Introduction

The ideology of, and various approaches to, an international norm of procedural fairness portrayed *supra* in section 1 and 2, indicate the overall starting points, and provide general directions as to a proper perspective on the international norm of procedural fairness. In order to bring the analysis a step further, it seems now apt to zoom in a bit, and expand on what may be entitled the *attributes* of procedural fairness. This enquiry must be designed multifaceted, starting with a

---

52 This phrase first appeared in *Tyrer v. United Kingdom*, Series A no. 26 § 31 related to the prohibition of torture, inhuman or degrading treatment in Article 3, where the Court said that “the Convention is a living instrument which, must be interpreted in the light of the present-day conditions”, and thus concluded that traditional corporate punishment of young law offenders – “birching” – in The Isle of Man was in contravention of the said Article. Subsequently, similar phrases have been used on a more general footing; see Merrills, *op. cit.* pp. 78–81.

53 *Kress v. France* (7th of June 2001) § 70.

depiction of the assorted *features* of procedural fairness according to Article 6 § 1 distributed into three chief *branches* (3.2), followed by an examination of the division between procedural fairness in *civil* cases on the one side and *criminal* cases on the other (3.3), an explanation of the correlation between procedural fairness and *supplementary procedural rights* (3.4), some reflections as to the interplay amid *procedural* and *substantive* fairness (3.5), and, finally, some closing remarks on the *nature of the assessment* as to whether the pertinent procedure has been "fair" (3.6).

### 3.2 *The Three Branches of Procedural Fairness*

Regarding the major operative features of procedural fairness according to Article 6 § 1, one could assume that the *text* of Article 6 § 1 would be the natural born star, as it encompasses the right to *a fair an public hearing within a reasonable time by an independent and impartial tribunal*. Of course, what is prescribed here constitutes vital components of procedural fairness. The wording of the provision is, however, not that suitable as starting point for analytical or structural purposes, since components of apparently different normative *levels* are put side-by-side, e.g. the requirements of a "fair" hearing, and a "public" hearing, respectively. Moreover, certain chief elements of the norm in Article 6 § 1 according to case law are not even traceable in the text of that provision, thus necessitating some reconstruction to be done.

At the outset, the notion of procedural fairness could refer to virtually every aspect of the administration of justice in civil cases. Thus it seems suitable to divide the broader concept of procedural fairness into certain chief categories or branches. Both the nature and quantity of such sub-groups of procedural fairness could most certainly be a matter of discussion and discretion. Initially, the following three – surely rough – categories seem however, apt: *Institutional guarantees* as to the deciding court, the right to a *proper handling* of the case by that court and the right of *access* to such court.

Features as to the *first branch* of procedural fairness – the institutional guarantees – might be connected to how courts and other tribunals are to be established, their affiliation with other governmental bodies, the appointment of judges etc., mechanisms of securing *independence* and *impartiality* being the core issues. Thus, looking at fair-trial provisions in the different human rights instruments one will soon discover that they are all concerned not only with procedure in the formal sense, but moreover strongly emphasises the institutional dimension of the administration of justice. Accordingly, the Universal Declaration on Human Rights Article 10 calls for an "independent and impartial tribunal", while Article 14 § 1 in the UN Covenant on Civil and Political Rights requires "a competent, independent and impartial tribunal established by law". Similarly, Article 6 § 1 of the European Convention on Human Rights necessitates an "independent and impartial tribunal established by law". Article 47 of the Charter of Fundamental Rights of the European Union is virtual identical, establishing the right to an "independent and impartial tribunal previously established by law". This broad notion of procedural fairness – encompassing even the institutional facet – is useful as a *keyword* to distinguish procedural rights from rights of a substantive character, such as the right to life, the prohibition of torture, the freedom of religion etc. The heading of Article 6 in the European

Convention of Human Rights – "Right to a fair trial"/"Droit à un procès équitable" – serves this pedagogic purpose. Furthermore, this wide-ranging approach is a reminder of the close association that exists between the structures of the judicial system on the one hand, and the procedure to be followed when dealing with cases, on the other. The two have a common foundation in the rule of law, they partly overlap, and – in practice – they can only be present simultaneously, the one being void without the other. For the sake of precision and perception it is, however, significant to advance the two elements separately.<sup>54</sup>

Even when used with reference to procedural dimensions in a more formal sense only, not the structural or institutional ones, the notion of procedural fairness is ambiguous. In both theory and in practice it is often used as including practically each and every element of a procedure according to Article 6 § 1, such as the right of access to court, the principle of equality of arms, the demand for public trial, the right to a decision within a reasonable time etc.<sup>55</sup> Such an approach is of course appealing for practical purposes, providing a simple reference to, and synopsis of, the body of procedural rights according to Article 6 § 1. However, the notion of fairness is – through the demand for a "fair hearing" – moreover used explicitly in the text of Article 6 § 1 as no more than one of a number of essentials for the proper administration of justice in criminal and non-criminal cases, along with the right to have the case decided within reasonable time by an independent and impartial tribunal according to a public trial. The notion of fairness consequently serves both as a keyword, a reference for the bigger picture – the proper administration of justice in the broader sense – as well as being an immediate operative legal requirement regarding certain specific elements of a court's handling of cases, i.e. a "fair hearing".<sup>56</sup> This binary use of the notion of fairness in connection with Article 6 is of course noteworthy in order to avoid woolliness. Additionally, and more substantial: The duality demonstrates the close relationship between the components of Article 6: At the outset it could be somewhat accidental which components of the broader concept of "fair trial" or "procedural fairness" that are to be regarded as part of "fair hearing" in the narrower sense, and which that should be established separately, as specific and explicit requirements of a fair administration of justice, alongside the right to a fair hearing. Both the demand for a public trial and for a decision within reasonable time could, and probably would, have been established as implied in "fair hearing" if they had not already been prescribed for explicitly in the text of Article 6 § 1, separately from the requirement of a "fair hearing". Case law concerning the UN Covenant on Civil and Political Rights Article 14 §

---

54 Similar Lethimaja and Pellonpää, *Article 10*, in Eide et al (ed.), *The Universal Declaration of Human Rights* p. 157 and Gomien, Harris and Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1996) p. 157.

55 For such a broad use of the concept by the ECHR, see, *inter alia*, *Brumarescu v. Romania*, Report 1999-VII §§ 61–62.

56 See also Gomien, Harris and Zwaak, *op. cit.* p. 171: "The notion of fairness in the context of Article 6 is a nebulous concept absorbing other elements explicitly mentioned there ..."

1 is illustrative for this purpose: Unlike Article 6 § 1 of the European Convention, the wording of Article 14 § 1 in the Covenant does not refer explicitly to the time aspects of court proceedings in non-criminal cases.<sup>57</sup> In *Muños Hermoza v. Peru* the Human Rights Committee nevertheless stated:<sup>58</sup>

“With respect to the requirement of a fair hearing as stipulated in Article 14, paragraph 1 of the Covenant, the Committee notes that the concept of a fair hearing necessarily entails that justice is rendered without undue delay.”

Thus, the Committee considered the *temporal* dimension of the right to a determination of the dispute to be an integral part of the right to a fair hearing. This ruling is approved in later cases.<sup>59</sup> Thus, one might assume that it is rather a question of convenience whether to perceive e.g. the question of publicity or decision within reasonable time, as being part of the “fair trial”, or as separate requirements. Although these features appear as separate elements in the text of Article 6 § 1, they are part of the same normative composition as the other attributes of procedural fairness. Thus, the wording and formal rubrics put aside, one common objective of the various fair-trial guarantees apart from the institutional dimension, is to secure the *proper handling* of the case. This might thus be considered the *second branch* of procedural fairness.

As to the *third branch* of procedural fairness – right of *access* to an independent and impartial court offering a fair hearing – it is to be noticed that the text of Article 6 § 1 is silent on its existence, let alone its scope and limitations. It is considered an *implied right*, established in case law primarily by reference to the *rule of law principle* and the *object and purpose* of Article 6 § 1.<sup>60</sup> Roughly, one might say that the right to access has a bearing on three levels: *Firstly* as to limiting the possibility of setting *formal conditions of admissibility* in domestic proceedings, such as time limits, lack of standing, immunity, etc. Such restrictions would – according to well-established case law from the ECHR – only be in accordance with Article 6 § 1 if necessary in a democratic society in order to attain specific legitimate aims. Moreover, the means employed must not be disproportionate to the aims sought, and must in any case not run counter to the very essence of the right of access to court. *Secondly*, the right of access to court stipulate a certain duty for the High Contracting Parties to *remedy factual obstacles to access* to a court, e.g. due to lack of financial means, poor language skills, a complicated judicial systems etc. *Thirdly*, the right of access has impli-

---

57 As for criminal cases, see CPR Article 14 § 3 c).

58 Case 203/86. See also *González del Rio v. Peru* (263/87); *Fei v. Columbia* (514/92); *Mukunto v. Zambia* (768/97).

59 *González del Rio v. Peru* (263/87); *Fei v. Columbia* (514/92); *Mukunto v. Zambia* (768/97).

60 See *supra* (1.2).

cations as to the *scope of review* by the competent courts, especially as to judicial review of administrative decisions.<sup>61</sup>

### 3.3 *Procedural Fairness in Criminal and in Non-criminal Cases*

In Article 6 § 1 criminal and non-criminal cases are governed side by side, through a common demand for both procedural forms; a trial that is fair. As announced in the title, and stated initially, this study is, however, limited to non-criminal cases, i.e. disputes over what the text of Article 6 § is calling “civil rights and obligations”. Such a parting certainly presupposes that these two attributes of Article 6 § 1 are best examined when dealt with separately. This assumption could perhaps need some explanation, as it is not intuitive evident when looking only at the wording of Article 6 § 1. The provision governs the two – at least *prima facie* – on the same footing, thus implying that the same norm is applicable on the two forms of procedure. Of course, on an abstract level, the norm is in fact the same, in the sense that both criminal and non-criminal cases must be conducted fairly. However, such a statement is of limited value, if the centre of attention, and the interpretation and application of the requirement of fairness, in practice must differ. The latter is assumedly the case, and shall be expounded a bit:

It is to be noted at the outset that the procedural problems that occur in criminal cases are in many respects quite different from what one will find in the typical civil cases. This is partly because probably all European states distinguish the two in their legislation, thus already by this generating differences in practice. Equally important as explanation of the incoherency of the law on criminal and civil procedure at both national and international level, are, however, the inherent differences amid the two forms of procedure. These are stemming, *inter alia*, from divergent objects and purposes, the different constellations and status of parties, the dissimilarities as to the public interests in the outcome etc. These inherent differences stipulate that the *equilibrium* of a fair trial will not necessarily be the same in the two forms of procedure. Although the nature and degree of such a differentiation may vary quite extensively according to the legal culture and tradition, the procedural law of any modern society will inevitably demonstrate at least some lack of unity between criminal and civil procedure, a fact that should even be recognised by the international norm of fair procedure in Article 6 § 1 of the European Convention on Human Rights. This was actually acknowledged already by the drafters of the UN Universal Declaration on Human Rights, e.g. illustrated by the separate fair trial provisions for criminal and civil cases initially introduced in so-called “Cassin Draft” of July 1947. This separated approach to criminal and civil cases is also to be found in the corresponding drafting history of the UN Covenant of Civil and Political Rights.<sup>62</sup> Although these

---

61 On the right of access to court in general, see Van Dijk and Van Hoof, *op. cit.* pp. 418–428; Harris, O’Boyle and Warbrick, *op. cit.* pp. 196–202; Reid, *op. cit.* pp. 63–68.

62 On the Cassin Draft and affiliated *Travaux Préparatoires* as to the Universal Declaration, and the pertinent drafting history of the UN Covenant, see Weissbrodt, *The Right to a Fair*

proposed provisions were later redrafted and partly combined into one fair trial article, the need to distinct the norm and the assessment of fair trial in criminal and civil proceedings was thus appreciated. The inherent differences in criminal and civil procedure may also be traced in the drafting history of Article 6 of the European Convention of Human Rights, and are approved in case law. Thus in *Levages Prestations Services v. France*, the ECHR emphasised that it had accepted that the requirements inherent in the concept of “fair hearing” are not necessarily the same in cases concerning the determination of civil rights and obligations as in cases concerning the determination of a criminal charge.<sup>63</sup>

The text of Article 6 seen as a whole, supports the necessity of distinguishing criminal procedure from civil procedure when dealing with the requirement of fair trial in Article 6 § 1. While that provision is the only part of Article 6 concerned with civil procedure, Article 6 §§ 2 and 3 distinctively states the minimums of a fair trial in *criminal* cases. Truly, this does not imply that features in Article 6 §§ 2 and 3 by definition do not apply even in civil cases, as both paragraphs must be said to encompass attributes that even could be seen as part of a fair trial according to Article 6 § 1.<sup>64</sup> However, in civil proceedings, these elements are not obligatory minimums, but rather possible requisites depending on the circumstances. Moreover, even when some of these features of fairness in criminal cases according to Article 6 §§ 2 of 3 are applicable to non-criminal cases as being part of the overall demand for a fair trial according Article 6 § 1, it is reasonable to assume that the High Contracting Parties are given some more latitude in applying them than the case might be in the criminal cases.<sup>65</sup>

The particularities mentioned *supra* are perhaps not that significant, when taken alone. However, they suggest apart approaches of a more general and far-reaching nature, touching on the core regime of Article 6 in civil and criminal cases, respectively: The operation of the principle on the *margin of appreciation*.<sup>66</sup> Thus, there are reasons to believe that this margin of appreciation in some respects might be noticeably wider in civil cases than in criminal cases, exactly due to the integral differences amid the to forms of procedure: In criminal cases one seeks to avoid miscarriage of justice in the sense of wrongful convictions,

*Trial – Article 8, 10 and 11 of the Universal Declaration of Human Rights* (2001) pp. 12–13 and pp. 44–45, respectively.

63 *Levages Prestations Services v. France*, Reports 1996-V § 46.

64 See, *inter alia*, the judgement of the ECHR in *Albert and Le Compte v. Belgium*, Series A no. 58 § 30: “Dr. Albert relied in addition on paragraph 2 and on sub-paragraphs (a), (b) and (d) of paragraph 3, but, in the opinion of the Court, the principles enshrined therein are, for the present purposes, already contained in the notion of a fair trial as embodied in paragraph 1; the Court will therefore take these principles into account in the context of paragraph 1 ...” Thus, free legal aid might be a requirement even in civil cases, although the only explicit provision on this matter is confined to criminal cases by Article 6 § 3 c), see the ECHR’s ruling in *Airey v. Ireland*, Series A no. 32.

65 See *Dombo Beheer v. Netherlands*, Series A no. 274 § 32.

66 On this principle generally, see *supra* (2.4).

and there is a strong public interest in the outcome of the proceedings. It is traditionally a battle between the individual and a public authority, and usually a lot is at stake for the private party. All these factors support the call for a quite intensive enquiry when it comes to adjudicate on the procedure followed in criminal cases. Civil procedure – on the other hand – is by nature construed far more upon considerations of *expediency*, *procedural economy* and the parties’ *autonomy*, and it entails a reduced danger for abuse of governmental power in the course of proceedings. In general, this calls for a less strict examination – i.e. a *wider* margin of appreciation – in civil cases compared with criminal cases. Thus, in *Dombo Beheer v. Netherlands*, the ECHR stated:<sup>67</sup>

“The requirements inherent in the concept of “fair hearing” are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law (see, *mutatis mutandis*, the *Albert and Le Compte v. Belgium* judgment of 10 February 1983, Series A no. 58, p. 20, para. 39), the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.”

The referral to “greater latitude” in civil cases can only be taken as an announcement on the margin of appreciation in such cases. Statements to the same effect are given in numerous subsequent judgements.<sup>68</sup>

This being said, there is reason to emphasise that the division between civil and criminal cases is not a bulkhead. *Firstly*, in some instances it is nearly impossible to distinguish the two. Thus, one might in practice find hybrids, typically in the form of civil cases of such a nature that considerations stemming for criminal procedure seems the most suitable, i.e. in administrative proceedings concerning disciplinary sanctions etc.<sup>69</sup> *Secondly*, case law related to one of the two procedural forms may – the necessary adaptation being made – be relied upon even when dealing with the other, as far as there are no rationale to distinguishing the two, particularly regarding the existence and general definition of fair-trial principles under Article 6 § 1 of the Convention.

### 3.4 Procedural Fairness and Supplementary Procedural Rights

Although the right to a fair trial according to Article 6 § 1 is in the centre of attention in this study, it is important to accentuate that this is not the only provision in the European Convention with relevance for procedural rights in non-criminal cases. On the contrary, there are a number of auxiliary provisions.

---

<sup>67</sup> *Dombo Beheer v. Netherlands*, Series A no. 274 § 32.

<sup>68</sup> See, *inter alia*, *Niderost-Huber v. Switzerland*, Reports 1997-I § 28.

<sup>69</sup> For illustration, see *Albert and le Compte v. Belgium*, Series A no. 58.

Some of these Articles prescribe explicitly rights of a procedural nature, the right to an effective remedy in Article 13 and the right to judicial proceedings in the case of deprivation of liberty according to Article 5 § 4, being the most obvious. Others prescribe *prima facie* substantive rights only, but nonetheless provide even procedural rights by *implication*. An important example is Article 8 on the right to privacy and family life: In matters involving interference with these rights, a party must be – according to established case law from the ECHR on Article 8 – involved in the decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests.<sup>70</sup> Moreover, delayed court proceedings in childcare-cases could not only be in breach of the right to a decision within reasonable time in Article 6 § 1, but in addition – due to the negative impact on the child's situation, and the often irreversible consequences of delay – contravene the right to family life according to Article 8.<sup>71</sup> Supplementary procedural rights might also stem from the right to impart and receive information according to Article 10, *inter alia* concerning publicity in court proceedings, reporting restrictions, or on the balance between the duty to give evidence and the protection of journalistic sources etc.<sup>72</sup> Such supplementary procedural rights will even derive from the limited ban on discrimination in Article 14, and the corresponding general prohibition of discrimination established by Protocol 12 to the Convention.

Supplementary procedural rights should also be taken into account when *interpreting* Article 6 § 1 in the context of the Convention, seen as a whole. As an illustration, both Article 8 on privacy and Article 10 on the right to information should be taken into consideration when discussing to what extent the principle of public trial enshrined in Article 6 § 1 implies that sensitive information on a party's health condition should be made available to the public.<sup>73</sup> As another example; the evaluation of what lapse of time that can be considered as reasonable within the meaning of Article 6 § 1 can not be unaffected by the fact that the pertinent case concerns interference with other convention rights, as, *inter alia*, the protection of family life in Article 8. Thus, in e.g. child-care cases, the requirement for speed of proceedings is substantially stricter than average.<sup>74</sup>

### 3.5 *Procedural versus Substantive Fairness*

One of the aims of the fair-trial requirement is to allow the national court to render a decision on the merits that is right, both on the facts and on the law. Thus, one might advocate that what is not right, could not be fair. According to this

---

70 *W. v. the United Kingdom*, Series A no. 121 § 64; *Buchberger v. Austria* (20th December 2001) § 42.

71 *H v. United Kingdom*, Series A no. 120 § 89.

72 On the latter, see *Goodwin v. United Kingdom*, Reports 1996-II § 39.

73 See *Z v. Finland*, Reports 1997-I p. 323.

74 See, *inter alia*, *Hokkanen v. Finland*, Series A no. 299-A § 72, where the ECHR emphasised that it is essential that custody cases are being dealt with *speedily*.

perception, errors on the *merits* of the case done by the national court deciding upon the matter, would be in contravention with Article 6 § 1.

Such line of reasoning could find some support in the abstract idea of fairness, as this necessarily encompasses equally procedural *and* substantive (distributive) fairness.<sup>75</sup> Moreover, the Convention is as such highly concerned with substantive fairness, thus including even this attribute to its object and purpose. An example to this end is the case law on the protection of property rights according to Article 1 of Protocol 1, whereby expropriation as a rule could only be accepted if fair compensation is provided. Thus, in *Lithgow v. United Kingdom* the ECHR stated:<sup>76</sup>

“[T]he taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable ...”

At this point, however, both the English and the French texts of Article 6 § 1 are quite clear in limiting the scope of that provision to *procedural* issues. The solution suggested by the wording, is also supported by both practical and system-orientated arguments regarding the relationship between national courts and the ECHR. If errors on the merits were to represent a violation of Article 6 § 1, the ECHR would be compelled to review the case fully, i.e. both the appreciation of *evidence* and the application of *national law* done by the national court. It would become a court of appeal – a “fourth-instance” – with general jurisdiction, far beyond its abilities and legitimacy. Furthermore, according to Article 19 of the Convention, the competence of the ECHR is limited to “ensure the observance of the engagements undertaken by the High contracting Parties” in the Convention. Although it is the Court’s duty to rule in last instance on the compliance with the requirements of the Convention, it is thus not empowered to substitute its own assessment for that of the national courts as regards the application of domestic law.<sup>77</sup> The same holds true regarding the assessment of the facts: The Court has to ascertain whether the proceedings, including the way in which evidence was taken, were fair. It is, however, for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced.<sup>78</sup> A complaint to the ECHR aiming as such at the appreciation of evidence or the application of national law done by the national court, should therefore be declared inadmissible *ratione materiae* according to Article 35 § 3.<sup>79</sup> Hence, in *Wood v. United Kingdom*, the former European Commission on Human Rights stated:<sup>80</sup>

---

75 Franck, *Fairness in International Law and Institutions* (1995) p. 7.

76 *Lithgow v. United Kingdom*, Series A no. 102 § 121.

77 *Bellet v. France*, Series A no. 333-B § 34.

78 *Mantovanelli v. France*, Reports 1997-II § 34.

79 *Ziegler v. Switzerland*, 19890/92, DR 74 p. 234.

80 *Wood v. United Kingdom*, 32540/96, 24 EHRR (CD) p. 69.

“[T]he Commission recalls that in accordance with Article 19 of the Convention, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention ...”

Similar approach has been followed by the Human Rights Committee regarding Article 14 § 1 in the UN Covenant on Civil and Political Rights. Thus, in the case of *B.D.B v. The Netherlands* it stated:<sup>81</sup>

“With regard to an alleged violation of Article 14, paragraph 1, of the Covenant, the Committee notes that while the authors have complained about the outcome of the judicial proceedings, they acknowledge that the procedural guarantees were observed in their conduct. The Committee observes that Article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of result or absences of error on the part of the competent tribunal.”

The notion of procedural fairness as used, *inter alia*, in Article 6 § 1 is thus based on the assumption that even the most fair trial cannot secure the correct outcome, thus being “imperfect procedural justice” according to *Rawls*’ definitions on justice, as opposed to “pure procedural justice”.<sup>82</sup> Although the purpose of the right to a fair trial is to provide for a correct decision on the merits of the case, the outcome of the proceedings will not be fair simply because of the trial being so.

This being obviously the only acceptable interpretation of Article 6 § 1 in the light of the Convention system seen as a whole, one must, however bear in mind that procedural and substantive issues inevitably are woven closely together, thus making it difficult to draw a sharp line between the two attributes of the law. The intimate interplay connecting the procedural and substantive facets of the law even makes it undesirable to distinct them too sharply: Justice might be perverted far beyond error, and it would not be in line with the spirit of the Convention, or the object and purpose of Article 6 § 1, to consider clear and substantial miscarriage of justice compatible with procedural fairness. The revelation of such could indeed suggest an unfair procedure, thus calling for a very close review. Moreover, according to the case law of the ECHR, a *flagrant denial of justice* must be considered in violation of Article 6 § 1, *inter alia*, when the substance of the reasons given in a domestic judgement are obviously void, invalid or arbitrary.<sup>83</sup> Apparently, this is not loyal to the specific limits of Article 6 § 1 or the general limitations on the Court’s competence *ratione materiae*. However, the evaluation done by the ECHR is restricted, confined to secure that there is *correlation* and *rationality* amid the parties submissions, the evaluation done by

---

81 Case 273/88.

82 Rawls, *A Theory of Justice* (rev. ed. 1999) pp. 74–75.

83 *De Moor v. Belgium*, Series A no. 292-A § 55; *Dulaurans v. France* (21st of Mach 2000).

the national tribunal and the reasons stated by the tribunal as to the its own ruling.

An additional dimension of procedural versus substantive fairness is the possible effect an unfair procedure might have had on the outcome on the merits. The question is whether the existence of *actual prejudice* must be proven in order to conclude that the Convention has been violated. *Domestic* procedural law is familiar with such a prerequisite, as most jurisdictions seem to require – save for certain grave irregularities – prejudice in order to quash a lower court’s judgement due to procedural errors. The wording of Article 6 § 1 does not support such a requirement explicitly. On the other hand, it does not exclude the possibility of such a prerequisite. However, in numerous judgements the ECHR has ruled that violation is conceivable even in the absence of prejudice. Proof of such is considered relevant only in the context of compensation according to Article 41 (former Article 50).<sup>84</sup> This being said, the outcome of the case is not without bearing under the Convention. On the contrary: As a rule, the *winning* party will not be able to complain to the ECHR regarding procedural irregularities, as he – according to established case law – is not considered a “victim” within the meaning of Article 35, thus lacking *locus standi* under the Convention. Consequently, such a complaint must be declared *inadmissible* as being incompatible with the Convention *ratione personae*.<sup>85</sup> The same holds true if the parties have *settled* during trial.<sup>86</sup> A complaint is nevertheless not inadmissible on this ground, if the applicant is able to show that notwithstanding the favourable or accepted outcome of the proceedings, the alleged procedural errors have been to his detriment, e.g. that judgement was not rendered within reasonable time.

### 3.6 The Nature of the Assessment

Neither the French, nor the English wording of Article 6 § 1 contains any inventory of meticulous directives for the procedure to be followed in civil cases. Apart from certain other requirements as to the proper handling of the case – i.e. on publicity and on a decision within a reasonable time – it is simply stated that the procedure must be *fair*. Moreover, contrary to the regime of procedural fairness in cases involving the determination of a *criminal charge*, minimum requirements as to what is considered fair, are not listed.

The open-ended approach suggested by the wording, is confirmed by case law. Thus, the former European Commission for Human Rights emphasised very

---

84 *Marckx v. Belgium*, Series A no. 31 § 27; *Artico v. Italy*, Series A no. 37 § 35; *Walston (no. 1) v. Norway* (3rd June 2003) § 58.

85 Presupposed in the former European Commission of Human Right’s admissibility decision in *X. v. Belgium* 9097/80 DR 30 p. 119 at pp. 130–131; Rogge, *The “victim” requirement in Article 25 of the European Convention of Human Rights*, in Matcher and Petzold (eds.), *Protection Human Rights: The European Dimension* (2nd ed. 1990) pp. 539–545 at p. 543.

86 See the former European Commission of Human Right’s admissibility decision in *Spandre and Fabri v. Belgium*, 18926/91 and 19777/92 (joined) DR 75 p. 179.

early, that what constitutes a “fair hearing” cannot be determined *in abstracto*, but must be considered in the light of the special circumstances of each case.”<sup>87</sup> The same overall view has all along been shared by the ECHR.<sup>88</sup> Rather to be an obligation of any *specific conduct* when dealing with a case, the duty to provide a procedure that is fair could thus be taken as an obligation of *result*; i.e. the national courts may follow whatever particular procedure they choose, as long as the effect can be seen to be a fair trial.<sup>89</sup> Accordingly, the notion of “fair hearing” in Article 6 § 1 is prescribing a normative evaluation, relative to times, places and circumstances, and to be applied with the reference to the facts of the case in hand. Thus, when applying Article 6 § 1 on a specific procedural issue, it is not merely a question of *revealing* pre-existent unfairness, but moreover to *decide* whether the actual procedure followed at national level should be accepted or not, all things considered. The outcome of the application of Article 6 § 1 as to the requirement of a fair hearing, is thus truly judge-made law.

This relativistic, *case-to-case approach* to “fair hearing” in Article 6 § 1 is certainly important in order to secure an effective, adaptive and dynamic norm. Nevertheless, applied unaccompanied, it supplies poor guidance or predictability *a priori*. Moreover, a normatively unqualified requirement of “fair hearing” represents a considerable danger of arbitrariness in its application, thus sustaining a procedural regime that only with difficulty could be considered compatible with the principle of *the rule of law*. The approach in case law reflects this underlying tension within Article 6 § 1 as to flexibility versus foreseeability.<sup>90</sup> Hence, it follows a twofold path, aiming at the best possible compromise.

*Firstly*, it is understood that the misty norm of “fair hearing” must be elaborated and *rationalised* in order to restore legal certainty and make the provision operable as a comprehensible, practical reality of civil procedure, not merely a magic charm for the learned oracle. Hence, there is need to identify the general working attributes, the *subsidiary principles* of “fair hearing” in order to transform it into an operational tool, giving understandable guidance in the real world.

*Secondly*, it is appreciated in case law that one cannot grasp the entire norm of “fair hearing” through the process of rationalisation only, irrespective of how cautiously and scrupulously this enquiry is carried out. There will inevitably remain a rest. This non-rationalised piece of “fair hearing” will embody a final, *normative evaluation* of the pertinent procedure taken as a whole: The *overall* assessment of fairness, the decisive being whether the proceedings in their entirety have been fair. This approach implies that procedural steps *prima facie*

---

87 This phrase was first used in a case on the right to be represented by a lawyer in a dispute before a labour court, see *X and Y v. The Federal Republic of Germany*, 1013/16 YB 5 p. 158 at p. 164.

88 See, *inter alia*, the Court’s approach in *Barberá, Messegué and Jabardo v. Spain*, Series A no 146; *Kostovski v. The Netherlands*, Series A no. 166.

89 In this direction, see also Van Dijk and Van Hoof, *op. cit.* p. 164.

90 On this, see also *supra* (2.5).

incompatible with the requirement of fairness, nevertheless do not constitute a violation of Article 6 § 1 if this is balanced throughout the entire proceedings.<sup>91</sup> The “overall-approach” is not merely operative when assessing the fairness in a *horizontal* perspective, i.e. the fairness of the procedure at each level of jurisdiction. It is even proper when looking at the procedure from a *vertical* angle, i.e. after the use of appeals and other remedies: An appearing lack of fairness in one instance may possibly be outweighed by the procedure in later instances, by *re-establishing* the balance or *remedying* an initially unfair procedure. Moreover, the overall perspective does not only serve the purpose of filtering away *prima facie* violations of Article 6 § 1, which under the surface do not embody unfairness. It cuts both ways, thereby making it possible that an *accumulation* of procedural irregularities could sum up to a violation of Article 6 § 1, even though each wrongdoing taken alone must be considered *de minimis*, i.e. too small or insignificant to represent a violation of Article 6 § 1 by itself.<sup>92</sup>

The overall-test – being the vessel of flexibility and dynamics – is a concrete, normative judgement *a-posteriori*, largely escaping analytical generalisation through deductive logics. However, in order to materialize the norm of fair hearing beyond the stage of qualified guessing, it is nevertheless beneficial to afford some directions on this concluding, overall-test. Of course, both historical and contextual facets of the right to a fair hearing will supply colour to the ultimate, normative assessment. Moreover, guidance may be found in the *overriding objectives* of the requirement of a fair hearing in civil cases: To secure that the *dispute is effectively determined* in accordance with a procedure affording each party the opportunity of an *adequate presentation* of his case towards the court; securing a decision based on *proper examination* of the evidence and submissions presented; and *encouraging the confidence* of the parties and the public as to justice actually being done. The latter – occasionally referred to as *the doctrine of appearances* – apparently demonstrates that whether a fair hearing has taken place is even a matter of *subjective* perception or appraisal. However, proof of actual lack of confidence is not the issue regarding neither the parties nor the public. The question is whether the pertinent procedure is designed and carried out in a manner *suitable of inspiring trust*, the main concern being whether any lack of confidence could be reasonably justified. This doctrine of appearances is certainly not anything new feature in case law.<sup>93</sup> However, the ECHR has noted on numerous occasions that the increased sensitivity to the fair administration of justice in the public substantiate growing importance attached to appearances.<sup>94</sup>

---

91 *Stanford v. The United Kingdom*, Series A no. 182-A § 24.

92 *Barberà, Messegué and Jabardo v. Spain*, Series A no. 146 §§ 68 and 89. See also Harris, O’Boyle and Warbrick, op. cit. p. 203.

93 See, *inter alia*, *Delcourt v Belgium*, Series A no. 11 § 31.

94 *Kress v. France* (7th of June 2001) § 82.