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THE RIGHT TO A FAIR TRIAL

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This publication contains the reports presented at the UniDem Seminar organised in Brno from 23 to 25 September 1999 by the European Commission for Democracy through law in co-operation with the the Constitutional Court of the Czech Republic and the University of Montpellier

INTRODUCTION

Introductory Speech by Mr Zdeněk KESSLER

Chairman of the Constitutional Court of the Czech Republic

Ladies and gentlemen, honoured guests,

I have the honour, on behalf of the Constitutional Court of the Czech Republic and on my own behalf, to welcome you to this meeting of representatives of European constitutional courts.

We highly esteem the fact that the Venice Commission Secretariat entrusted us with the task of organising this meeting. We thank you for this expression of confidence, and we will do our utmost so that the meeting will proceed in the proper manner.

The legal profession in the Czech Republic devotes full attention to all events organised by the Council of Europe and the European Union.

In its decision-making, the Constitutional Court of the Czech Republic draws upon the practice of the European Court for Human Rights.

In the legislative process, the government places great stress upon the harmonisation of Czech law with the law of the European Union. This effort is confirmed as well by the fact that the Minister of Justice of the Czech Republic, JUDr. Otakar Motejl, is in attendance at this discussion. We cordially welcome him. In the evening, the Deputy Prime Minister and Chairman of the Legislative Council, JUDr. Pavel Rychecký, will be here to greet the participants.

I trust that this meeting of representatives of constitutional courts from Member States of the Council of Europe, and particularly their perspective on one of the most significant current issues, the right to a fair trial, will doubtless prove a true asset in the building of a democratic, law-based state.

Opening Address by Mr Pierre GARRONE

Administrative Officer, Venice Commission Secretariat

Mr President, ladies and gentlemen

This is the third time the Venice Commission has the honour of organising a UniDem seminar on the theme of the European constitutional heritage, in this instance in conjunction with the Czech Constitutional Court. The first seminar, which was held in 1996 in Montpellier, discussed the question of whether or not there is a European constitutional heritage and, if so, its content. Although the conclusion was far from unequivocal, an agreement was nevertheless reached on a number of points. In particular, participants agreed that it is not possible to define a constitutional heritage that is common to the whole of Europe and foreign to the rest of the world, still less a European constitutional heritage that is set in stone for ever. However, it was felt that there are common European values expressed at constitutional level and that the existence of this constitutional heritage cannot simply be denied.

On the basis of these conclusions, the Venice Commission decided to continue the seminars by focusing on the European constitutional heritage. For this, it adopted an original approach suggested by the CERCOP and Montpellier University, which proved a success at the second seminar organised in Montpellier in July 1998. The chosen approach consists in selecting one aspect of the European constitutional heritage and attempting to identify its strictly "European" content, in other words aspects that are common to constitutional law

throughout Europe. The emphasis is on a practical approach, with contributions from constitutional lawyers and, above all, members of supreme constitutional authorities, Constitutional Courts and equivalent bodies. The seminar itself is divided into two parts. During the first part, participants study a questionnaire and listen to presentations of country reports that give them an overview of the different national solutions. In addition, there is the solution provided by the European Convention on Human Rights, which stands as the European constitutional charter and cornerstone of European constitutional heritage. During the second part of the seminar, which constitutes a major innovation, constitutional judges are asked, on the basis of their respective domestic laws, to find a solution to a specific case relating to the European constitutional heritage. Insofar as they are encouraged to reach agreement on a common solution, this second part can be seen as European constitutional heritage in the making and proof of the concept's dynamic quality. As international exchanges develop, it will become richer still. The exchanges themselves give rise to "transconstitutionalism", where each court is able to draw inspiration from the constitutional practices of courts in other countries.

This concept of transconstitutionalism is one the Venice Commission has been keen to promote almost ever since it was set up. It does so in two ways, by studying and comparing "transnational" topics and by cooperating with Constitutional Courts. Firstly, therefore, it works on "transnational" topics, carrying out comparative studies and organising UniDem seminars such as this one. Secondly, co-operation with Constitutional Courts takes place through the Centre on Constitutional Justice and in particular the Bulletin on Constitutional Case-Law and the CODICES database. By rendering Constitutional case-law far more accessible, these instruments make it easier, I hope, for a Constitutional Court to decide whether it should follow the decision taken by another constitutional court in another country or, on the contrary, take its own, different, decision.

Over the next three days we therefore have the great privilege of combining two aspects of the Commission's work: on the one hand transnational activities – in particular the UniDem seminars – and, on the other hand, co-operation with Constitutional Courts.

But what about the theme chosen for this important event? How have we managed to gather together so many distinguished lawyers, senior judges and professors? Apparently, they are attracted by the theme of this seminar, namely the right to a fair trial and the opportunity it provides for discussing various aspects of trials and procedure.

The fact that so many senior high-level experts should be gathered together to talk about procedure may seem surprising, for two reasons. Firstly, since when has procedure been regarded a noble branch of law deserving such attention? Is procedure even "true" law? And, secondly, what does procedure have to do with constitutional law?

Let us examine these two objections more closely, starting with the objection that procedure suggests procedural formalities, surely a secondary matter best left to second-rate practitioners? In continental Europe, at least, procedure has long been regarded as distinct from "true" objective and subjective law, despite the glorious past of Roman law which linked procedure and rights. Be that as it may, what would law be like without procedure, in other words ultimately without sanctions? Very little. The rules of law would be reduced to natural obligations, and as for individual rights, law philosophers would be at their leisure to question their very existence. This debate would probably even be the central legal debate, much more so than the constitutional heritage. Or, authorities would invent their own procedure, outside law. Although such an approach, resulting in arbitrariness, clearly amounts to negation of the rule of law, and of law itself, it has nonetheless been a feature of many parts of the world and, indeed, is still commonly found today. However, to come back to the theme of this seminar and Europe's constitutional heritage, this first objection must be rejected on the ground that procedure, which must be fair, is essential for applying the rule of law.

What about the second objection? What, if anything, does glorious constitutional law have in common with procedure with the obscure formalities and red tape associated with procedure? This objection must also be rejected on several counts. Firstly, because of the fundamental nature of the right to a fair hearing, as embodied in constitutional texts and Article 6 of the European Convention on Human Rights, which, both general and detailed, is so often cited when no other Article of the Convention can be, and which been found to have been violated more often than any other. Not forgetting Article 13 and even Article 5 which are not unrelated to the right to a fair hearing. The second reason why this objection must be rejected is that constitutional law also needs sanctions. Article 13 again when Article 6 does not apply. And numerous constitutional provisions which go to show that procedure is not merely a matter of statute law. The European Convention on Human Rights again, with its own machinery, the originality of which is precisely a procedure that sets it apart from earlier declarations without any real legal impact. The last reason for rejecting the objection is that the right to a fair hearing is a right that concerns constitutional judges, on two fronts. It concerns them not only because they, at the level of their supreme national court, are called upon to review compliance with this constitutional principle, but also

insofar as they themselves have a duty to apply the right to a fair hearing, as the European Court of Human Rights pointed out in the *Ruiz Mateos* case.

It is no exaggeration to state that judges apply the right to a fair hearing all the time, rather like Mr Jourdain with prose. More than other fundamental rights, the right to a fair trial demands that judges be constantly on their guard as they are always in danger of violating it. All judges sitting in higher courts also have to check that this principle has been correctly applied at the lower levels.

Here we have the honour of bringing together representatives of constitutional courts which carry out 'concentrated' reviews. The first such court was the Austrian Constitutional Court, followed very closely, as you will remember, by the Court of the former Czechoslovak Republic on which the host Court, like other courts, is modelled. In addition to these "Kelsenian" courts, however, there are also the supreme courts whose reviews are not 'concentrated', and whose constitutional jurisdiction exits alongside their powers relating to civil, criminal or administrative cases. These courts can share with us their experience of the right to a fair hearing outside the purely constitutional sphere.

I hope the fundamental nature of the right to a fair hearing, as established in all the different sources of law (constitutional, international, and legislative rules, decisions of constitutional and ordinary courts), is clearer now.

It is time now to get down to the substance of the debates. Right from the start, our approach will be not only international but also inter-continental, with papers on both United States and South African law. Then, tomorrow, we shall be tackling the specific example of a case relating to the constitutional heritage. Without wishing to influence the outcome of the discussion, I should nonetheless like to say that I hope we shall succeed in coming to an agreement, thereby building up our European constitutional heritage.

I should like to end by thanking the Czech constitutional court for inviting us to this city and giving us this opportunity over the next few day to sample its many tourist attractions and gastronomic delights. I should also like to thank the team from CERCOP and the University of Montpellier with whom co-operation on the theme of our European cultural heritage continues to be so fruitful.

REPORTS

THE RIGHT TO A FAIR TRIAL IN THE CASE-LAW OF THE ORGANS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY Mr Franz MATSCHER

Professor at the University of Salzburg, Director of the Human Rights Institute,
Former judge at the European Court of Human Rights, Member of the European Commission for Democracy through Law

I. Introduction

It is only thanks to Article 6 of the ECHR that the notion of "fair trial" entered the legal/procedural heritage of the states of mainland Europe in the first place.

It is a contribution from *common law*, in which it has its roots. The British, moreover, would argue that the concept of fair trial is but the incorporation into procedural law of the idea of *fair play* in sport.

That is not to say, however, that the principle of fair trial was previously unheard of: even before the Convention, the concept existed in our procedural systems in the form of the right to a hearing, the *audiatur et altera pars* of Romano-Canonical proceedings. The two - equally vague - terms naturally had different connotations, but the principle was the same.

Of this Article 6 of the European Convention, my friend and colleague at the Strasbourg Court, the late Walther Ganshof van der Meersch, a Belgian judge, once said that it would make a marvellous compendium of procedural law[1]. That was perhaps overdoing it, but it is certainly true that Article 6 outlines the meaning, albeit in rather vague terms, of the procedural safeguards laid down in the Convention.

In the original French and English versions of the Convention, Article 6 uses the terms "équitablement" and "fair hearing", which were translated into German as "in billiger Weise", into Italian as "equitativo" and into Spanish as "de manera equitativa". Alas, I do not know what the equivalent would be in the languages of the other member countries of the Convention. American legal language, according to the 14th Amendment of the US Constitution, talks of "due process of law".

[1] *Quoted by de Salvia, Lineamenti di diritto europeo dei diritti del uomo (1991), p. 135.*

As regards the right to the proper administration of justice, from which the concept of fair trial derives, the Court, from its earliest judgements, took the line that this right held such a prominent place that a restrictive interpretation would not be in keeping with the aim and purpose of Article 6[2].

The Austrian Supreme Court echoed this view when it declared in a recent judgement[3] that the right to a hearing was such a fundamental principle that any failure to observe it would normally result in the proceedings being rendered void.

The other procedural and institutional safeguards contained in paragraph 1 of Article 6 are that the court must have been established by law, and that it must be independent and impartial; Article 6 further requires that the proceedings be conducted and judgement pronounced publicly and hence orally, and - something that is important and also new in general trial theory - that a decision be given within a reasonable time.

All of these safeguards are covered by a vast body of case-law built up by the Commission and the Court. I cannot go into the details here, but I would like to point out that according to the Court's case-law, as inaugurated by the *Golder v. the United Kingdom*[4] judgement and which has never been challenged since, the procedural safeguards contained in Article 6 do not apply only when proceedings have been instituted; Article 6 guarantees first and foremost the right of access to the courts, which is an extremely important principle.

Paragraph 3 of Article 6 provides, *inter alia* (it speaks of "minimum" rights), for special safeguards for criminal proceedings. These are essentially:

- the right to be informed promptly, in a language one understands and in detail, of the accusation against one;
- the right to have adequate time and facilities for the preparation of one's defence;
- the right to defend oneself in person or through free legal assistance;
- the right to examine the prosecution witnesses and to obtain the attendance and examination of witnesses on one's behalf under the same conditions as the prosecution witnesses;

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[2] *Delcourt v. Belgium, 17.10.1970, A/11 § 25; Artico v. Italy, 13.3.1980, A/37 §33.*

[3] *OGH, 8 0b 333/98y of 28.1.1999.*

[4] *7.5.1974, A/18 §§ 28-36.*

- the right to have the free assistance of an interpreter.

The principle of the presumption of innocence enshrined in Article 6 § 2 is also a kind of procedural safeguard, moreover.

The Court has repeatedly maintained that these special safeguards are merely examples of the principle of fair trial and that they would also apply if paragraph 3 did not exist.

- This explains why the Court normally deals with these special safeguards in conjunction with the principle laid down in § 1[5].

- The Court, furthermore, also uses these special safeguards - or some of them at any rate - to better explain the scope of the principle of fair trial in civil matters as well[6].

The concept of fair trial as such is extremely vague. In order to make it operational, one first has to ascertain what specifically it involves[7], as I will now endeavour to do.

II. The concept of fair trial, the consequences arising therefrom and its implementation in judicial practice.

1. A central feature of the concept of fair trial is *equality of arms*. According to the Court's case-law, equality of arms is part of the wider concept of fair trial[8].

Just like the concept of fair trial, the concept of equality of arms is derived from sporting terminology, in particular duelling etiquette: the combatants must be equipped with arms - pistols - of equal value, something that is carefully checked by the seconds before the duel commences. The same rule applies in sporting events, whether skiing competitions or Formula 1 motor racing.

What does this equality of arms mean in practice?

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[5] *Colozza v. Italy, 12.2.1985, A/89 §26; Bönisch v. Austria, 6.5.85, A/92 §29.*

[6] *Airey v. Ireland, 9.10.1979, A/32 § 26 (Art. 6 § 3 c); Dombo Beheer B-V v. the Netherlands, 27.10.1993, A/274 § 32 (Art. 6 § 3 d).*

[7] *Matscher, Der Einfluß der EMRK auf den Zivilprozeß, Mél. Henckel (1995), p. 596.*

[8] *Ekbatani v. Sweden, 26.5.1988, A/134 §30.*

a) In criminal cases, it requires the defence to be on an equal footing with the prosecution. All the written evidence that the prosecution submits to the court must be communicated to the defence so that it can present its counter-arguments.

This issue has long exercised the minds of the Strasbourg Court and Commission in Austrian cases. After a number of amendments to the code of criminal procedure, following several judgements against Austria[9], the matter was deemed to have been resolved. In the case of *Nideröst-Huber v. Switzerland*, however, the Court found that there had been a breach of Article 6 § 1.

b) Similar problems can arise in civil matters: under the civil procedure rules of several Swiss cantons, a lower court referring a case to a higher court can attach its comments on the case, yet these are not disclosed to the applicant[10].

Strictly speaking, what we have here is not really a problem of equality of arms between the two parties involved, but it is a violation of the principle of fair trial.

c) The principle of equality of arms can also cause problems in cases - typically encountered in Roman-law countries - where the *procureur général* (or *avocat général*) of the court of cassation also intervenes in civil proceedings[11].

The Court, wrongly in my view, has held that one of the parties might see the *procureur général* as being biased towards the other party[12].

d) The fact that the presence, in an advisory capacity, of the *avocat général* of the court of cassation during the chamber's deliberations undermines at least the appearance of equality of arms is now well established[13].

The time-limits - for remedies or other procedures - must be the same for both parties in civil cases, and for the prosecution and the defence in criminal cases[14].

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[9] *Brandstätter v. Austria, 28.1.1991, A/211; Bulut v. Austria, 22.2.1996, Reports of Judgements and Decisions 1996, 1271.*

[10] *18.2.1997, Reports of Judgements and Decisions 1997, 101.*

[11] *Lobo Machado v. Portugal, 20.2.1996, Reports of Judgements and Decisions 1996, 195; Vermeulen v Belgium, 20.2.1996, Reports of Judgements and Decisions 1996, 224.*

[12] *Vermeulen v. Belgium, joint dissenting opinion of Gölcüklü, Matscher, Pettiti, p. 237; dissenting opinion Van Compernolle, p. 239.*

[13] *Borgers v. Belgium, 30.10.1991, A/214-B; see also, in the opposite respect, Delcourt v. Belgium (op cit).*

The notion of discrimination can also come into play[15].

e) In criminal cases, the accused must be afforded an opportunity to present his grounds of defence, in particular to call defence witnesses in the same way that the prosecution can call prosecution witnesses, as expressly stated in Article 6 § 3 d.

f) In civil matters, if the rules of procedure attached a greater probative value to one party's evidence than to the other's, this would constitute a breach of the principle of equality of arms. Accordingly, in a case involving the Netherlands, the Court found that the principle of equality of arms had been violated by virtue of the fact that, under Dutch law in force at the time, the general manager of the plaintiff company had not been allowed to testify, because he was identified with the latter, whereas the manager of a branch of the defendant company *had* been permitted to give evidence. The two individuals in question were the only people to have been present at the disputed negotiations, however, and there was no other evidence[16].

In this judgement, the Court ruled that, notwithstanding the fact that the procedural safeguards contained in Article 6 were not necessarily the same in civil cases as they were in criminal cases and that the Contracting States had greater latitude when dealing with civil cases, equality of arms implied that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that did not place him at a substantial disadvantage *vis-à-vis* his opponent, and that there must therefore be a fair balance between the parties (§§ 31-14 of the judgement).

In a similar case involving Switzerland[17], the court had heard on oath a manager of the plaintiff company, whereas the wife of the defendant - as a close relative of the latter - was not allowed to take the oath. Once again, apart from the defendant himself, who was heard for information purposes, the two witnesses in question had been the only ones present at the negotiations concerned. Yet while, in this particular instance, the court had accepted the version presented by

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[14] *Kremzow v. Austria, 21.9.1993, A/268-B §§ 73-75.*

[15] *Rasmussen v. Denmark, 28.11.1984, A/87.*

[16] *Dombo Beheer B.V. v. the Netherlands (aforementioned).*

[17] *Ankerl v. Switzerland, 23.10.1996, Reports of Judgements and Decisions 1996, 1566 §§ 35 ss.*

the sworn witness for the plaintiff, it was on the ground that this version was borne out by other objective evidence, whereas the defendant's wife had been unable to tell the court anything material about the conduct of the negotiations in question. In the circumstances, the Court was entitled to make a distinction between this case and the Dutch one, mentioned earlier, and to conclude that the proceedings had, as a whole, satisfied the "fair trial" requirements and had not infringed the principle of equality of arms.

This example shows that, when seeking to ascertain whether proceedings have been fair, the Court considers the proceedings as a whole.

g) The principle of equality of arms or fair trial does not mean, of course, that the court must accept all the arguments and all the evidence submitted by a party[18].

When carrying out its task of freely assessing the evidence and establishing the facts, the court can satisfy itself on the basis of some evidence, without admitting other evidence, particularly if it does not consider the latter relevant or believes that it would merely obstruct the proceedings. The Strasbourg Court does check, however, to see whether the non-admission of certain evidence is compatible with the principle of a fair trial.

I should further point out here that the dividing line between the assessment of evidence and the requirements of fair trial is not always clear.

A similar problem arises in domestic law, moreover, insofar as a higher court - in particular a supreme court - is not authorised to re-examine the facts, including the assessment of evidence, but merely to supervise the application of substantive law and check that the correct procedure has been followed[19].

h) To conclude this section, note that the principle of equality of arms and/or fair trial would be infringed if the judge were to treat one party more favourably than the other. Such problems might occur, for example, in Austrian law (Article 432 of the code of civil procedure), which requires the district judge to assist any party who is not assisted by a lawyer ("manuduction" requirement).

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[18] *Brandstätter v. Austria (aforementioned), §52; Bricmont v. Belgium, 7.7.1989, A/158 §§ 88, 89; Vidal v. France, 22.4.1992, A/235-B § 33.*

[19] *Matscher, Mängel der Sachverhaltsfeststellung, insbesondere der Beweiswürdigung, und Verletzung der Verfahrensgarantien im Lichte der EMRK, Mél. Gaul (1997), p. 435.*

This is no easy task for the judge who, if he takes the "manuduction" too far, is liable to be accused of a breach of impartiality.

The fact that one party can call on the services of a qualified lawyer and that the other party's lawyer may be less qualified, can also put the latter at a disadvantage, but if the lawyers in question have been freely chosen by the parties involved, the judge cannot intervene, short of invoking, *mutatis mutandis*, the "manuduction" rule, which would be difficult to say the least.

The situation is different in the case of lawyers appointed by the court to provide free legal aid (or defence). Once again, however, the State, represented by the judge, is obliged to intervene only if the lawyer seriously and manifestly fails to perform his duties[20].

Similarly, the principle of equality of arms and/or fair trial would be violated if one failed to provide a party who did not have sufficient financial resources with free legal aid in order to place him on an equal footing with the other party, represented by a lawyer. This can also cause problems as regards the right of access to the courts, as the Court has already observed on one occasion[21].

2. Something else that may be considered an aspect of fair trial is the adversarial principle, or *audiatur et altera pars*. This hearing must take place on equal terms between the two parties, there being some overlap between the requirements of the adversarial principle and those of equality of arms.

The adversarial principle is an inherent part of any judicial function. For a decision-making body only qualifies as a "court" if, before giving his decision, the judge affords each of the parties an opportunity to present their point of view.

The judge is not bound, of course, to accept the factual and legal arguments presented by the parties, but the latter must at least have the chance to acquaint the judge with these arguments.

What I have just said applies to both civil and criminal cases. It also applies in substance to civil proceedings which are unilateral, in that there is only one plaintiff or defendant and perhaps no real opponent, as for example in non-contentious proceedings (I am thinking here of guardianship cases, administration orders, etc.). Such proceedings are more about the right to a hearing than the adversarial principle proper.

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[20] *Artico v. Italy (aforementioned), §37 ss. Kamasinski v. Austria, 19.12.1989, A/168 § 63 ss. Stanford v. United Kingdom, 23.2.1994, A/282-A § 28.*

[21] *Airey v. Ireland (aforementioned).*

Technically speaking, there are several ways in which the requirements of the adversarial principle can be satisfied:

The most common situation is that where there are two parties - the plaintiff and the defendant in civil cases, and the prosecution and the accused in criminal cases. Here, each party makes his application or presents his point of view and the other party does likewise. In criminal cases, the accused must also be able to comment on the prosecution's point of view and, in any event, he must have the "last word"[22].

The adversarial principle can be observed via written proceedings or via an oral hearing. In criminal cases in particular, I believe an oral hearing is definitely essential because the adversarial principle is less effectively ensured by purely written proceedings; at one stage of the proceedings at least - normally the initial one - the proceedings should be oral, as stipulated, moreover, in Article 6, §1 of the Convention. In saying that, I mean a genuine oral hearing and not the kind of farcical affair often seen in various countries' civil courts[23].

The adversarial principle does not necessarily require a plaintiff's reply and a defendant's reply or, if the proceedings are written, two or even three exchanges of pleadings. Particularly in appeal proceedings and supreme courts, often only one set of pleadings will be presented by each party, which is in keeping with the requirements of Article 6.

In the interest of procedural efficiency, particularly in straightforward cases, or those which require a speedy decision, summary procedures exist which are initially unilateral: order to pay, provisional or protective measures, administrative offences, etc. In such cases, the judge (or administrative body) decides on the basis of the allegations made by the plaintiff alone or the prosecuting authorities, insofar as these allegations have at least a *fumus boni iuris* and are suitably convincing; the decision is merely provisional, however, and the other party can apply to have it set aside; in that event, the decision will be rendered void and the proceedings then become adversarial. This is also wholly in keeping with the requirements of Article 6 § 1.

Neither the adversarial principle, nor the principle of fair trial requires the judge to inform the parties of the factual and legal arguments which he intends to adopt in his decision, provided these arguments have been presented. As regards those arguments which have not been presented, however - particularly when the judge

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[22] *Borgers v. Belgium (aforementioned).*

[23] *Fischer v. Austria, separate opinion of Judge Matscher, 26.11.1995, A/312 p. 23.*

wishes to assign the disputed facts a different (criminal) legal classification - it is essential that he present these arguments and that he avoid springing a decision on the parties that is based on factual or legal arguments which the parties might not have thought of[24].

In the case of in absentia proceedings, the adversarial principle does not apply. In the interest of the proper administration of justice, however, the institution of proceedings in absentia is a necessary sanction against a party who chooses, of his own free will, not to appear before the judge or who, in criminal cases, absconds.

Provided that in civil matters, any party who fails to appear because he did not receive the summons or was prevented from attending for reasons of force majeure, is afforded an opportunity to contest the decision in absentia (restitutio in integrum), there is no reason why proceedings should not be instituted in absentia.

The issue is more complicated in the case of criminal proceedings; I cannot go into the details here, however, and will confine myself instead to two case-law references[25].

The right to appeal against the judge's decision is not an essential part of the concept of fair trial, but it is certainly a desirable one. That is why the system of two-tier proceedings was introduced under Art. 2 of Protocol No. 7 for criminal cases of some seriousness. I should emphasise, however, that the adversarial principle as such does not require the existence of a means of appealing against the court's decision; it is concerned primarily with relations between the parties, and not so much with those between the parties and the court.

Where there are two (or even three) levels of jurisdiction, moreover, the appeals procedure must always be accompanied by the safeguards set out in Article 6[26], [27].

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[24] *Gea Catalán v. Spain, 10.2.1995, A/309, §§ 28, 29; Salvador Torres v. Spain, 24.10.1996, § 30 ss, Reports of Judgements and Decisions 1996 p. 1577; Pélissier and Sassi v. France, 25.3.1999.*

[25] *Colozza v. Italy, 12.2.1995 A/89; F.C.B v. Italy, 28.8.1991, A/203-B.*

[26] *Matscher, Heilung von konventionswidrigen Mängeln durch Rechsmittel; konventionswidrige Rechtsmittelverfahren bei konventionskonformen unterinstanzlichen Verfahren, Mél. Adamovich (1992), p. 405.*

[27] *Ekbatani v. Sweden (aforementioned), §26ss; see, however, the various dissenting opinions p. 17ss.*

The right of appeal might even be seen as posing a problem under the fair-trial rule, rather than under the adversarial principle.

The same could be said for the need to give reasons for the decision. The statement of reasons should not, in any case, be too long, but it must enable the person for whom the decision is intended and the public in general to follow the reasoning that led the judge to make a particular decision. The right of appeal, moreover, can only be effective if the reasons for the decision are sufficiently spelt out.

The adversarial principle must be applied in accordance with the principle of equality of arms; the general concept of fair trial demands this.

To a certain extent, the adversarial principle also needs to be seen in the light of the principle of the presumption of innocence, enshrined in Art. 6, § 2. Once again, though, I feel this is more a matter of a specific aspect of the principle of fair trial, rather than of the adversarial principle proper.

There is a vast body of case-law on the requirements of the adversarial principle, which partly overlaps with that looked at in sub-chapter II/1 relating to equality of arms. The adversarial principle, however, has dimensions which go beyond the notion of equality of arms and which extend across the whole vast area of due process. Consider, for example, the issue of hearing anonymous witnesses or the reading of written statements made by witnesses who are not present at the hearing[28].

In criminal cases, furthermore, a distinction ought to be made between the pre-trial phase and the sentencing phase.

The adversarial principle is an extremely wide-ranging issue and one that I cannot hope to cover in any depth within the scope of this report; indeed, it warrants a seminar in its own right[29].

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[28] Kostowski v. the Netherlands, 21.11.1989, A/166; Windisch v. Austria, 27.9.1990, A/186; Unterpertinger v. Austria, 24.11.1986, A/110; Lüdi v. Switzerland, 15.6.1992, A/238; Van Mechelen and Others v. the Netherlands, 23.4.1997, Reports of Judgements and Decisions 1997, 691.

[29] Matscher, Le principe du contradictoire (in: Colloque en honneur du juge Joao de Deus Pinheiro Farinha, Lisbon, 4 April 1997, Documentaçao e direito comparado No. 75/76, 1998), p. 115.

The principle of a fair trial can also appear in other guises; in particular, there is a tendency to refer to this principle when dealing with specific rules, and where there is thus no need to invoke the general rule, as for example when dealing with

- the presumption of innocence (Article 6 § 2)[30] ;

- the right to the assistance of a court-appointed lawyer (Article 6 § 3 c)[31];

- the right of access to the file (Article 6 § 3 b)[32];

- the right to hear witnesses (Article 6 § 3 d)[33].

In most of the cases cited in sub-chapter II/1, therefore, the Court referred to the general principle of a fair trial, as enshrined in § 1 of Article 6, even if the situation in question was covered by one of the specific rules set out in §§2 and 3 of Article 6. This would seem to be in order whenever the wording of a particular clause is felt to be rather narrow and does not expressly cover the matter one wishes to examine under it. In such cases, the general principle of a fair trial allows an extensive interpretation of a specific clause of § 3 of Article 6[34].

III. Conclusions

The notion of fair trial is central to Article 6. It plays an eminent role in all civil and criminal cases which fall within the scope of this article.

Elsewhere, eg in electoral or military administrative proceedings, the principle is not directly applicable as such. In a law-governed state, however, it is at least

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[30] *Deweer v. Belgium, 27.2.1980, A/35 § 56; Minelli v. Switzerland, 25.3.1983, A/62 § 27; Allenet de Ribemont v. France, 10.2.1995, A/208 § 35.*

[31] *Quaranta v. Switzerland, 24.5.1991, A/205 § 27; Van Hoang v. France, 25.9.1992, A/243 § 39.*

[32] *Kremzow v. Austria (aforementioned), § 52; Kamasinksi v. Austria (aforementioned), § 87, 88.*

[33] *Ferrantelli and Santangelo v. Italy, 7.8.1996, Reports of Judgements and Decisions 1996, 1937 § 51.*

[34] *Bönisch v. Austria (aforementioned), § 28 ss.*

desirable that the procedures in question be guided by this principle, even in areas that are not covered by the European Convention.

I am somewhat reluctant, moreover, to endorse those Court decisions which also apply, fully and indiscriminately, the safeguards contained in Article 6 to appeal proceedings against a decision ordering that a person be placed (or held) in detention within the meaning of Article 5 § 4[35].

The proceedings referred to in Article 5 § 4 must, of course, be judicial proceedings; they must, first and foremost, fit the description of a remedy in the procedural sense[36], but not all the procedural safeguards provided for in Article 6 come into play[37].

Much the same can be said for Article 1 of Protocol No. 7, which contains certain procedural safeguards relating to expulsion: decision to be taken in accordance with the law, right to submit reasons against expulsion and have the case reviewed and the right to be represented. The safeguards in question must certainly satisfy the basic requirements as to fair trial, but they are not necessarily the same as those laid down in Article 6 of the Convention for civil and criminal cases.

Even less, the effective remedy within the meaning of Article 13 of the Convention may, but need not necessarily, be of a judicial nature and meet the requirements of Article 6[38].

According to the Court's established case-law, moreover, Articles 5 § 4 and 6 of the Convention constitute special rules relating to Article 13[39] and the procedural safeguards contained in Article 13 are subsumed by those set out in Articles 5 § 4 and 6, with the result that, where the Court has already found a breach of the special rules in question, there is no need to examine the situation under the general rule of Article 13 as well[40].

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[35] *Sanchez-Reisse v. Switzerland, 21.10.1986, A/107 § 42ss; Lamy v. Belgium, 30.3.1989, A/151 § 29; Toth v. Austria, 12.12.1991, A/224 §§ 83, 84; Kampanis v. Greece, 13.7.1995, A/318-B § 47; Assenov and Others v. Bulgaria, 28.10.1998, § 162; Nikolova v. Bulgaria, 25.3.1999, § 58 ss.*

[36] *Matscher, Der Rechtsmittelbegriff der EMRK, Mél. Kralik (1986) p. 257.*

[37] *Toth v. Austria, separate opinion, p. 27.*

[38] *See footnote no. 36.*

[39] *Matscher, Zur Tragweite des Art. 13 EMRK, Mél. Seidl-Hohenveldern (1988), p. 315.*

Let us conclude by returning to Article 6. Some see all the institutional and procedural safeguards contained in this article as deriving from the principle of fair trial. A seminar held by the French Court of Cassation on 22 March 1996 in Paris on "New developments in the concept of fair trial within the meaning of the ECHR"[41], for example, used this heading to examine more or less the full range of procedural safeguards set out in Article 6 of the European Convention.

Where Article 6 § 1 provides for specific safeguards, however, eg the requirements as to independence and impartiality, publicity, decision within a reasonable time, I prefer, for methodological reasons, to base myself exclusively on the safeguards in question without having to refer to the general principle of fair trial as well.

The situation may be different as regards the specific safeguards contained in § 3 of Article 6, as I explained in sub-chapter II/3.

I do not agree either with certain tendencies to invoke the concept of fair trial as an argument in support of claims which have nothing to do with this procedural safeguard, ie to turn it into some kind of all-purpose tool[42].

Otherwise, the broad and essentially vague notion of fair trial provides the Court's case-law with a solid basis on which to construct all the requirements which must be met by civil and criminal proceedings in a law-governed state.

Of this vast corpus of case-law, I have been able to give only a few examples, but they at least show what the Strasbourg Court means by the principle of fair trial.

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[40] *Chalal v. United Kingdom, 15.11.1996, Reports of Judgements and Decisions 1996, 1831 §§125, 146, Nikolova v. Bulgaria, (aforementioned) § 69.*

[41] *Actes du Colloque, published by l'Université Robert Schuman de Strasbourg and by the Court of Cassation (1996).*

[42] *Eg to combat - in the interest of the Bar - the Austrian institution of the "Finanzprokuratur" which, like the avocat-général in some Roman-law countries (there is a similar institution in other countries) represents the State before the courts in private-law disputes; see Kühne, Finanzprokuratur - "Anwalt und Berater der Republik?" Ein gleichheitswidriges (letztes?) Monopol? Österreichische Juristen-Zeitung 1998, p. 201; contested by Kremser, Finanzprokuratur - Anwalt und Berater der Republik! Österreichische Juristen-Zeitung 1999, p. 441.*

THE RIGHT TO A FAIR TRIAL IN DOMESTIC LAW

Czech Law Report by Mr Pavel HOLLÄNDER

Justice of the Czech Constitutional Court

1. Definition and Legal Value of the Right to a Fair Trial

1.1 Constitutional Regulation of the Right to a Fair Trial

At the constitutional level, the right to a fair trial is regulated by the Charter of Fundamental Rights and Freedoms, by the Constitution, and, as implied by Article 10 of the Constitution, by international treaties on human rights and fundamental freedoms.

The Charter of Fundamental Rights and Freedoms was adopted in January 1991 by the Czechoslovak Parliament and formed one of the most important milestones in the process of overcoming the communist legal order. The Constitution of the Czech Republic (Article 3 and Article 112, paragraph 1) declared the Charter of Fundamental Rights and Freedoms to be a part of the constitutional system of the Czech Republic.

The right to a fair trial forms part of the fundamental right to judicial and other legal protection specified in Chapter 5 of the Charter. When specifying the scope and contents of the rights which comprise the rights to a fair trial in their entirety, I am basing my view on the body of judicial findings of the European Court of Human Rights related to Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms[1]. From this viewpoint, the Charter explicitly contains the following fundamental rights forming part of the right to a fair trial:

- parity between the parties to the proceedings (Article 37, paragraph 3);
- the open and verbal nature of the judicial proceedings (Article 38, paragraph 2);
- the right to submit evidence and to express opinions on all the evidence submitted (Article 38, paragraph 2);
- the right to have the case considered and resolved without undue delay (Article 38, paragraph 2);

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[1] *See J.A. Frowein, W. Peukert, Europäische Menschenrechtskonvention, EMRK-Kommentar. 2. Auflage, Kelh-Strassburg-Arlington 1996, p. 150 ff.*

- the right to the services of an interpreter (Article 37, paragraph 4);
- the right to legal assistance (Article 37, paragraph 2) and to defence in criminal proceedings (Article 40, paragraph 3);
- the right to refuse to make a statement in general (Article 37, paragraph 1) and in particular the right to refuse to make a statement pertaining to the accused in the criminal proceedings (Article 40, paragraph 4).

Some of the components of the right to a fair trial are explicitly regulated by the Constitution. These are:

- parity between the parties to the proceedings (Article 96, paragraph 1), and
- the open and verbal nature of the judicial proceedings (Article 96, paragraph 2).

In accordance with Article 10 of the Constitution, the ratified and promulgated international treaties on human rights and fundamental freedoms, which are of a binding nature upon the Czech Republic, are immediately binding and take precedence over the law. On the basis of the above provisions for constitutional transformation, the Czech legal order vests the legal status of constitutional acts in particular in the Convention on the Protection of Human Rights and Fundamental Freedoms and in the International Treaty on Civil and Political Rights and, for the purpose of this subject, in the provisions concerning the right to a fair trial.

The above constitutional regulation concerning the right to a fair trial is promoted in particular by the judicial findings of the Constitutional Court. In connection therewith I consider it necessary to mention the competence of the Constitutional Court and thus also the contexts within which the Constitutional Court protects fundamental rights and freedoms.

Compared to other European countries, the Czech Constitutional Court has relatively great powers. In particular it has the power to undertake abstract and specific reviews of legal norms, the power to review whether or not interventions by public authority bodies are constitutional in terms of fundamental rights and freedoms, the power to review the constitutionality of judicial decisions as the most important component thereof, and the power to make decisions in disputes regarding the competencies of state bodies as well as of local government bodies. The Constitutional Court also functions as the court of appeal in cases concerning the election law, and finally in such cases as impeachment of the President.

With respect to the reviewing of interventions by public authority bodies affecting fundamental rights and freedoms (Article 87, paragraph 1, clause d/ of

the Constitution, under which the Constitutional Court makes decisions on a constitutional petition against legally binding decisions and other interventions by a public authority body affecting the constitutionally guaranteed fundamental rights and freedoms), a certain degree of influence on the Czech law maker by the German constitutional system may be assumed; under the German Constitution (Article 93, paragraph 1, clause 4a), the "Federal Constitutional Court shall make decisions on constitutional petitions which may be submitted by any person claiming that any of their fundamental rights has been violated by the public authority".

1.2 Legal Value of the Right to a Fair Trial

In order to answer the question whether the right to a fair trial is a fundamental principle, it is necessary to adopt a working definition of the term "legal principle", taking into account the discussions which are taking place amongst legal theoreticians.[2]

I believe that legal principles within a body of norms are in the nature of an axiom. From this assumption it is possible to derive other characteristics of legal principles:

- within such a body, legal principles act as regulatory ideas (they either form a consensual base for complexes of norms – for example, the principle of the open and verbal nature of proceedings before a court is related to various norms, such as the norms regulating the proceedings, or the specification of causes for special appeal against legally binding decisions of the court of appeal – or they act as interpretation bases for elementary law – for example the interpretation applied by the decisions of the Constitutional Court concerning the terms contained in the Civil Code, in particular of ownership rights, from the viewpoint of protection of fundamental rights and freedoms;

- typical of such legal principles is a high degree of generality of the subsumption conditions (not necessarily the contents of the disposition);
- legal principles are most closely related to metanormative bases of the body of norms, that is to its value and teleological basis.

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[2] *See in particular J. Raz, Legal Principles and the Limits of Law. The Jale Law Journal, 81, 1972; J. Esser, Grundsatz und Norm. 4. Auflage. Tübingen 1990; R. Dworkin, Taking Rights Seriously, quoted according to German translation: Bürgerrechte ernsgenommen. Frankfurt am Main, 1990; J. Wroblewski, Principles, Values and Rules in Legal Decision-Making and Dimensions of Legal Rationality. Ratio Juris, 3, 1990; J. R. Sieckmann, Regelmodelle und Prinzipienmodelle des Rechtssystems. Baden-baden 1990; R. Alexy, Recht, Vernunft, Diskurs. Frankfurt am Main 1995, p. 177ff.*

In comparison with the traditional characteristics of axioms, the description of characteristics defining legal principles contains one additional element: the fact that they are not only a consensual base for the creation of norms, but also an interpretation base for elementary law. Should we assume that the principles common to the entire legal order are contained in norms at the constitutional level, the constitution thus becomes not only an authorising base and a frame for elementary law, but also "the consensual centre of the legal system"[3]; we may speak of a constitutionalisation of the legal order.

The right to a fair trial is regulated neither in the Charter of Fundamental Rights and Freedoms nor in the Constitution, but its existence is regularly derived by the Constitutional Court from the right to judicial protection (Article 36, paragraph 1 of the Charter of Fundamental Rights and Freedoms). In its own judicial findings, the Constitutional Court regularly applies such a right as an interpretation base for elementary law, in particular from the viewpoint of the meaning and purpose of a fair trial. In other words, the Constitutional Court applies the fundamental right to a fair trial as a principle.

Let me present several examples:

Under the provisions of Section 239, paragraph 1 of the Rules of Civil Proceedings, a special appeal against legally binding decisions of the court of appeal is admissible against a judgement or a resolution of a court of appeal on merit, by which the decision of the court of the first instance is confirmed should the court of appeal state in the verdict of the decision that the special appeal against legally binding decisions of the court of appeal is admissible since the decision is of a principal legal importance.

With respect to the foregoing, the Constitutional Court stated (Constitutional Petition, Volume 7, Judgement No. 19): "The procedure of courts, by which the admissibility of the special appeal against legally binding decisions of the court of appeal was declared in the verdict of the judgement without limitation, and such a limitation only to certain legal matters is contained in the justification of the judgement or is implied by such a justification, creates procedural insecurity in the parties to the proceedings, results in unspecific definition of the contents and scope of the rights and obligations of the parties to the proceedings, and as a result, such a procedure makes it possible to limit procedural rights". By this interpretation, the Constitutional Court, from the fundamental right to a fair trial, derived the right of the parties to the proceedings to legal certainty in their

[3] *R. Alexy, Recht, Vernunft, Diskurs. Frankfurt am Main 1995, p. 213.*

procedural rights, from the viewpoint of which the Constitutional Court interpreted elementary law.

In the case of the Constitutional Petition, Volume 9, Judgement No. 113, in connection with the evaluation of the constitutionality of the decision of the court in the matter of the extension of the period of custody, the Constitutional Court stated that, in the opinion of the Constitutional Court, the purpose of the criminal proceedings is not only the "fair penalisation of the perpetrator", but that the very purpose of the criminal proceedings is a fair trial. The Constitutional Court stated that the existence of proper proceedings is an inevitable condition of the democratic legal state. In connection with the case under consideration, the Constitutional Court stated that one of the principles which represent a part of the right to proper proceedings as well as of the term "legal state" (Article 36, paragraph 1 of the Charter of Fundamental Rights and Freedoms, and Article 1 of the Constitution) and which eliminate arbitrariness in decision making, is also the obligation of courts to justify their decisions; such a justification shall have, with respect to criminal proceedings in the case of a resolution, the form specified by the appropriate provisions of the Rules of Criminal Proceedings. The justification must state the relationship between the merit findings and reflections when considering evidence on the one hand, and the legal conclusions of the court on the other. In the case that the justification fails to contain specific evidence, as well as in the case that the court's decision under consideration cannot be reviewed on the grounds of lack of evidence and on the grounds of unintelligibility, the legal conclusions of the court form a violation of the constitutional principle of a ban on arbitrariness in decision-making; this was considered by the Constitutional Court to be a violation of the right to a fair trial. In other words, the Constitutional Court, from the principle of the fundamental right to a fair trial, derived a ban on arbitrariness in the decision-making of the courts, from the viewpoint of which the Constitutional Court interpreted the provisions of the Rules of Criminal Proceedings regulating the pre-requisites for judicial decisions.

Since the establishment of the Constitutional Court in 1993, the most extensive agenda of the Constitutional Court has consisted of cases relating to the restitution of property. The Constitutional Court has endeavoured to breach the rather formalist approach of the general courts when considering such cases. Probably the most flagrant examples of such an approach on the part of the general courts were cases in which the judicial proceedings were discontinued on the grounds of "absence of "passive capacity" (the capacity to be sued) on the part of the opposing party", when the claimant incorrectly identified the entity obliged to release the restituted assets (for example "Municipality Office" was stated instead of "Municipality", or "City District" instead of "City", on the basis of the registration in the Property Registry). In the case of the Constitutional

Petition, Volume 5, Judgement No. 68, the Constitutional Court stated with respect to such procedural conduct of the general courts: "When the procedural legal acts of the parties to the proceedings contain patent aberrations, the remedy of which makes it also possible to remedy the lack of conditions within the proceedings, and when the statement of such patentness does not require any procedural activity on the part of the court (such as substantiation), it is necessary to give the parties to the proceedings the opportunity to remedy such aberrations. The contraposition to such a procedure consists of an inflated formalism which results in sophisticated justification of the patent aberration". By an entire series of decisions, the Constitutional Court, from the principle of the right to a fair trial, derived a ban on inflated formalism, from the viewpoint of which the Constitutional Court subsequently interpreted elementary law, that is the procedural provisions of the Rules of Civil Proceedings.

1.3 Structure of the Right to a Fair Trial

It has already been stated that the fundamental right to a fair trial is, in the judicial findings of the Constitutional Court, derived from the fundamental right to judicial protection. Its structure is defined in two ways. A part of its components is regulated directly by the Charter of Fundamental Rights and Freedoms, by the Constitution, and by international treaties on human rights and fundamental freedoms, which are, under Article 10 of the Constitution, immediately binding and take precedence over the law. The second part then develops *a posteriori* by the judicial findings of the Constitutional Court; in general it may be stated that the Constitutional Court expressly formulates these components and thereafter either evaluates the constitutionality of elementary law (in the proceedings concerning the review of norms) or interprets elementary law (in the proceedings concerning constitutional petitions) from the viewpoint of such components. Some of these components I have already mentioned in the examples presented of the decisions of the Constitutional Court, such as the ban on inflated formalism, or the right of the parties to the proceedings to legal certainty with respect to their procedural rights.

I will present some examples concerning both above groups of components of the fundamental right to a fair trial, that is the components given *a priori* by the constitutional system and the components given *a posteriori* by the judicial findings of the Constitutional Court.

In the case of the Constitutional Petition, Volume 2, Judgement No. 46, the Constitutional Court, within the scope of the proceedings concerning the review of norms, reviewed the constitutionality of the practice of anonymous witnesses testifying in criminal proceedings. When reviewing this area of problems, the Constitutional Court stated: "The meaning of the right to have

the case considered publicly, in connection with the right to express opinions regarding all the evidence considered, is to provide the defendant in criminal proceedings with the opportunity of public verification of evidence submitted against such a defendant. In the case of a witness's testimony, this verification contains two components: the first consists of verification of the truthfulness of the testimony on merit, the second consists of the possibility of verification of the trustworthiness of the witness. The practice of anonymous witnesses testifying thus limits the opportunity of the defendant to verify the truthfulness of the witness's testimony presented against the defendant as it eliminates the possibility of expressing opinions regarding the person of the witness and the witness's trustworthiness. Thus the practice of anonymous witnesses testifying limits the defendant's right to defence, is in conflict with the principle of the oppositional nature of the proceedings, is in conflict with the principle of parity between the parties to the proceedings since the same limitation is not imposed on the prosecuting party and therefore is in conflict with the principles of a fair trial". For the given reasons, the Constitutional Court considers the practice of anonymous witnesses testifying in criminal proceedings to be in conflict with Article 38, paragraph 2, and Article 40, paragraph 3 of the Charter of Fundamental Rights and Freedoms, that is in conflict with the right to express opinions on all the evidence considered within the scope of the proceedings and in conflict with the right to defence, both of which form part of the fundamental right to a fair trial. It is also necessary to state that in the given case the Constitutional Court was well aware of the purpose of the practice of anonymous witnesses testifying, that is the necessity of protection of the witness's life, in particular against possible threat by organised criminal groups; nevertheless, upon application of the principle of proportionality and the principle of minimisation of restrictions of the fundamental rights in the case of a conflict thereof, the Constitutional Court found the reviewed legal provision unconstitutional. "With such a considerable intervention in the right of the accused to defence, and thus also in the principles of a fair trial, it was the obligation of the law-giver to look for possible minimisation of such an intervention and to formulate corresponding instruments. Examples of such instruments may be the procedural mechanisms or the establishment of an exception from the general rule of free evaluation of evidence by the judge, by imposing an obligation on the court, in the case of testimony by an anonymous witness, to particularly examine whether the court and the parties to the proceedings have sufficient opportunity to deal with the trustworthiness of the witness, and the probative power of the witness's testimony, and the like. These examples document the fact that, within the scope of the regulation of the practice of anonymous witnesses testifying, the law-giver has room for a regulation of instruments in order to minimise the intervention in the right to defence and rights resulting from the fair trial. The selection of the instrument

in order to minimise intervention in the fundamental right and freedom is under the competence of a democratic law-giver".

In the case under Ref. No. III. 257/98, the Constitutional Court, from the right to express opinions on all evidence considered within the proceedings (Article 38, paragraph 2 of the Charter of Fundamental Rights and Freedoms), derived a ban on "surprising decisions" by courts as a part of the fundamental right to a fair trial: "One of the functions of the Constitution, in particular the constitutional regulation of fundamental rights and freedoms, is its reflection throughout the entire legal order. The meaning of the Constitution consists not only of regulation of fundamental rights and freedoms as well as institutional mechanisms and the process of creating legitimate decisions of the state (or bodies of public authority), not only of the immediate binding nature of the Constitution and its position as the immediate source of law, but also of the obligation on the part of state bodies or bodies of public authority to interpret and apply the law from the viewpoint of the protection of fundamental rights and freedoms. In the case under consideration, this means the obligation on the part of the courts to interpret the individual provisions of the Rules of Civil Proceedings in the first place from the viewpoint of the purpose and meaning of the protection of constitutionally guaranteed fundamental rights and freedoms. The provisions of Article 36, paragraph 1, and Article 38, paragraph 2 of the Charter of Fundamental Rights and Freedoms imply the fundamental right to the real and effective possibility for the parties to the proceedings to be heard before the court, which consists of the entitlement to reason in terms of both law and merit. A modification to the legal opinion of the court in the proceedings on legal remedies against the decisions of administrative bodies thus forms grounds for cassation. From the viewpoint of constitutional law, the parties now have the possibility of applying the law, expressing opinions, or submitting new evidence which may not have been relevant earlier. Should the court, within the scope of the verbal proceedings, fail to make it possible for the parties to express their opinions concerning a different legal opinion with respect to the evaluation of the case, and should the court justify the confirming decision with such an opinion, the court thus denies the parties the real and effective possibility of being heard before the court, which consists of the entitlement to reason in terms of both law and merit; as a result of this, the court violates fundamental rights and freedoms resulting from Article 36, paragraph 1, and Article 38, paragraph 2 of the Charter of Fundamental Rights and Freedoms".

One of the examples of a component of the fundamental right to a fair trial, formulated by the judicial findings of the Constitutional Court, may be the decision in the case of the Constitutional Petition, Volume 11, Judgement No. 79, in which the High Court rejected a petition against the decision of the Regional Court concerning the rejection of a proposal for the disqualification of a judge on

the grounds of prejudice on the part of the judge; the High Court stated that the petition against such a decision of the Regional Court is not admissible *ex lege*. This opinion was based on the provision of Section 141, paragraph 2 of the Rules of Criminal Proceedings, under which petition may be used to question a resolution of a court only in such cases when the same is expressly permitted by the law and provided that the case is considered in the first instance (in the given case, the Regional Court acted as the court of appeal). The Constitutional Court did not accept the above opinion of the High Court on the basis of the following statement: "Whenever the laws admits double interpretation (here, "case" can mean both the subject of the criminal proceedings, that is decision-making on the guilt or innocence and punishment of the defendant, or the proceedings concerning the prejudice of the judge) it is necessary, on the grounds of the principles of a fair trial, when applying the law, to prefer the interpretation which is as much in accord with the constitutional order of the state as possible".

2. The Use of the Right to a Fair Trial

2.1 The Relevance of the Right to a Fair Trial in the Reasoning of the Parties to the Proceedings

The intensity of the application of the right to a fair trial is determined by several factors. The first consists of the normative scope of procedural rules which make it possible to use such a right. The other factors consist of the accents of the judicial findings of the Constitutional Court and the general courts in this area, and finally of the extent of awareness of the parties to the proceedings of such rights.

The Constitutional Court pays extraordinary attention to the protection of the right to a fair trial. This may be proven by the fact that in the area of constitutional petitions approximately two thirds of the cassation judgements are justified by the violation of the right to a fair trial (or the right to judicial protection). In addition, within the scope of an algorithm developed for the evaluation of the constitutionality of the decisions of public authority bodies, the Constitutional Court applies the principle of subsidiarity of substantive-law review to adjective-law review (the Constitutional Petition, Volume 9, Judgement No. 159): "Since the Constitutional Court concluded that the principles of proper proceedings were not complied with within the scope of the proceedings before the general court, and since the nullification of the judgement of the general court provides scope for re-considering the case, and also since the petitioner now has the possibility of being heard before the general court and thus the possibility of applying reasons in terms of both the merit and legal aspects of the case being considered, the Constitutional Court did not consider the constitutionality of the decision of the general court being questioned from the viewpoint of

constitutional subjective substantive rights.. The Constitutional Court believes that the protection of constitutionality must be connected with minimisation of interference with competencies of other bodies; in other words, when a judgement which nullifies a decision concerning the last procedural instrument provided by law to protect the rights gives room in procedural terms for the protection of such a right within the system of general courts, then the constitutional review of the decision of the general court is governed by the principle of subsidiarity of substantive-law review to "adjective"-law review.

The above trend in the judicial findings of the Constitutional Court is naturally observed in particular by the expert public; therefore the majority of constitutional petitions concentrate reasoning on the procedural issues.

The objections with respect to the right to a fair trial in the proceedings before general courts may be applied in accordance with the regulations contained in the procedural rules. For example in civil proceedings, the court of appeal considers the defects in the proceedings before the court of the first instance only to the extent to which the defects could result in an incorrect decision on merit (Section 212, paragraph 2 of the Rules of Civil Proceedings). The above provisions are interpreted by the doctrine as follows: "It is unquestionable that a defect in the proceedings which in general may have an influence on the correctness of the decision does not necessarily result, in a specific case, in a factually incorrect decision. The court of appeal considers the question whether the contents of the verdict of the decision would have been different if there had been no defect in the proceedings. The nature of the matter suggests that this evaluation may be unambiguous only when negative, that is if it is not possible to ascertain that the contents of the verdict of the decision would be the same in the absence of the defect in the proceedings".[4] Similar provisions apply also to the area of administrative justice: "The defects in the proceedings before an administrative body shall be taken into account by the court only if the resulting defects might have had an influence on the legality of the decision questioned " (Section 250i of the Rules of Civil Proceedings).

In civil proceedings, a violation of a certain portion of the entire area of the fundamental right to a fair trial constitutes a reason for a special appeal against legally binding decisions of the court of appeal under the provisions of Section 237, paragraph 1, clause f) of the Rules of Civil Proceedings. Under these provisions, the special appeal against legally binding decisions is admissible against the decision of a court of appeal if a party to the proceedings was denied the possibility of being heard before the court due to a incorrect procedure on the

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[4] *J. Bureš, L. Drápal, M. Mazanec, Občanský soudní řád. Komenář. 2. vydání, Praha 1996, p. 572*

part of the court in the course of the proceedings. The interpretation of the civil judicial findings of the above reason for the admissibility of the special appeal against legally binding decisions of the court of appeal consists of the statement that the denial of the possibility of being heard before the court means such a procedure of the court by which the court makes it impossible for the given party to exercise its procedural rights provided by the Rules of Civil Proceedings. The admissibility of the special appeal against legally binding decisions of the court of appeal does not depend on whether or not the party to the proceedings was denied the possibility of being heard before the court in the proceedings of appeal or in the proceedings before the court of the first instance (Collection of Judicial Decisions and Opinions, Issue No. 25/93).

In the criminal proceedings, the court of appeal also reviews the correctness of the procedure of the proceedings preceding the judgement against which the appeal was applied; the court will also take into account the defects which were not claimed by the appeal (Section 254, paragraph 1 of the Rules of Criminal Proceedings). The reason for the nullifying judgement may be formed only by material defects in the proceedings, in particular violation of the provisions which are to serve to clarify merit or to secure the right to defence; or by defects in the judgement, in particular lack of clarity and/or incompleteness of the merit findings (Section 258, paragraph 1, clause a/, b/ of the Rules of Criminal Proceedings). According to the judicial findings, the material defects consist of defects which might have caused an incorrect judgement or absence of some of the verdicts (Collection of Judicial Decisions and Opinions, Issue No. III/66). The protection of the fundamental right to a fair trial in criminal proceedings is served also by an irregular remedy called "petition against violation of law", which is at the disposal of the Minister of Justice only. This irregular remedy may be applied in the Supreme Court against a legally binding decision by a court, state prosecutor, or the investigator (Section 266 et seq. of the Rules of Criminal Proceedings).

2.2 Areas of Application of the Right to a Fair Trial from the Viewpoint of Various Branches of Law and Stages of the Proceedings

Neither legal theory nor the judicial findings of the Constitutional Court has any doubt that the fundamental right to a fair trial applies to all types of proceedings in the legal order; that is civil proceedings and the proceedings on the judicial review of administrative decisions, criminal proceedings, and administrative proceedings.

It is equally indubitable that its maxims apply to all stages of the individual types of the proceedings. From the viewpoint of the protection of the right to a fair trial before the Constitutional Court in connection with the individual stages of the proceedings, it is, however, necessary to note the principle of subsidiarity which

governs the proceedings on constitutional petitions, under which the admissibility of the constitutional petition is conditioned by the full utilisation of all procedural instruments provided by law for the protection of rights (Section 75 of the Constitutional Court Act).

The above general statements may be documented by the judicial findings of the Constitutional Court, in particular in the area of reviewing decisions on custody in the preliminary criminal proceedings and the judicial findings related to the review of compliance with preventive measures of the fair trial before the courts of the first instance and courts of appeal weighing merit, and the Supreme Court (court of special appeal against legally binding decisions) in the civil proceedings, etc.

THE RIGHT TO A FAIR TRIAL IN HUNGARY

Hungarian Law by Mr László TRÓCSÁNYI and Ms Alexandra HORVÁTH[5]

For a more convenient approach to the vast, sprawling subject of the right to a fair trial, we thought it desirable to divide it up into its main aspects. An examination from the following five angles in particular should provide an overall view of the enjoyment of this right in Hungary:

1. the emergence of the right to a fair trial in Hungary;

2. the right to a fair trial in Hungarian legislation;

3. the right to a fair trial in the case-law of the Constitutional Court;

4. the right to a fair trial in court practice;

5. other manifestations of the right to a fair trial.

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1. <u>Emergence of the right to a fair trial</u>

We should begin our study of the right to a fair trial by examining the change in the political system in 1989.

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Before 1989, legislation and court practice were heavily imbued with the principle of "socialist" legitimacy. Proceedings were therefore characterised by a somewhat paternalistic attitude on the part of the state and by restrictions on the parties' freedom of action. Consequently, there was no question of ensuring the independence of the judicial system and the impartiality of judges. The executive was equipped with means of influencing the administration of justice, as is illustrated by the fact that judges had to be appointed by the ruling party. Under the socialist regime, therefore, the parties to proceedings had no effective access to their procedural rights. To sum up, before Hungary's transition to democracy, there were limits to the fairness of the judicial system.

Naturally, in a country where the administration of justice was politically influenced for forty years, a great deal of work was needed, firstly to neutralise the negative effects of the previous political regime and then to rebuild the legal system. Parliament and the Constitutional Court played a particularly important role in the transition to democracy.

The main difficulty in this undertaking was the fact that whenever parliament passed new laws, the Constitutional Court was required to review their constitutionality, on top of its existing workload in relation to older legal rules.

2. The right to a fair trial in Hungarian legislation

The right to a fair trial is enshrined in the Constitution, and its substance is made more explicit in individual laws and consolidated by international treaties. An important factor in the emergence of the right to a fair trial in Hungary was the ratification of the European Convention on Human Rights in 1993. The convention has thus been incorporated into the domestic legal system in the form of a law.

As far as the provisions of the Constitution are concerned, the right to a fair trial is enshrined in Article 57, which is part of the chapter on fundamental rights. The inclusion of the right to a fair trial in this chapter was intended as a means of ensuring that this right was safeguarded in the same way as fundamental rights[6].

In particular, there are two additional constitutional safeguards for fundamental rights - and hence the right to a fair trial - as opposed to "ordinary" rights. The first is laid down in Article 8, paragraph 2 of the Constitution: "In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined

[6] *Article 70(K): "Claims arising from the infringement of fundamental rights, and objections to the decisions of public authorities regarding the fulfilment of duties, may be brought before a court of law."*

by law; such law, however, may not restrict the basic meaning and contents of fundamental rights". The application of this safeguard is monitored by the Constitutional Court. The second safeguard, laid down in Article 70(K) of the Constitution, concerns a remedy against infringements of fundamental rights.

The right to a fair trial was incorporated into the Constitution when it was amended in 1989. The wording used in the Constitution was borrowed from Article 14 of the International Covenant on Civil and Political Rights.

The following ingredients of the right to a fair trial are listed in the Constitution: access to the courts, independence of judges, requirement of a public hearing, the right to present one's own case and the right of appeal.

It should be noted that the Constitution does not specify all the ingredients of the right to a fair trial; more detailed regulations are laid down in individual laws.

The ingredients of the right to a fair trial are in particular set out in regulations governing the structure and operation of the judicial system and in the codes of civil and criminal procedure. It was considered extremely important that the right should be included in both codes in order to ensure its effective realisation. These legislative changes took place during the reform of the Hungarian judicial system, a process embarked upon in 1990.

As far as the scope of the reform is concerned, significant measures were taken in 1997 to modernise the status of judges and the structure of the courts. The law passed in this area provided for the separation of the executive and the judiciary, a measure which had far-reaching implications. For example, the Minister of Justice was stripped of the right to appoint court presidents. Organisational and administrative matters concerning the courts are now dealt with by a council known as the National Judiciary Council, which is empowered to draw up courts' budgets.

During the reforms, therefore, the most important principles governing the operation of the judicial system were set out in detail.

The aim of the reform, backed by parliament, was to bring Hungarian legislation into line with the European Convention on Human Rights, and in particular Article 6. The Strasbourg Court's case-law in relation to this article was also taken into account by the legislature.

Parliament's efforts to harmonise legislation in this area have meant that provisions on the right to a fair trial have become increasingly highly developed and detailed since 1989. The requirement to observe the right to a fair trial has

thus assumed considerable importance in legislation in general, in that compliance with this requirement also serves as a yardstick for future laws.

The government also recently introduced a bill before parliament, the intention of which was to set strict time limits in order to speed up court proceedings during the preparation and conduct of civil cases. It is, however, questionable whether imposing tight deadlines is the best means of ensuring compliance with the requirement of a reasonable period of time.

3. The right to a fair trial in the case-law of the Constitutional Court

The Constitutional Court has inevitably played a particularly important role in the development, strengthening and application of the right to a fair trial. The Court has had the opportunity to interpret a number of aspects of this right. It should be noted that the Court has, in its decisions, given a fairly broad interpretation of the right; decisions have frequently referred to external sources, such as the case-law of the Strasbourg Court and international treaties.

A number of decisions serve to illustrate the Court's case-law in relation to the right to a fair trial[7].

Firstly, mention should be made of Decision No. 59/1993 (XI.29). The facts of the case were that under Hungarian civil procedural law, courts could reject a complaint without issuing a summons if the complaint was manifestly unfounded or impossible to judge. This general provision had been incorporated into the Code of Civil Procedure in 1952 but had been revoked in 1957. The legislature had reintroduced it in 1972 in order to speed up proceedings.

The Constitutional Court found that the provision infringed the citizen's right, safeguarded by the Constitution, to a hearing by an independent tribunal. The Court emphasised that citizens were entitled to have their case heard by a court, and that access to the courts could not be refused for purely practical reasons. It consequently annulled the relevant provision of the Code of Civil Procedure.

Decision No. 58/1995 (IX.15) concerns the field of criminal law. In the particular case, the constitutionality of a provision of the Code of Criminal Procedure was challenged. Under the disputed provision, hearings could take place *in camera* in the interest of minors and in order to protect morals. The applicant claimed that the requirement for the accused to produce, in public, a

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[7] *The summaries of decisions include extracts from the Bulletin on Constitutional Case-Law, published by the Council of Europe's Venice Commission: in particular, No. 3/1993, p. 22, No. 3/1995, p. 311, No. 3/1996, p. 361 and No. 1/1998, p. 57.*

medical certificate concerning her mental state was a breach of her right to privacy.

The Constitutional Court did not find that the disputed provisions of the Code of Criminal Procedure were unconstitutional, but ruled, in an interpreting judgement, that they must be interpreted in accordance with constitutional principles and with the more detailed provisions of the International Covenant on Civil and Political Rights. Article 14 of the covenant provides for the possibility of holding all or part of a trial *in camera*, particularly where this is necessary to protect the interests of the parties with regard to their privacy.

Decision No. 52/1996 (XI.14) concerns the independence of the judiciary. In the particular case, the applicants challenged the constitutionality of several articles of Law Decrees Nos. 3 and 4 of 1983. The disputed provisions restricted the right of lawyers to act as legal representatives before a court or prosecution service in which they had already been employed as judges or prosecutors; the restriction applied for a period of two years from the date on which their employment had ended. The Minister of Justice and the Chief Public Prosecutor were able to exempt lawyers from the restriction.

The Constitutional Court stated in its decision that it was contrary not only to the constitutional principle of the independence of the judiciary but also to the principle of the separation of powers for the Minister of Justice and the Chief Public Prosecutor to have the discretionary power to decide whether lawyers in either private or commercial practice could act as legal representatives before a court or prosecution service in which they had previously been employed as judges or reporting judges.

With regard to another ingredient of the right to a fair trial (the right to present one's case), Decision No. 793/B/1997 ruled that reading aloud the testimony of an accused person at a court hearing despite the fact that the accused had refused to give evidence during the trial did not constitute a disproportionate restriction of the rights of the defence if certain constitutional requirements were met. In particular, the Court specified three requirements:

1. reading aloud and using the testimony given during the investigation can be constitutional if it is done in order to clarify the facts of the case or in the interest of another accused person or the victim;

2. the judge should examine whether, during the investigation, the accused was informed of his or her right to remain silent and the consequences of doing so, and whether the testimony was given under duress;

3. the judge should obtain evidence from other sources, even if the accused has made a full confession.

Case No. 6/1998 (decision of 11 March) was referred to the Constitutional Court by a judge who, in a case during which the public prosecutor had accused some members of the state security services of disclosing a state secret, had considered that a provision of the Code of Criminal Procedure and a provision of the ministerial decree on issuing copies of case files to the accused were unconstitutional. The Constitutional Court stated in its decision that the disputed provisions of the Code of Criminal Procedure and the ministerial decree on issuing copies of case files, under which the defence counsel and the accused were refused access to case files if they contained state or official secrets, infringed the rights of the defence and the right of an accused person to a fair trial.

4. The right to a fair trial in court practice

A new trend is emerging in Hungary: in court proceedings, applicants are relying directly on provisions of the Constitution or international conventions. In the past, this was only done rarely - primarily, no doubt, because of the lack of precedents.

The case-law of the Supreme Court shows that certain ingredients of the right to a fair trial - in particular, the right to present one's case and the presumption of innocence - are increasingly being cited by applicants.

An interesting example is the Supreme Court's annulment of a judgement of a district court on the ground that the right to a fair trial had been infringed (Bf.V.1664/1997/3). In the particular case, the district court had failed to summon the witnesses requested by the accused. In its decision to set the judgement aside, the Supreme Court referred to Article 6, paragraph 3(d) of the European Convention on Human Rights, which provides that everyone charged with a criminal offence has the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

It should be noted that district judges are entitled to act of their own motion and suspend proceedings if they are supposed to apply a legal rule that conflicts with the constitutional provision on the right to a fair trial.

In the light of the foregoing, it appears that the right to a fair trial has become a genuine, effective right, occupying a prominent place in the case-law of the

various courts. This suggests that it will continue to play an increasingly important role in the ordinary courts.

5. Other manifestations of the right to a fair trial

Under Article 6 of the European Convention on Human Rights, the right to a fair trial is an integral part of the administration of justice. The Strasbourg Court takes the view that the term "tribunal" is to be understood in its broadest sense; hence all bodies required to settle civil disputes are to be regarded as courts. Following this reasoning, administrative bodies may also be regarded as a kind of court in the sense that they are required to resolve civil disputes. Consequently, the right to a fair trial should also be guaranteed in proceedings before these bodies.

Hungary has adopted the same line of thought, with the addition of a further element. The ombudsman responsible for supervising the functioning of administrative bodies has on a number of occasions (for example, in decisions 6414/1996, 8441/1996, 4574/1997, 6788/1997, 7627/1997 and 10640/1997) pointed out that the right to a fair trial cannot be interpreted as a requirement that is only applicable to the courts. The fact that the Constitution only explicitly mentions the courts in relation to the right to a fair trial does not mean that other bodies are exempted from the requirements of impartiality and a fair trial. According to the broader interpretation followed by the ombudsman, administrative bodies and organs of the public authorities are also required, in the course of their proceedings, to meet the conditions for ensuring a fair trial.

From this broader perspective, the ombudsman has examined the application of the right to a fair trial in relation to a number of bodies, for example within the national defence forces and university bodies and in proceedings conducted by consumer protection bodies, local authorities and the police.

To sum up, it should be noted that Hungary has developed a broad concept of the right to a fair trial, which is realised and enjoyed in more spheres than are actually required for member states under international provisions. However, it is worth pointing out that the problems typically connected with the right to a fair trial are a long way from being solved in Hungary: proceedings take too long, there are practical problems during the investigation stage, the courts are overburdened and judges' working conditions are unsatisfactory.

Nevertheless, a positive assessment may be made since the right to a fair trial, which emerged only recently in Hungary, is safeguarded by laws whose application is monitored by the Constitutional Court. In this way, the enjoyment of the right is secured in terms of both legislation and court practice.

THE RIGHT TO A FAIR TRIAL IN ROMANIA

Romanian Law Report by Mr Florin Bucur VASILESCU

Judge at the Constitutional Court of Romania

The idea of rights is merely the concept of virtue brought into the world of politics ……Tocqueville

The life of a society depends on the preservation of individual rights ...Herbert Spencer[*]

1. The rule of law is fundamental to genuine democratisation of political systems, and for this reason it has assumed a privileged status in modern times: "*Who does not draw inspiration from the rule of law or include implementation of it amongst either the accomplishments on which his country prides itself or the objectives that it sets for itself?*"[1]

The concept of the rule of law is a defining characteristic of European constitutionalism, the influence of which in the modern world is indisputable.[2] Under this concept, the state itself limits the scope of its powers on the basis of its own system of values. Should the state fail to take account of the positive law that it has itself created, the very legitimacy of its exercise of power is called into question. As Ihering stated at the beginning of this century, "*an executive which undermines a legal system that it has itself established is depriving itself of authority*".[3]

Carré de Marlberg, one of the great French legal theoreticians, stressed that "*the rule of law system has been devised in the public interest and is especially*

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[*] *Unofficial translation*

[1] *Léo Hamon, L'Etat de droit et son essence, in "Revue française de Droit constitutionnel", 1994, No. 4, p. 699.*

[2] *C. Grewe and H. Luiz-Fabri, Droits constitutionnels européens, Paris, PUF, 1995, p. 9; along the same lines, F.B. Vasilescu, Fin du millénaire: triomphe du constitutionnalisme européen, in the "Annuaire international de Justice Constitutionnelle", Vol. XII, 1996, Economica, PUAM, 1997, p. 60 et seq.*

[3] *R. von Ihering, L'Evolution du droit (Der Zweck im Recht), Paris, Libr. A Marescq, 1901, p. 260.*

intended to protect citizens and defend them against the arbitrary actions of state authorities",[4] and the public institution which is accessible to individuals is the court: "*In order for the rule of law to be implemented, it is in fact essential that citizens are equipped with legal powers that enable them to contest flawed state actions that would infringe their individual rights*".[5] In such conditions, *"... control by the courts, in this context, seems, even more so than in the past, the real guarantor of the rule of law*".[6]

"*What is the purpose of, and justification for, an application to the courts?*"[7] wondered Léo Hamon: his response is a real synthesis of the supreme values of the process of justice, embodied by the judge, who is characterised by "*a specific intellectual training, independence from political authority, an obligation to act on the basis of general rules and on the basis of inter partes proceedings while providing reasons for the decision taken*".[8]

2. In modern constitutional law, the opportunity available to citizens to apply to the courts in order to have their rights and legitimate interests respected derives from the institution of rights and safeguards. General rights include the right to apply to a court, the right to put one's case and know one's opponent's case and the right to legal certainty.[9] In the context of the right to put one's case and know one's opponent's case, French judicial practice, based on relevant international principles and agreements, has emphasised, as well as constitutional protection for the functions of counsel, the need for a fair and just procedure which guarantees that the rights of the parties are balanced.[10]

3. Nowadays, the most important international agreement enshrining human rights both comprehensively and explicitly is the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948. The provisions of Article 10 of the declaration articulate what is known as the "fair trial" rule, establishing that "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination*

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[4] *Carré de Marlberg, Contribution à la théorie générale de l'Etat, Paris, Sirey, 1920, vol. I, p. 492.*

[5] *Idem. In a similar vein, see F.B. Vasilescu, op. cit., p. 62.*
[6] *J. Chevallier, L'Etat de droit, Paris, Montchrestien, Cole.Clefs, 1992, p. 87.*

[7] *Op. cit., p. 709.*

[8] *Ibidem.*

[9] *L. Favoreu et al., Droit constitutionnel, Paris, Dalloz, 1998, p. 864 et seq.*

[10] *Idem, p. 869.*

of his rights and obligations and of any criminal charge against him". At European level, the necessity of a fair trial is stated in the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which came into force on 3 September 1953, and which provides for the same right in a significantly different manner: *"In the determination of his civil rights* (our underlining) *and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."* The text then provides that the judgement shall "*be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*". The same text then provides for the presumption of innocence and, in criminal cases, the right of the accused to be informed, in a language which he understands and in detail, of the nature and cause of the accusation against him, to have adequate time for the preparation of his defence and to have legal assistance, to put forward witnesses and to have the free assistance of an interpreter if he cannot understand or speak the language used in court. It is clear that these last requirements refer exclusively to criminal proceedings.

4. These provisions express a concept known in the English-speaking countries as the "fair trial" ("procès équitable" in French). For a trial to be fair, a body of procedural rules must be applied throughout, which are intended to create a balance between the parties to the proceedings, and arrangements established that can guarantee the independence and impartiality of the judiciary. This independence presupposes measures that will guarantee free decision-making (conditions of appointment, remuneration, career development, etc). Impartiality makes demands of the judge's personal qualities and intellectual and moral scrupulousness. Given responsibility for applying the law, judges are frequently called on to interpret it, not on the basis of their personal values, but with a strict neutrality preventing them from taking sides and requiring them to act solely on the basis of the decisive material in the case-file.[11]

The Commentary on the European Convention on Human Rights (hereunder referred to as the Comm. CEDH) points out that the English title of this important document is more precise than the French one, since the Convention's objective is in fact not only to enumerate these rights and liberties, but to protect them, this

[11] *La Déclaration Universelle des droits de l'homme, texts collected by M. Bettati, O. Duhamel and L. Greilsamer for "Le Monde", Paris, Gallimard, Col. Folio/Actuel, 1998, p. 71.*

being the basic idea underlying the Convention, the stated aim of which is "*to create practical methods to ensure they are respected*".[12]

Consequently, the Convention represents a natural link between the fundamental freedoms of the individual and the requirements of a democratic society, with the judicial practice of the Strasbourg Court time and again highlighting "*the prominent position held by the right to a fair trial in a democratic society*".[13] At the same time, it has frequently been noted in the case-law pertaining to implementation of the ECHR that "*the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*" (our underlining).[14]

4.1. In analysing the interpretation of Article 6 of the ECHR, it is possible to identify several areas: the safeguard mechanism, scope, general content and general content concerning criminal cases.

The main elements in the first area are the parties concerned by the safeguard, namely the individual, as the beneficiary of the guarantee, and the state as the provider, as well as the approval given to this safeguard, which requires the judicial system to be independent and genuinely free from any interference on the part of the state: the supervision carried out by the Strasbourg Court continues to be both practical in relation to the cases submitted for judgement, and comprehensive in the sense that the various guarantees enshrined in Article 6 are inter-related and that "*respect for a particular safeguard should be weighed up in relation to the whole of the trial*".[15] With regard to the scope of the safeguard, particular attention should be paid to the civil aspect ("rights and obligations"), which nevertheless covers the entire field of litigation relating to interpersonal relations, and more, given that *"... the boundaries between public and private law were becoming hazy and shifting in many areas*".[16]

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[12] *La Convention européenne des droits de l'homme, article-by-article commentary (in French), edited by E. Pettiti, E. Decaux and P.H. Imbert, Paris, Economica, 1995, p. 240.*

[13] *Comm. CEDH, p. 241.*

[14] *Idem; the Airey v. Ireland case, judgement of 9 October 1979, A, No. 32 §24; the Artico v. Italy case, judgement of 13 May 1980, A, No. 37 §33 and a number of subsequent judgements (Ibidem).*

[15] *Comm.CEDH, p. 248.*

[16] *Idem, p. 251. For this reason, we believe that disputes pertaining to administrative matters cannot be considered exceptions to the trial concept.*

With regard to protection in criminal cases, although the content of Article 6 is extensively and clearly set out (for example, the obligation to ensure that the individual is officially notified by the competent authority of the allegation that he has committed a criminal offence),[17] the general content of the safeguard encompasses a wide variety of aspects which represent a subject, or frequently the main subject of the Strasbourg Court's supervision.

Accordingly, the requirements concerning courts (they should have the necessary characteristics of impartial, independent and legally-established courts, to which the individual must have genuine access) and trials themselves (for example, it is not absolutely necessary to have different tiers of jurisdiction)[18] should be noted: in this respect, it is important for "*each of the parties to the trial to be able to present his case under conditions which do not place him at a substantial disadvantage in the trial as a whole vis-à-vis his opponent ...*"[19]. In this context, it should be emphasised that even the presumption of innocence *"is not a totally distinct principle, but a particular application of the requirement for fairness"*[20]); the same applies to *inter partes* debate in the context of a public trial, it being specified that "*the public nature of proceedings protects individuals from the administration of justice in secret with no public scrutiny*"[21]: this helps to maintain confidence in the courts.

Clearly, the concept of "reasonable time" is of particular importance: in considering it, the Court has regard to the nature of the case, in accordance with the "justice delayed is justice denied" principle, and takes account of the complexity of the trial, the behaviour of the parties and the public authorities, etc.[22]

5. The Romanian system which ensures implementation of the provisions of Article 6 of the ECHR[23] has several levels: the constitutional, supra-constitutional

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[17] *Ibidem, p. 256.*

[18] *Ibidem, p. 263.*

[19] *Ibidem, p. 265: Delcourt v. Belgium, judgement of 17 January 1970, A No. 11, §34.*

[20] *Ibidem, p. 265: Minelli v. Italy, judgement of 25 March 1983, A No. 62, §27.*

[21] *Ibidem, p. 266.*

[22] *Ibidem, p. 268: X v. France, judgement of 31 March 1992, A No. 234, Dobbertin v. France, judgement of 25 February 1993, A No. 256 §44 etc.*

[23] *Ratified by Romania in Law No. 30 of 18 May 1994, published in Official Gazette No. 135/1994. The Universal Declaration of Human Rights was ratified prior to 1989.*

and infra-constitutional levels and case-law, particularly the decisions reached by the Constitutional Court since it commenced its work (in June 1992).

5.1. The concept adopted by the Romanian Constituent Assembly[24] was that of a "binary" system[25] which includes two sets of sources, one national (excluding the local level, since Romania is a unitary state with a high degree of centralisation) the other international. The Romanian Constitution contains provisions in the latter sphere which are in line with international standards. Thus, under Article 20, "*Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence".* In addition, Article 11 provides that treaties which have been ratified by parliament are part of national law. Thus, all provisions concerning the right to a fair trial included in international conventions of every kind are part of national law and enjoy special status in relation to the latter's provisions.

At the same time, constitutional provisions include specific regulations guaranteeing an appropriate framework for the observance of citizens' rights in the justice system in general, and with particular regard to a fair trial.

Thus, in the context of the joint provisions on fundamental rights and freedoms, set out in Section II, free access to justice (Art. 21) is regulated in the following terms: "*Every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties, and interests. The exercise of this right may not be restricted by any law*"[26] (our underlining).

In accordance with the provisions of Chapter VI, Section I, justice shall be rendered in the name of the law and judges shall be independent and subject only to the law (Art. 123), the office of judge being incompatible with any other public or private office, with the exception of teaching activities in higher education (Art. 124). In addition, Article 37 states that judges may not belong to political parties. Article 124 also lays down that judges shall be appointed by the President of

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[24] *After 14 months of debate, the Romanian Constitution was adopted by the Constituent Assembly on 21 November 1991, and was endorsed by the referendum of 8 December 1991.*

[25] *L. Favoreu, op. cit., pp. 181-182.*

[26] *For this reason, even Article 1 of the Constitution mentions justice among the supreme values guaranteed by the Romanian state.*

Romania and that they shall be irremovable.[27] Only the Superior Council of the Magistracy can promote, transfer and discipline judges; the President may only appoint judges to any court, or prosecutors, on the Council's recommendation (with the exception of judges on probation). In addition, the Council performs the role of a disciplinary council for judges: in this case, proceedings are presided over by the President of the Supreme Court of Justice (in other instances, proceedings are presided over by the Minister of Justice, who has no right to vote - Art. 133).

Under Article 132 of the Constitution, the Superior Council of the Magistracy consists of judges elected for a four-year term by the two Chambers of Parliament in joint session.

With regard to the public authorities which administer justice, the provisions of Article 125 of the Constitution should be noted: under these, justice is administered exclusively by the Supreme Court of Justice and the courts established by law, the creation of courts of exception being prohibited.

The provisions of Article 148 (1) are of particular importance in ensuring the proper conduct of the judiciary's operations: they state that the independence of the judiciary is absolute, in that, like the other items listed under this article, it cannot be subject to revision. Nor may any revision of the Constitution affect fundamental freedoms or their safeguards (Art. 148 (2)).

Turning to certain specific aspects of the fairness of the trial, referred to above, it is necessary to draw attention to a series of constitutional provisions on the conduct of the trial proper, as well as to various procedural safeguards intended to ensure the necessary framework at the level of the international standards mentioned.

Accordingly, Article 126 lays down that proceedings shall be public, except in cases provided for by law, and Article 128 states that the parties concerned may appeal against decisions of the court, in accordance with the law.

The language of court proceedings has to be Romanian, but, taking account of the special protection afforded to national minorities, which have the right to preserve their linguistic identity (Art. 6 of the Constitution), Article 127 (2) provides that citizens belonging to these minorities (and also persons who do not understand Romanian) shall be entitled to take cognisance of all acts and files of the case, to

[27] *The judges of the Supreme Court of Justice are appointed for a renewable term of 6 years (Article 124 of the Constitution), again by the President of Romania.*

speak before the court, and to formulate conclusions through an interpreter; in criminal trials, this right shall be ensured free of charge.[28]

On the question of personal liberty, Article 23 provides genuine and detailed protection for the principle of *habeas corpus* (extending to nine paragraphs); for this reason, it seems appropriate to draw attention to some of the most important provisions, covering the presumption of innocence (paragraph 8), the principle of *nullum crimen sine lege, nulla poena sine lege* (9) and police custody and the rights of detained or arrested persons, and particularly to paragraph 5, according to which a person who has been detained or arrested shall be promptly informed, in a language he understands, of the grounds for his detention or arrest, and notified of the charges against him, as soon as practicable; notification of the charges shall be made only in the presence of a lawyer of his own choosing or appointed *ex officio*. Finally, Article 24 is categorical: the right of defence is guaranteed, and the parties have the right to a lawyer throughout the trial.

5.2. However, the independence of the judiciary is preserved by yet another method, via one of the most important supra-constitutional principles, the separation of powers. As is known,[29] this principle is not enshrined *per se* in the Romanian Constitution, but the case law of the Constitutional Court has applied it in a number of cases,[30] and it may rightly be considered "a structural and operational principle of the Romanian constitutional order".[31] Furthermore, the case-law of the Constitutional Court confirming this principle merely gives expression to the content of Article 2 (2) of Law No. 47/1992 on the court's organisation and functioning, which states that the provisions of law-making texts which violate the provisions and principles of the Constitution (our underlining) are unconstitutional.

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[28]By Decision No. 113 of 20 July 1999, the Constitutional Court unanimously rejected an objection concerning the possibility of ratifying the European Charter for Minority Languages: the decision was published in the Official Gazette No. 60, of 29 July 1999.

[29]F.B. Vasilescu, op. cit., p. 55.

[30]See, for example, the decisions mentioned in the report presented by the delegation of the Romanian Constitutional Court on the occasion of the 10th Conference of the European Constitutional Courts in Budapest, published in "Separation of Powers regarding the Constitutional Court's Jurisdiction", Budapest, 1997, p. 337 onwards (in the French text); also, F.B. Vasilescu, La justice constitutionnelle en Europe Centrale: Roumanie, Bruylant (Brussels), LGDJ, Paris, 1997, p. 138.

[31]The same report, p. 338 (in the French text).

One of the Court's first decisions in this area, namely Decision No. 6/1992,[32] declared unconstitutional a law under which the parliament suspended the process of judgement and the execution of final court decisions concerning certain specific cases, categorically citing violation of the separation of powers principle: "*Under this principle, parliament does not have the right to intervene in the process of administering justice (...). Interference by the legislative authorities which would prevent the judicial authorities from operating (...) would have the effect of creating a constitutional imbalance between these authorities*".

5.3. However, there is no doubt that the majority of the legal provisions governing preservation of the requisite conditions for a fair trial are contained in the infra-constitutional law-making texts, particularly the Law on the Organisation of the Courts (No. 92/1992), amended in 1997,[33] the Law on the Organisation and Functioning of the Constitutional Court (No. 47/1992), also amended in 1997,[34] and the Codes of Civil and Criminal Procedure. Thus, as well as reiterating some of the constitutional texts, Law No. 92/1992 includes provisions intended to consolidate the independence of the judiciary, ensure optimal functioning of the Superior Council of the Magistracy, regulate the appointment and promotion of judges and, more generally, govern various facets intended to bolster application of the principle of the irremovability of judges.

Law No. 47/1992 on the Organisation and Functioning of the Constitutional Court also includes significant provisions on the fairness of trials, relating to the resolution of objections of unconstitutionality in the context of *a posteriori* supervision of government - adopted laws or orders carried out at the request of the parties or of the prosecution service.

In its initial form, the law provided that certain objections, which were bound to be deemed clearly unfounded ("*manifesta infondatezza*", according to the Italian model) could be resolved without the parties being summoned to appear, provided that all the judges in the division were in agreement.

Under the amended Law of 1997,[35] all hearings (on the resolution of such objections) are now public, with the parties frequently asserting that the previous proceedings had not provided them with an opportunity to prepare and argue their defence before the court. Otherwise, the entire procedure for this type of

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[32] *Published in Official Gazette No. 48 of 4 March 1993.*

[33] *Republished in Official Gazette No. 259 of 30 September 1997.*

[34] *Republished in Official Gazette No. 170 of 25 July 1997.*

[35] *Law No. 138 of 24 July 1997, published in Official Gazette No. 170 of 25 July 1997.*

supervision is conducted in accordance with the rules of civil procedure, except in cases where the specific nature of the court's activity necessitates exemptions, when, for example, requests have to be made for opinions from certain public authorities (the Chambers of Parliament and the government) concerning the objection of unconstitutionality submitted for judgement. With regard to the consequences of the decisions, it is known that, where decisions are given in the context of supervision of constitutionality, they have *erga omnes* effects and are all published in the Official Gazette, are final in nature and are valid only from the date of publication.

Admittedly, the majority of provisions pertaining to the guarantee of a fair trial are included in the two codes of procedure (civil and criminal), but since it is impossible to give an exhaustive list, we will simply list the most important ones.

Thus, with regard to the language used in the trial, Article 128 of the Code of Criminal Procedure states that an interpreter may be used only in cases where the judge does not know the accused persons' mother tongue: otherwise, proceedings take place in the latter language. Article 7 of the Code provides that "*in territorial administrative units with a non-Romanian population, the use of the native language of this population is guaranteed*". In addition, Article 142 (2) of the Code of Civil Procedure provides that the judge himself may act as an interpreter for the other parties to the proceedings if one of these parties is familiar only with his mother tongue and is unable to communicate in the official language of Romania.[36]

With regard to the right of defence, while Article 6 of the Code of Criminal Procedure states that "*The right of defence is guaranteed to accused persons and other parties throughout the criminal trial. During the criminal trial, the judicial organs are required to ensure that the parties may exercise fully their procedural rights under the law and to bring the necessary evidence for the defence*", Article 74 of the Code of Civil Procedure states that a person who is unable to pay for a lawyer may request free legal assistance, which may be granted if certain conditions are met. Also with regard to the exercise of this right, Article 156 of the Code of Civil Procedure provides that, at the request of the party concerned, the court may postpone the case, in the absence of a lawyer at the first date set for the hearing: in court practice, requests are always approved in such cases. With reference to the requirement that cases be judged within a reasonable time, Article 260 of the Code of Civil Procedure provides that if the court is not able to reach a decision at the end of the hearing, it may postpone adoption of the judgement for a

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[36] *F.B. Vasilescu, Constitutional forms of the Nation-State: Romania, in "The transformation of the nation-state in Europe at the dawn of the 21st century", Council of Europe, Coll. Science and Technique of Democracy, No. 22, Strasbourg, 1998, pp. 99 and 100.*

maximum of seven days. Finally, all the procedural measures cited for both civil and criminal cases guarantee equal treatment for the parties to the dispute throughout the trial, including the appeal procedure, indicating the existence of a series of special provisions concerning the option available to the principal state prosecutor of using certain special remedies.

6. Since it was set up more than seven years ago, the Constitutional Court has frequently had the opportunity to express an opinion on certain areas which directly concern the pre-conditions for a fair trial, in line with the provisions mentioned in the practical contexts or international declarations referred to above.

Thus, the court has issued certain important decisions on the independence and irremovability of judges.

Accordingly, in Decisions No. 45 and No. 46/1994, declaring numerous provisions of the rules of procedure of the two Chambers of Parliament unconstitutional, the court held that the summoning of judges by a parliamentary committee in order to give an account of their activities was unconstitutional, since "*it clearly violates the constitutional provisions laying down, even implicitly, the separation of powers in the state and, undoubtedly, impinges on the independence of the judiciary and its subjection to the law alone*". In Decision No. 39/1996, the court held that the system of requirements set up for appointing judges "*is intended to ensure effective implementation of the principle of the independence of the judiciary and, at the same time, to guarantee the judiciary's professionalism and prestige*".

With regard to the public nature of hearings, Decision No. 56/1993 stated that public proceedings for divorce applications did not contravene Article 26 of the Constitution concerning respect for family and private life, since the court could take its decision without the public's presence if it was felt that the evidence would be better established in this way; otherwise, as stated in the decision, exclusion of the public would violate the principle of the public nature of hearings, "*which represents a fundamental principle of the administration of justice in a state governed by the rule of law*".

On the question of public delivery of judgements, the court ruled in Decision No. 11/1999 that Article 22 (5) of the Code of Civil Procedure was unconstitutional: this article states that courts have the right in certain cases to deliver judgement without summoning the parties to the judge's chambers, and that the period for entering an appeal should begin from the date of this judgement, which the parties cannot be aware of. The Constitutional Court therefore held that the interested party was deprived of "*the opportunity to take*

cognisance of the judgement delivered, a fact which, more often than not, makes it impossible to exercise the right of appeal within the required time".

In numerous decisions, the Constitutional Court has held that it was constitutionally acceptable to amend the Code of Civil Procedure so that the principal state prosecutor could use the special appeal procedure to have a judgement set aside only within 6 months of a court's judgement becoming final, rather than at any time, as had been provided for in the previous provisions of the Code of Civil Procedure. It thus acknowledged the need to resolve cases within a reasonable time. In this regard, see, for example, Decisions No. 29, No. 52 and No. 79/1997.

The decision on the provisions of Article 278 of the Code of Criminal Procedure (Decision No. 486/1997) is an important one, intended to strengthen free access to justice in criminal cases. The Constitutional Court ruled unconstitutional provisions in the Code of Criminal Procedure which were the subject of a complaint relating to the measures or steps decided by the prosecutor and resolved only via the prosecuting bodies, through official channels. It ruled that these provisions violated Article 21 of the Constitution, which states that no law may restrict access to justice, a principle which also extends to the right of parties concerned to ask the courts to examine their applications in such situations.

With regard to the use of remedies in criminal cases, the provisions of Article 332 (3) of the Code of Criminal Procedure, which state that only the prosecutor and the arrested defendant concerned have the right to lodge an appeal, were found to be unconstitutional, as they violated Article 128 of the Constitution on the use of remedies and the principle of equal treatment of parties, since an equal interest in lodging an appeal may exist not only for the arrested defendant concerned, but also for persons who have not been arrested but who nevertheless have an interest in the setting aside of the unfavourable judgement in question (Decision No. 129/1996).

A Constitutional Court decision which has helped significantly to preserve individual rights is Decision No. 99/1994, concerning the presumption of innocence, which must be respected until the judgement against a defendant in criminal proceedings becomes final (Article 23 (8) of the Constitution). This decision stated that the provisions of a 1969 law requiring detainees to wear detention centre uniform during prosecution proceedings or trial, in the same way as persons who had been finally convicted, were unconstitutional. According to the statement of reasons for the decision, these provisions signified that, although such defendants had not been found guilty (and were therefore entitled to a presumption of innocence), they appeared before the prosecution body or court in

clothing similar to that worn by persons serving a prison sentence, a fact that was in direct conflict with the presumption of innocence.

Finally, the text of Article 257 of the Code of Criminal Procedure was found to be unconstitutional: under this article, examination of the defendant and the presentation of evidence for use in the prosecution before the court is asked to begin a trial remain at the discretion of the prosecutor, who may therefore refer the case to the courts without telling the person concerned. However, in accordance with the Strasbourg Court's practice, "*the charge should be the official notification, issued by the responsible authority, of the accusation of having committed a criminal offence*".[37]

This means that the official notification cannot be left to the prosecutor's discretion, and that the accused person must be aware of having been so accused, in order to have sufficient time to prepare his or her defence before the court.

Of course, the Constitutional Court has delivered many other decisions on the constitutionality of the rules governing criminal as well as civil proceedings, although it began its work only recently. However, we have selected those decisions of greatest interest in the current context. This work will be gaining an even higher profile, particularly on account of, for example, the adoption of a Code of Criminal Procedure, the draft of which is currently being prepared.

THE RIGHT TO A FAIR TRIAL IN SPAIN

Spanish Law Report by Ms Teresa FREIXES

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I. DEFINITION AND LEGAL FORCE OF THE RIGHT TO A FAIR TRIAL

Incorporation of the right to a fair trial in the Spanish legal system

The right to a fair trial is guaranteed in Article 24 of the 1978 Spanish Constitution and is described as "the right to obtain the effective protection of the judges and the courts". This article is to be found in Title I, Chapter 2, Section 1 of the Constitution; *the right to the effective protection of the courts is therefore placed in the part of the Spanish Constitution which is afforded the firmest*

[37] *Commentaire CEDH, p. 270.*

guarantees. Recognition of this right, with its attendant high level of legal guarantees, was born with the Constitution. Furthermore, the Spanish constituent assembly was fully conscious of the importance of the effective protection of the courts in a state governed by the rule of law, and the role of Article 6 of the European Convention on Human Rights as the minimum standard required of acceding countries, given that Spain at that time had applied for membership of the Council of Europe.

Two points need to be made about the structure of our 1978 Constitution and Article 24: first, Article 10.2 states that the fundamental rights enshrined in the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and international conventions and treaties ratified by Spain (in other words, these rights must be interpreted in line with the European Convention on Human Rights). Second, there is a striking similarity between Article 24 of the Constitution and Article 6 ECHR: in both cases, recognition of this right is addressed in a composite way, beginning with a general clause (the right to a fair trial in the Convention and the right to the effective protection of the courts in the Constitution) followed by a list of procedural guarantees to ensure the effective exercise of those rights.

An examination of the legislative debates makes it clear that *Article 6 of the Convention was the model for Article 24 of the Constitution*. This has made it considerably easier to incorporate the guarantees enshrined in the ECHR and the case-law of the European Court of Human Rights into the Spanish legal system, particularly as regards procedural guarantees. Furthermore, throughout its own case-law, the Spanish Constitutional Court, in interpreting the right to the effective protection of the courts in accordance with the international treaties ratified by Spain, has frequently made reference to the similarity between Article 6 ECHR and Article 24 of the Constitution, viewed either as a whole or individually with regard to each of the guarantees contained therein[38].

The legal force of the right to a fair trial

Under the Spanish Constitution, *the right to a fair trial is a fundamental right with constitutional force and direct effect which can be relied upon before any court*,

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[38] *For example, STC 12/1993 granting procedural guarantees to social proceedings in consideration of the case-law of the European Court; STC 99/1985 granting foreigners the right to the effective protection of the courts in accordance with the European Convention; STC 101/1984 incorporating the definition of independent and impartial court established by the European Court into the interpretation of the ordinary courts predetermined by law required under Article 24 of the Constitution.*

since Article 53 of the Constitution confers this force on those rights which, like those contained in Article 24, derive from Title I, Chapter 2, Section 1.

The Constitutional Court, from its very first judgements (STC 25/1981) has granted a twofold legal dimension to fundamental rights, including the right to a fair trial. The Constitutional Court considers these rights to have a legal structure as *subjective rights in the traditional sense*, comprising the guarantee of a legal "status" for individuals and legal persons who are entitled to exercise these rights, in that they can be enforced before the ordinary courts or through an amparo appeal before the Constitutional Court (STC 64/1988). Furthermore, the Constitutional Court confirmed the *objective nature* of the right to a fair trial as a fundamental factor in the constitutional order, both as regards the whole legal system and each of the constituent branches, since Article 10.1 of the Spanish Constitution states that basic rights are "fundamental to political order and social peace" (STC 53/1985).

This twofold dimension, subjective and objective, gives the right to a fair trial a legal position which has a snowball effect since, as will be seen below, the objective nature of this right has led, among other things, to the constitutional establishment of *actio popularis*[39].

Furthermore, the Constitutional Court has ruled that even if a right recognised in the constitution requires legislative action so that it may be further developed and become fully effective, one cannot wait for parliament to perform its task and for laws to be promulgated for this to happen, since fundamental rights and freedoms are the direct origin of rights and obligations and are not simply general principles (STC 254/1993). In accordance with this doctrine, the Constitutional Court sometimes *establishes guarantees of a fair trial by applying the Constitution directly*. This, for example, is the case with regard to the granting of the right to an interpreter free of charge for Spanish citizens who do not have a sufficient knowledge of Spanish (STC 194/1984)[40] as it would in respect of a foreigner.

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[39] *This refers to the possibility for any member of the public to bring an action in the course of proceedings to defend the interests of all society, whether or not he or she is in any way concerned with the case. Counsel representing actio popularis is in an situation of "equality of arms" in relation to the other parties in the proceedings as a consequence of the objective nature of the right to a fair trial. However, actio popularis as interpreted by the Constitutional Court cannot always be used, as it is a right deriving from a law and it is the law which governs how and in what circumstances it may be exercised (STC 154/1997).*

[40] *The Constitutional Court asserts that the right to an interpreter derives directly from the Constitution, even if parliament has not carried out its role of introducing legislation in that respect and the Constitution imposes the requirement of mastery of Spanish, since it is not possible to hamper the right of defence and, consequently, the smooth communication*

The Constitutional Court has also ruled that the effective protection of the courts enshrined in Article 24 of the Constitution is a *right of performance* which can be invoked exclusively from the courts forming part of the judicial power (STC 205/1990). It is, therefore, a right which the public authorities must guarantee and, consequently, they must provide all the material and personal means to ensure citizens have access to justice at all levels. Accordingly, the public authorities will have to establish the procedural and material conditions, including budgetary appropriations, to ensure the effective exercise of this right.

Nevertheless, account must also be taken of the extent to which the right to a fair trial is *circumscribed by law*. If we look closely at Article 24 of the Spanish Constitution as a whole, it is clear that the two paragraphs require the introduction of specific legislation since it is virtually impossible to secure effective protection and provide for the procedural guarantees set out in this article without legislative action to determine arrangements for access to the courts, time limits, etc. This requirement has shown that it is impossible to apply the Constitution in the absence of procedural laws. The Constitutional Court has indeed acknowledged this by applying the interpretative approach associated with legally circumscribed rights to the right to a fair trial (STC 99/1985) although it also demonstrated, as we saw with regard to the right to an interpreter, that the Constitution may sometimes directly create rights or guarantees as a result of a broad interpretation of the Constitution or laws.

Consequently, it may be concluded that in the Spanish Constitution, the right to a fair trial is a fundamental right of performance which generally requires to be circumscribed in legislation but which has been directly applied by the Constitutional Court, in cases where the absence of legislation might give rise to a violation of this right, in line with a broad interpretation of the Constitution.

The constitutionally declared scope of the right to a fair trial as an independent right containing guarantees which are also fundamental rights

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between people deprived of their liberty and their counsel. The judgement under reference concerned a Basque citizen who showed that he did not understand Spanish well enough to communicate with the court trying him and the latter had failed to assign an interpreter to him because the law on criminal procedure provided for this facility only in respect of foreigners. The Constitutional Court considered that the law should be interpreted as broadly as possible to avoid its being declared unconstitutional and for this reason it established the right to an interpreter for Spanish citizens in direct application of the Constitution.

As shown above, the right to a fair trial in the Spanish Constitution is complex in structure, similar to the structure of Article 6 of the European Convention on Human Rights.

Article 24 of the Spanish Constitution states:

> 1. Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his legitimate rights and interests, and in no case may he go undefended.
>
> 2. Likewise, all persons have the right of access to the Ordinary Judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of the evidence pertinent to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to the presumption of innocence.
>
> The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences.

It will be seen that *Article 24 of the Spanish Constitution contains, in its first paragraph, the general concept of the right to a fair trial*, described as the "effective protection of the judges and courts" for all legitimate rights and interests, including the right not to go undefended. The *second paragraph of Article 24 describes certain procedural guarantees*, to which the authors wished to give the strongest safeguards (including the amparo appeal) and *which are also fundamental rights*, independently of their relation to the right to a fair trial.

The Constitutional Court throughout its whole doctrine has shown that there are two legal aspects to Article 24 which are closely connected but which nevertheless must be differentiated: the second paragraph of this article describes procedural guarantees; the first establishes the principle of effective protection in terms of access to the courts (STC 46/1982).

The Constitutional Court has asserted the complex structure of the first paragraph since in the view of the Court, *the right to effective protection is an independent right which presupposes*, from a positive perspective, *access to the courts*[41], including the right to obtain a court ruling in conformity with the law, and *the*

[41] *It should be added that in the view of the Constitutional Court, given that the right to the effective protection of the courts enshrined in Article 24.1 of the Constitution guarantees access to the courts, it establishes a guarantee prior to the trial aimed at verifying whether the relevant circumstances to this effect have occurred (STC 46/1982).*

right to the use of instruments which, in the exercise of this right, must be made available in defence of own interests, including the adversarial principle and equality of arms[42]. All this must be interpreted as a unitary whole so as not to lead to what in Spain is termed "indefensión" – the position of not being able effectively to claim or defend one's rights (STC 48/1986). "Indefensión", according to the Constitutional Court, has a material and not exclusively procedural nature (STC 89/1986). For it to be relied upon, the courts must have prevented the parties to the proceedings from exercising their rights of defence (STC 89/1986) but with a certain constitutional justification (STC 98/1987). The *right to obtain a court ruling in conformity with the law,* in the view of the Constitutional Court, includes *the obligation for courts to provide reasons* for their rulings (STC 14/1991) with reasonable grounds (STC 184/1992) at both procedural and material level (STC 325/1994) which complies with the will of the parties and the system of sources of law (STC 23/1988)[43]. Moreover, the Constitutional Court includes in the right to a fair trial, as one of the constituents of the grounds for judgements, the *need to justify changes of doctrine,* since if this were not the case there would also be a violation of the principle of equality before the application of the law (STC 42/1993 among others). Lastly, the Constitutional Court also demands in the concept of fair trial the *right to obtain the enforcement of final judgements*[44], which also sometimes entails the adoption

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[42] We have a number of problems with the Constitutional Court implementing Act and the principle of equality of arms in proceedings concerning objections as to unconstitutionality, since the European Court of Human Rights in the case of Ruiz Mateos noted that the prohibition imposed on the parties to the trial to submit their arguments in advance (whereas the Principal State Prosecutor, the Attorney General, the Chamber of Deputies or the Senate and, in the case in question, the collegial organs of the Autonomous Communities were all able to file their memorials) was a violation of Article 6 of the Convention. This judgement of the European Court has not yet had appropriate repercussions on domestic legislation.

[43] Several judgements of the European Court of Human Rights concerning Spain (cf the Ruiz Torija, Hiro Balani, Gea Catalan and Salvador Torres cases) concern the provision of reasons for court rulings and more specifically the problems of failure to provide an adequate statement of grounds (incongruencia omisiva) or delivering a more severe sentence on appeal ("reformatio in pejus"). These cases have had a significant impact on the judiciary and have helped improve the quality of court decisions.

[44] Spanish procedural laws do not govern the enforcement of judgements of the European Court of Human Rights (nor any other supranational court), which raised a serious problem with effect from the very first condemnation of Spain by the Strasbourg Court in the case of Barbera, Messegué and Jabardo. The Constitutional Court, in order to enforce these judgements ruled that a violation of a right enshrined in the European Convention on Human Rights (insofar as that right was also recognised in the Spanish Constitution) found by the Court in Strasbourg, despite the fact that the latter's rulings were not directly enforceable, also constituted a violation of the Constitution which needed to be remedied by the domestic

of cautionary measures (STC 189/1990 and STC 39/1995)[45]. With this interpretative approach we can see that the Constitutional Court considers the right to a fair trial to be an independent right with its own precisely defined scope which can be relied upon in all proceedings.

There are also *procedural guarantees* and other institutions linked to the right to a fair trial covered in the second part of Article 24 of the Spanish Constitution, such as:

- the right of access to the ordinary judge predetermined by law
- the right to defence
- the right to the assistance of a lawyer
- the right to be informed of the charges
- the right to a public trial
- the right to a trial without undue delays
- the right to a trial with full guarantees
- the right to use evidence pertinent to the defence
- the right not to make self-incriminating statements
- the right not to declare oneself guilty
- the right to the presumption of innocence
- the determination by law of professional secrecy
- the determination by law of cases in which for reasons of family relationship it shall not be compulsory to bear witness.

The contents of the second paragraph of Article 24 of the Constitution as defined by the Constitutional Court have a dual nature, deriving from their legal quality and their constitutional status. On the one hand, we are faced with procedural guarantees which must be upheld in order to ensure in practice the right to a fair trial, not only for the proceedings as a whole but also in each of the individual stages (STC 13/1981).

These guarantees have been described by the Constitutional Court throughout its case-law in thousands of decisions. It is therefore impossible here to discuss in

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judicial organs by means of ordinary appeals or, alternately, an amparo appeal (STC 245/1991).

[45] *With regard to cautionary measures, which are of particular importance in administrative contentious proceedings, the Constitutional Court does not have a consistent case-law. On occasion it unequivocally asserts the need for them when there is an evident clear justification and at other times it demands precise grounds from the courts for them to be accepted (see judgements STC 29/1995 and STC 78/1996, as well as STC 56/1997 on provisional custody as a cautionary measure in criminal proceedings).*

detail the principle interpretations of each one of them[46]. However, despite the difficulties, we shall attempt to summarise some of the most important.

The right of access to the ordinary judge predetermined by law is considered by the Constitutional Court in relation with Article 25 (al.1) of the Constitution in accordance with the interpretation required by Article 10.2 of the Constitution (in particular Article 6.1 of the ECHR with regard to an independent and impartial court). In this context, the Constitutional Court has on several occasions addressed the principle of "*nulla poena sine lege*" (no penalty without law making it so), the independence and impartiality of the courts. The Constitutional Court believes that the right of access to the ordinary judge predetermined by law requires the judicial organ to have been set up through legislation and that the latter grants courts competence to deal with the cases coming before them. In addition, the legal regime governing such bodies is such that they cannot be considered as exceptional or special courts (STC 47/1983)[47]. The independence and impartiality of judges are described in detail by the Constitutional Court which considers them to be guaranteed as a result of the provisions for withdrawal and challenges set out in the procedural laws and spelt out in several judgements of their own court and the Supreme Court. With respect, it is important to note that the Constitutional Court holds that impartiality must be both subjective and objective in each case, because it is essential for society to be able to have confidence in the judicial system (STC 142/1997). It should not be forgotten that the Spanish legal system was reformed some years ago in order to separate the functions of investigating judge and trial judge; the Constitutional Court, with regard to this question, had pointed out, in line with the judgements of the Strasbourg Court[48], the unconstitutionality of Spanish legislation prior to the

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[46] It cannot be forgotten that the introduction of an amparo appeal in our constitution and the placing of the right to a fair trial within its scope has produced a very broad constitutional doctrine on the guarantees enshrined in Article 24 of the Constitution. A cursory analysis of the "Boletín de Jurisprudencia Constitucional" (digest of Constitutional Court decisions) shows that over 80% of the decisions concern Article 24 of the Constitution.

[47] This classification is important for our judicial system since we cannot forget that in the Franco regime there were special courts. During the first few years of democracy there was a debate as to whether the Audiencia Nacional (ordinary courts with judges specialising in socio-economic offences, drug-trafficking and terrorism) was an ordinary court predetermined by law and comprising independent and impartial judges, but once the European Court of Human Rights (in the Barberá, Messegué and Jabardo case) had confirmed the validity of this court from the point of view of the European Convention on Human Rights, the debate ended.

[48] The European Court of Human Rights always insists that the investigating judge cannot be involved in the judgement (see, inter alia, the de Cubber case).

current Constitution, where the same judge could run the investigation and deliver the judgement (STC 145/1988).

The right to defence and the assistance of a lawyer in a trial has also been the subject of a good number of Constitutional Court decisions. In virtually every case, the Constitutional Court demands that this right not be interpreted merely as a formal procedural element (STC 42/1982) since this right entails an actual, effective performance in which the passive presence of a lawyer is not enough (STC 110/1994 and STC 179/1991 among others)[49]. An expression of this material concept of the right to defence is reflected in the fact that the Constitutional Court always demands that an interpreter be appointed if the person in question does not have a sufficient command of Spanish (STC 71/1988). However, there are also certain inconsistencies in the Constitutional Court's doctrine since in a number of judgements it has accepted that certain stages of the proceedings may take place without the assistance of a lawyer if they are not fundamental stages (STC 47/1987 and STC 208/1992, among others).

The right to be informed of the charges has, in the view of the Constitutional Court, an almost absolute nature and this right is viewed as one of the substantive guarantees of a criminal trial (this has been evident right from the Court's very first judgements, such as STC 12/1981, right up to the present) in all stages of the proceedings (STC 53/1987) and even in trials for negligence (STC 54/1985).

The right to a public trial is justified by the Constitutional Court by the right to information which is also recognised in the Constitution and by the need to give the trial sufficient transparency to enable society to have confidence in the judicial system (STC 64/1994), but it accepts certain constitutionally-based limitations, for example in order to guarantee the privacy of persons or to ensure the successful outcome of judicial investigations (STC 96/1987 and STC 176/1988)[50].

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[49] *With regard to the right to assistance from a lawyer, the Constitutional Court has a doctrine which is distinct from that of the European Court of Human Rights since, on the basis of Article 17 of the Spanish Constitution (governing the assistance of a lawyer for persons held on remand), it differentiates between the right to assistance from a lawyer in a trial and the right to assistance from a lawyer in respect of deprivation of freedom whereby it does not grant the same level of assistance, this being much more limited in the second case, and even more so if the person held on remand is suspected of terrorist acts (cf STC 196/1987 and STC 199/1987).*

[50] *The Constitutional Court has given a new interpretation to the provisions of the Law on Criminal Procedure with regard to publicity of the trial since as it was promulgated prior to the present Constitution, it gave undue emphasis to the judge's powers to authorise trials in camera.*

The right to a trial without undue delays is interpreted and applied by the Constitutional Court in line with the case-law of the European Court of Human Rights. It rigorously applies the elements of the case, the activity of the parties, the administrative organisation of justice and the attitude of the judge hearing the case[51]. The majority of undue delays relate to the excessive workload facing the judicial organs and this in turn relates to the responsibility of the political authorities (Ministry of Justice or the General Council of the Judiciary) for not having taken the appropriate steps to satisfy the needs of the courts (STC 36/1984 or STC 85/1990, amongst others).

The right to a trial with full guarantees is viewed as a means of ensuring the application of all procedural guarantees, even if they are not expressly provided for in the Constitution or legislation. Accordingly, this right includes the right of appeal to a higher judicial authority (which in international texts, such as the International Covenant on Civil and Political Rights, is often referred to as the two-tier system of judicial review). With regard to this two-tier system, the Constitutional Court asserts that it is invariably applied in criminal proceedings (see for example STC 22/1987) but not in administrative contentious proceedings (see for example STC 89/1995)[52].

The right to use all evidence pertinent to the defence. This right has been the subject of significant case-law of the Constitutional Court, either where it declared the unconstitutionality of certain regulations (which led to the immediate amendment of certain parts of legislation) or with the issue of a "constructive interpretative" order for mandatory application by the courts and administrative authorities (given that Spain has not yet passed procedural laws, following the Constitution, in all legal branches[53]). The acceptance of evidence not provided by

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[51] In the Sanders case, the European Court of Human Rights condemned Spain for a lack of diligence on the part of the political and administrative authorities which had not provided the courts with the material and human resources necessary for an acceptable administration of justice. In the Ruiz-Mateos case, contrary to the view of the Spanish Government, the European Court held that the prohibition of undue delays also applied to the Constitutional Court, which led to the filing of new complaints before the Court in Strasbourg.

[52] Spanish laws on procedure do not expressly recognise this right to a two-tier system of judicial review, although in the majority of cases, this two-tier system is ensured by the ordinary appeal system. This omission has caused problems in a number of cases (trials of elected representatives, a number of administrative complaints, for example) and it should be pointed out that Spain was condemned by the Court in Strasbourg for a violation of Article 6 of the Convention with regard to the trial of elected representatives.

[53] Although the majority of laws governing judicial procedures in respect of social affairs and administrative contentious proceedings have gradually been reformed, it is only two months ago that the new Civil Procedure Act was passed. The current Civil Procedure Act is the one

witnesses or which is not written evidence resulted from judgements of the Supreme Court or the Constitutional Court[54]. This approach has developed from the very first Constitutional Court decisions where it rejected control on the admissibility of evidence by giving the ordinary courts the authority to assess the relevance of evidence (see for example STC 36/1983) up to the most recent in which the Constitutional Court differentiates between various types of evidence, such as the acceptance of circumstantial evidence if based on fully substantiated facts (STC 182/1995), the value solely as circumstantial evidence of police statements which can be used as evidence only if they are verified by an adversarial judgement (STC 173/1997), the fact that identification of offenders in identification parades is insufficient evidence (STC 148/1996), the fact that suspicions are not evidence as they are not in themselves sufficient to destroy the presumption of innocence (STC 24/1997), the setting of conditions to enable audio and video cassettes to be used as evidence (STC 190/1992), and the distinction between direct witness and indirect witness, the latter's statements not being accepted as evidence if a direct witness could be found (STC 79/1994). Above all, there has been the adoption of the doctrine of "contaminated evidence", in accordance with the judgements of the United States Supreme Court, first of all by the case-law of the Constitutional Court (STC 114/1984) and then by the Implementing Judicial Act which now provides that evidence obtained through the violation of fundamental rights is null and void and, consequently, all judicial decisions based on such evidence are also vitiated and null and void.

The right not to make self-incriminating statements and not to declare oneself guilty has a general and verifiable effectiveness in the majority of Constitutional Court judgements. However, it has raised a number of problems in cases concerning alcohol testing and investigations by the tax authorities since in both cases, at least initially, the Constitutional Court had held that evidence should be provided by the persons charged themselves and this appeared to be incompatible with the right not to declare oneself guilty or not to make self-incriminating statements. At the moment, the Constitutional Court has reaffirmed the validity of alcohol tests as pre-constituted technical evidence (with effect from STC 103/1985) but there has been a change in its concept of the duty to collaborate with the tax authorities. Although initially (STC 110/1984), the Constitutional Court considered that taxpayers should provide all the necessary documentation to facilitate the work of the tax authorities, it subsequently turned towards the case-law of the European Court asserting that the right not to make self-incriminating

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drafted in the last century with amendments made during the Franco dictatorship and as a result of Constitutional Court judgements.

[54] *The latter holds that even in civil cases, provided certain conditions are met, the presentation of evidence must be guaranteed and it assigns the decision in this field to the ordinary courts (STC 131/1995).*

statements must also be upheld in administrative proceedings if sanctions are imposed because, in such cases, the burden of proof always falls to the administration (STC 45/1997)[55].

The presumption of innocence constitutes a fundamental interpretative approach in the deliberations of the Constitutional Court in respect of trial guarantees. It defined this presumption as a genuine fundamental right which must be upheld by all public authorities (STC 331/1981). Accordingly, the Constitutional Court uses this legal institution as a keystone for all other judicial guarantees since it holds that until the evidence eliminates this presumption, there can be no question of guilt (STC 109/1986). Furthermore, the Constitutional Court applies the principle of presumption of innocence not only to criminal proceedings, but to any decision, be it administrative, social or civil in all cases where there may be a sanction or limitation of rights (STC 13/1982).

Finally, to conclude this summary of the second paragraph of Article 24 of the Constitution, it should be added that the Constitutional Court has had very little opportunity to comment on the *right not to make statements for reasons of family relationship or professional secrecy*. The only time it has ruled that professional secrecy is not a sufficient argument is in the case of banking secrecy (STC 110/1984).

However, in order to supplement the description of procedural guarantees related to the right to a fair trial, it should be pointed out that the Constitution, in Title VI, concerning the judicial power, includes other procedural guarantees such as the right to legal aid, the confidentiality of case files and the activities of the public prosecutor in defence of constitutional rights. These guarantees, however, do not have the same constitutional protection as those included in Article 24.2 of the Constitution, as they do not have direct access to amparo appeals, unless it can be shown that their violation constitutes at the same time a violation of Article 24.2. Although they are guarantees which must be upheld in judicial proceedings, they have not been included in Article 24 of the Constitution as strictly part of the right to a fair trial.

The laws on civil, criminal, social and administrative procedure also contain other procedural guarantees. Sometimes, they are totally new but in virtually all cases, they supplement or clarify the guarantees enshrined in Article 24.2 described above. The Constitutional Court confirms that all procedural rules must be interpreted in line with the Constitution and, consequently, in a way which complies as far as possible with the protection of the courts set out in Article 24

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[55] *It should be pointed out that the European Court of Human Rights established a case-law to this effect with the Funke, Crémieux and Miailhe cases.*

(STC 90/1986). However, given that these guarantees have a legal but not constitutional force, I shall not look at them here since the Constitutional Court has repeatedly refused to rule on issues linked to the interpretation of a law.

II. THE RIGHT TO A FAIR TRIAL IN PRACTICE

Having described the concept, scope and constitutional position of the right to a fair trial, I shall now attempt to summarise how this right is applied in practice.

Reliance on the right to a fair trial before the Constitutional Court and the ordinary courts

The right to a fair trial, either viewed as a whole (paragraph 1 of Article 24 of the Constitution) or in the light of the other rights which guarantee it (paragraph 2 of Article 24), *is very often relied upon before the Constitutional Court and the ordinary courts.* Indeed, it is the most relied upon right in view of the fact that the Constitution has held it to be the guarantee of all legitimate rights and interests.

An analysis of the statistics of the Constitutional Court shows that the *majority of amparo decisions*[56] *relate to the right to a fair trial.* Over 80% of the Constitutional Court's decision, be they acts or judgements, relate to Article 24 of the Constitution, representing 250-300 decisions per year on this article. If we are counting referrals, the number rises to 10,000 decisions per year, still with the same 80% proportion. This clearly shows the extremely high frequency with which the right to a fair trial is relied upon before the Constitutional Court and it has led to a change in the assessment of referrals in the Constitutional Court Implementing Act in order to lighten this preliminary stage so as to devote more time to the decision-making stage[57].

With regard to the ordinary courts, it must first of all be said that the subsidiary nature of the amparo appeal derives from the fact that the *right to a fair trial must*

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[56] *The amparo appeal is the procedure which accounts for the majority (more than 80%) of the work of the Constitutional Court. Conflicts of competence between the Autonomous Communities and central government are the second most frequent proceedings; preliminary objections as to compliance with the Constitution are the third; direct appeals against laws the fourth and lastly prior verification of international treaties. All these other constitutional contentious proceedings account for only 1/20th of proceedings before the Constitutional Court and among these, the prior verification of international treaties has only been used for the Treaty on the European Union.*

[57] *There has also been an academic debate on the relevance of introducing a sort of "certiorari", as in the United States Supreme Court in the assessment of referrals to the Constitutional Court. There have also been calls, fortunately unheeded, for amendments to the Constitution in order to abolish the amparo appeal.*

first of all be relied upon before the ordinary courts, since it must be shown in the amparo referral procedure that all ordinary channels have been exhausted and that the right which has allegedly been violated has been relied upon in such channels. This aspect of the amparo appeal derives from the fact that the *right to a fair trial is also very frequently relied upon before the ordinary courts.*

The Constitution recognises that *Article 24 (both paragraphs) may be relied upon by "all persons".* Those benefiting from the rights contained in this article are, therefore, all natural persons, whether of Spanish nationality or not (STC 99/1985), all private law legal persons (STC 53/1983) and all public law legal persons who are entitled by law to plead a case before the courts. *A result of this broad conferral of authority is an increase in cases concerning the protection of the right to a fair trial.*

It should also be added that the *objective nature* required by the Constitutional Court for the right to a fair trial, one of the most protected fundamental rights in the Constitution, as a *guarantee of all other legitimate rights and interests*, imposes on this right an obligation of performance which the public authorities must fulfil. This guarantee is valid both for the right viewed as a whole as recognised in paragraph 1 of Article 24 of the Constitution and for each of the rights and guarantees recognised in paragraph 2 of this same article (STC 205/1990). Lastly, to conclude with the protection afforded, Article 24 together with Article 121 provides for the *compensation for parties* to the trial if the courts, even by error, have failed to apply adequately the right to a fair trial (STC 36/1994).

The whole of this constitutional context for the right to a fair trial shows that this right is a genuine *means of domestic public order which can be relied upon by the courts in the course of a trial and by each of the parties* present in the proceedings.

Fields of application of the right to a fair trial

In the interpretation made by the Constitutional Court of Article 24, *all matters without exception fall under the right to a fair trial.* Earlier, I referred to the broad conferral of authority to initiate proceedings and I also mentioned that all courts are bound by the two paragraphs of Article 24 in the protection of any legitimate right or interest, as provided for in the Constitution.

The Constitutional Court has asserted and guaranteed this wide field of application of Article 24 in numerous judgements in order to provide for the effective exercise of the right to a fair trial before all courts.

In this context, from its very first judgements, the Constitutional Court *has demanded the application of the criminal guarantees enshrined in Article 24 in proceedings concerning administrative sanctions* (STC 18/1981), even though there is provision for differences deriving from the nature of administrative proceedings to be taken into consideration.

Similarly, the Constitutional Court has asserted that *criminal guarantees must be applied in military disciplinary proceedings*, even the right of review by a superior body, and that the specific situation arising from the "special dependence relationship" may be accepted only insofar as they are essential and not in contradiction with constitutional principles (STC 21/1981).

It should also be noted that Article 24 is applied to *proceedings where the person charged is not of full age and proceedings before the juvenile court* (STC 71/1990). Furthermore, juveniles are entitled to special protection, recognised by the laws on procedure and the laws on the protection of juveniles and young people, deriving from their vulnerable position.

However, with regard to *sanctions imposed in the context of a private work contract*, the Constitutional Court considers that the *guarantees enshrined in Article 24 do not apply* to the internal organisation of firms or the workplace, as this is not a case of public "*ius puniendi*" (STC 46/1982). Nonetheless, if an incorrect application of these sanctions can be claimed before the social court then, as a consequence of the general application of non-criminal procedural guarantees and the overall concept of the right to a fair trial, Article 24 of the Constitution is applicable in the social courts.

Application of the right to a fair trial in the proceedings

In the Spanish judicial system, the *right to a fair trial concerns all stages of the proceedings*, from the initial referral to the final decision. This, moreover, applies to all courts. As shown throughout this paper, the Constitutional Court has confirmed this application in all its case-law; however, I shall mention a few supplementary doctrinal positions in order to give a clearer picture of the extent of the right to a fair trial in all stages of the proceedings.

In criminal proceedings, we have seen the prohibition imposed on the investigating judge from delivering judgements, we have also seen changes to the admission of evidence and other significant interpretations of procedural guarantees consolidated by the Constitutional Court. It should be added that the Constitutional Court *does not accept "*reformatio in pejus*" unless it could have been foreseen* throughout the proceedings, either because there had been judgements prior to the one where no further appeal was possible or if a harsher

sentence had been asked for by the public prosecutor. In such cases, a harsher judgement is in theory feasible (STC 144/1996)[58].

I should also draw attention to the importance which the Constitutional Court attaches to the provision of reasons for court decisions. Above and beyond the considerations described above, the Constitutional Court has looked at *procedural omissions* and stated that *they must not be considered solely in a formal sense, but that the material dimension must also be taken into account* (STC 100/1996). The Constitutional Court has also looked at the problem of decisions where, as a result of a consolidated practice in the pre-democratic regime, courts used *printed models*. The Constitutional Court concluded that such practices were not acceptable since the right to have reasons for court decisions required explanations with *plausible and legally well constructed reasons* for the decision taken in each individual case (STC 169/1996), which should include both the *legal criteria and factual elements* in support of the decision (STC 126/1996).

Lastly, the Constitutional Court sets great store by respect for the right to a fair trial and all the guarantees enshrined in Article 24 of the Constitution which it has proclaimed (even though it has suffered from the consequences, as we have seen, as regards the vast number of amparo appeals) in line with the *principle of anti-formalism* in interpreting this article. Accordingly, we see, for example, the assertion included in many judgements that even where there is an *inadequate formal presentation of the referral or errors in identifying the constitutional principle relied upon, the Constitutional Court is nonetheless empowered to rule on the alleged violations* (STC 167/1987, 184/1992, 80/1994 and 22/1997 among others).

THE RIGHT TO A FAIR TRIAL IN SWISS LAW

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Switzerland is today in rather an exceptional constitutional situation. On 1 January 2000 the current Constitution[*], which dates back to 1874, will be replaced

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[58] *The Constitutional Court entirely follows the doctrine of the European Court of Human Rights, emphasising that the latter stated its position on this matter in a case concerning Spain, the Salvador Torres case, where the Court accepted the case-law of the Constitutional Court and Spanish legal practice described above.*

[*] *Constitution: Cst.*

by a new one which was adopted on 18 April 1999 but has not yet been promulgated. Therefore, it would be worthwhile going into the development of the Constitution and the relevant case-law up to the present day and examining the new text before concluding by answering the questionnaire submitted to rapporteurs.

Paragraph I - Definition

Unlike its predecessor, the Constitution of 18 April 1999 comprises several detailed provisions on procedural safeguards, which are nowadays considered as essential human rights in relations between the citizen and the authorities. Last century, procedural matters were left to the Cantons, which also legislated in civil and criminal law, and, most significantly, dispensed justice. Although they were stripped of the power to enact substantive law in 1898, they continued to organise the courts and procedure (old Articles 64 and 64 bis of the 1874 Cst). Articles 122 (2) and 123 (3) Cst. also leave this apportionment of powers unchanged.

However, this cannot be a matter of indifference to the Confederation because although it is a formal issue it is crucial for any State governed by the rule of law. Day-to-day practice quickly highlighted one glaring omission from the old Constitution. The Federal Tribunal lost no time in ruling that refusal by the Cantonal authorities to dispense justice to a citizen would violate the principle of the equality of all citizens before the law[59]. By thus linking procedural safeguards to the old Article 4, the Federal Court avoided giving them the status of independent rights. It merely prescribed *minimum safeguards* to be respected by all Cantonal authorities. In fact, litigants used these minima to claim actual legal rights, and adduced them through public-law appeals (Articles 84 ff. of the Federal Law on the Organisation of the Judiciary [OJ]).

Over the years, an increasingly strong line of authority has fleshed out the institutions, which eventually agreed on the term "denial of formal justice", as opposed to "denial of substantive justice". These expressions, translated from the German, suggested that the authority could commit various kinds of injustices. The first referred to serious procedural faults and the second to arbitrary decisions and blatant substantive inequalities.

Prohibition of the denial of formal justice was defined as a set of constitutional rules binding upon all public employees, requiring them to follow an effective, balanced, reasonable procedure ensuring equality among litigants. These principles could be broken down into various categories. According to one

[59] *Arrêt du Tribunal Fédéral (ATF - Judgement of the Federal Court) 3, p. 430.*

conventional classification citizens were first of all entitled to a fair, reasonably expeditious trial. Their second right was that to a fair hearing by their judge, and thirdly they could claim legal aid if the circumstances so required.

The European Convention on Human Rights, ratified by Switzerland in 1974, complemented the maxims developed by case-law by securing the judge's protection during criminal investigations and access to an independent court in civil proceedings (Articles 5 and 6 ECHR).

These conditions provided individuals with adequate protection. All that remained was to draft explicit constitutional provisions. This lacuna has now been made good under Articles 29 to 32 Cst., which codify the Federal Court's case-law and summarise the relevant provisions of the European Convention. They are therefore in line with the effort to update the Constitution and make virtually no substantive changes. The concept of "denial of formal justice" is not mentioned and in fact could now be shelved. However, doctrine will probably retain it for a long time to come so as not to disconcert legal practitioners and in order to facilitate research into judgements pronounced under the old legal system. It might even retain the threefold distinction between the right to fair treatment, the right to a hearing and legal aid (Article 29 Cst.). Specific civil and criminal procedural safeguards can easily be included under these headings, particularly the first two (Articles 30, 31 and 32 Cst). Moreover, these safeguards at least partly come under a different heading because they are mainly a matter for the courts, which is why no further mention will be made of them in this document.

Paragraph II - The right to a fair trial

Article 29 (1) Cst. first of all requires State authorities to deal with all cases submitted by citizens in accordance with a set procedure. This safeguard is general in nature and covers all public employees and all legal fields. However, it involves special rules in certain areas necessitating specific precautions, including civil and criminal proceedings. It comprises three main aspects: access to the legal authority (Section I), a formal decision taken within a reasonable time (Section II) and eschewal of excessive formalism (Section III).

Section I Right of access to the legal authority

The right is secured for all State bodies, whether judicial or not. However, it comprises special clauses applicable to courts.

a. Lawful composition of authorities

There are two aspects to this first requirement: first of all, the adjudicating authority must have a lawful composition, and secondly it must guarantee impartiality.

The first aspect is a mainly formal one which is not explicitly mentioned in Article 29 Cst. Nevertheless, the practice relating to the old Articles 4 and 58 Cst. established the basic composition of such bodies, which was unaffected by the entry into force of the new Constitution. This aspect primarily concerns the courts, but also takes in executive bodies: during oral proceedings, all the judges involved in giving the decision must attend all the evidence-taking hearings[60]; decisions given by industrial tribunals are only valid if the tribunal comprises equal numbers of employers and employees[61]; five-member tax appeal boards cannot sit with only four of its members, unless expressly stipulated in tax legislation[62]; and if the law requires the registrar to attend and be given the right to speak, the court/tribunal cannot give decisions in his absence[63]. On the other hand, the absence of a judge from the reading of the judgement is insufficient grounds for nullifying it if he/she has attended the trial hearings and deliberations[64].

On the substantive front, litigants are entitled to expect at least apparent, if not actual impartiality on the part of all State authorities. Article 30 (1) Cst. restricts this requirement to judicial proceedings. As in the past, however, case-law will undoubtedly extend it to all State bodies, because proceedings cannot be deemed "fair" if they are entrusted to individuals personally involved in the case or lacking the requisite objectivity[65]. These guarantees apply to all proceedings before any State body whatsoever, which is why it is wrong to say that the provisions of Article 30 Cst. concern only "judicial proceedings"[66]. If this were the case, as the Federal Council claims, the new Constitution would represent a considerable retreat vis-à-vis the old text, which would slightly defeat the purpose.

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[60] *ATF 96 I 324.*

[61] *ATF 48 I 252.*

[62] *ATF 85 I 274.*

[63] *Judgement of the Federal Court of 22 January 1999.*

[64] *ATF 103 Ia 408.*

[65] *See ATF 125 II 119; 124 I 255.*

[66] *Feuille Fédérale (FF - Federal Paper) 1997 I 185.*

If the members of the trial court have an interest in the proceedings or if they have already been involved in them in a different capacity, they must withdraw of their own accord or else be excluded by the competent body[67]. Difficulties with part-time judges are dealt with as they arise: for instance, if a lawyer is defending a case pending before a given court, he or she cannot be involved in judging a case on the same legal issue in the same court[68]. On the other hand, the mere fact of counsel for one of the parties being a part-time judge in an administrative court cannot be used to adduce bias on the part of the whole court. Conversely, litigants can prevent wrongful challenges to judges: if they are excluded on insufficient grounds, the court is deemed to be unlawfully constituted[69].

Citizens have an absolute right to a lawfully constituted court. Consequently, they can secure cancellation of the decision even if the defect of which they complain has not influenced the result and they can expect no actual advantage to accrue from reconsideration of their case. However, the parties must be seen to be acting in good faith: if they delay unreasonably in submitting their complaint they forfeit the right to do so[70].

b. General safeguards on judicial proceedings

Article 30 (1) and (3) Cst. set out a number of rules which do not cover government officials but do apply to all judicial authorities of whatever nature, rank or powers. The two paragraphs derive primarily from the old Article 58 of the 1874 Constitution and Article 6 (1) ECHR.

First of all, the public can submit cases to the courts. This right, which is implicit in both the Constitution and the European Convention, gives all citizens access to the judges and enables them to commence proceedings, submit complaints and lodge appeals. In particular, no one can be subjected to pressure to discontinue proceedings. Moreover, they cannot be deprived of their fundamental rights, which are, in principle, inalienable and indefeasible. For instance, although prisoners obviously cannot unconditionally exercise all the rights inherent in civil capacity, they can only be prevented from appearing and pleading before a court if

[67] *ATF 114 Ia 275; 112 Ia 147; 108 Ia 48.*

[68] *ATF 124 I 121.*

[69] *ATF 108 Ia 48.*

[70] *ATF 114 Ia 348.*

so required by the aim of the imprisonment and the prison rules, the public interest and proportionality rules being the decisive criteria[71].

Secondly, the trial court must not only be competent vis-à-vis the Constitution and the law, but must also, like all State authorities, have a lawful composition and guaranteed impartiality. Furthermore, Article 30 (1) Cst. requires it to be "independent", that is to say free of any influence from all other State bodies. This condition differs from impartiality, even though case-law and doctrine often confuse the two concepts[72]. The principle of the separation of powers implies that the judiciary must not be answerable to the executive or even the legislature. Various mechanisms are used to guarantee the independence of judges: the mode of election, life tenure or, failing that, long terms of office, appropriate salaries and possibly immunities. The Cantons have a choice of solutions, but are required to guarantee that judges will be free of any constraint in the administration of justice.

The second sentence of Article 30 (1) Cst. expressly prohibits "special courts". This has a twofold meaning. From the formal angle, it means that the judicial body is "established by law" and therefore needs a legal base in order to act. In substantive terms, it implies that the State cannot set up a special court, even under new legislation, "on the grounds of a specific circumstance or individual"[73].

Without being explicit, Article 30 Cst. allows litigants to demand that their case be "tried under judicial proceedings", at least in certain cases. The problem is, however, that the Constitution does not specify the scope of this guarantee. If we are to believe the Federal Council, this is a matter for international law, ie Article 6 (1) ECHR and Article 14 of the United Nations Covenant and the related case-law[74].

Lastly, Article 30 (3) Cst. requires the hearing and the reading of the judgement to be open to the public. This brings it into line with Article 6 (1) ECHR, to which Switzerland had previously entered a reservation[75]. It applies to all proceedings before a judge, in accordance with Article 6 ECHR, including straightforward

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[71] *ATF 124 I 336, paras. 4b and c.*

[72] *See A. KÖLZ, "Commentaire de la Constitution Fédérale du 29 mai 1874" ("Commentary on the 29 May 1874 Federal Constitution"), re. Article 58, 16 ff., and the judgements quoted.*

[73] *FF 1997 I 185; cf. ATF 105 Ia 171; 161.*

[74] *FF 1997 I 185.*

[75] *Recueil systématique du droit fédéral (RS - classified compilation of the federal law) 0.101, p. 24.*

sentence orders issued under simplified procedure[76], but not judicial reviews of the lawfulness of detention as laid down in Article 5 (4) ECHR[77]. In principle it implies that hearings and decisions must be accessible to the public and copies of judgements available from an office open to the general public[78]. Furthermore, the law may provide for exceptions in order to protect overriding public or private interests[79]. Therefore, neither Article 6 ECHR nor the Constitution requires public hearings in criminal cases involving minors[80] or public access to the discussions of psychiatric boards reviewing the lawfulness of detention on the basis of Article 397a of the Civil Code[81].

c. The specific case of civil proceedings (Article 30 [2] Cst.)

Article 30 (2) Cst. sets out one special criterion for civil proceedings, namely that they must take place before the court of the defendant's place of residence. This provision extends this safeguard to all "civil actions", abolishing the conditions and limitations imposed by the old Article 59 Cst. However, this change is more apparent than real, because now the Constitution expressly authorises new legislation providing for exceptions, which had not been mentioned in the old Constitution. In fact the increasing numbers of exceptions had been incompatible with the text and could therefore have been considered unconstitutional. Consequently, the new version can be seen as bringing the *de facto* situation into line with the Constitution.

Article 30 (2) Cst. sets out a complicated rule. On the one hand, it apportions judicial powers among the Cantons, while on the other it engenders a fundamental right which litigants can exercise by filing a public-law appeal (Article 189 (1) (a) Cst. and Articles 84 et seq. OJ). However, it does not permit litigants to challenge the validity of Federal provisions by alleging that they infringe this principle.

This right can obviously only be granted to individuals resident in Switzerland. International law is applicable to cases involving foreign relations; this includes the Lugano Convention of 16 September 1998, which came into force on 1

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[76] *ATF 124 IV 234.*

[77] *ATF 114 Ia 182, and the judgements quoted.*

[78] *Ibid.*

[79] *FF 1997 I 186; ATF 119 Ia 99.*

[80] *ATF 108 Ia 92.*

[81] *ATF 114 Ia 182.*

January 1992 in respect of Switzerland[82]. Precisely because of the old Article 59 Cst., Switzerland entered a reservation when ratifying this treaty[83]. The question whether the new Article 30 (2) Cst. makes this reservation unnecessary arose during the *travaux préparatoires*, but has not yet been answered[84].

d. The specific case of criminal proceedings (Article 32 Cst.)

Article 30 (1) Cst. sets out the principle of the **presumption of innocence**, to the effect that no one can be deemed guilty until the final decision is taken and he or she has been sentenced. However, this provision also concerns the proceedings themselves to the extent that it places the burden of proof on the prosecution and presupposes thorough assessment of all evidence[85]. In substantive terms, this principle has a variety of consequences: the press must maintain confidentiality concerning cases pending[86]; judges reviewing the lawfulness of detention on remand cannot base their decision on the defendant's "future sentence"[87]; costs cannot be charged to defendants if they are acquitted[88] or if proceedings are discontinued[89], unless so required by the specific circumstances of the case[90]; and persons detained on remand must not be forced to work[91]. In the second meaning of the term, the court must carefully weigh up the evidence produced before it, on the basis of the principle *in dubio pro reo*[92]; it must release the accused if doubts persist in his/her favour[93]; it must take no account of the aggravating circumstance of an offence committed by a gang where there is solid evidence to the contrary,

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[82] *RS 0.275.11.*

[83] *Ibid., p. 41.*

[84] *FF 1997 I 186.*

[85] *ATF 120 Ia 37.*

[86] *ATF 122..IV 3i5; 116 IV 39.*

[87] *ATF 124 I 327.*

[88] *ATF 113 Ia 77; 112 Ia 373.*

[89] *ATF 120 Ib 155; 119 Ia 334; 116 Ia 162; 115 Ia 310.*

[90] *ATF 109 Ia 160; 107 Ia 166.*

[91] *ATF 123 I 238.*

[92] *ATF 124 I 87.*

[93] *ATF 120 Ia 31, 37-8; see FF 1997 I 189.*

unless there are compelling reasons for doing so[94]; and where the defendant[95] or taxpayer decides not to speak, it must not use this in evidence against him/her, unless he/she is required to produce evidence and refuses to do so[96].

Article 32 (2) Cst. mentions an essential aspect of the right to a fair trial. It requires the authority to inform litigants of the charges against them "promptly and in detail". This information must be given in a language understood by the parties concerned, in accordance with Article 6 (3) (a) ECHR[97]. As a result, this provision permits defendants to prepare their defence effectively, that is to say that it gives them sufficient time to choose counsel or request the appointment of an official defence lawyer, to produce evidence or request additional investigations. According to case-law this right lapses not at the time of the committal for trial but only after delivery of the judgement. It implies that the criminal court must provide information and assistance to the parties *proprio motu*, and in particular explain to them that they are entitled to officially assigned defence counsel[98].

By virtue of Article 32 (3) Cst. "every convicted person is entitled to a review of the corresponding judgement by a higher court". This absolute right is enormous in scope. It applies to any individual who has been found guilty of any kind of criminal offence. It therefore goes even further than the commitments entered into by Switzerland under international treaties[99]. Nevertheless, it reserves judgement on cases (which are in fact very rare) where the sentence is passed at first instance by the Federal Court, which is the country's supreme court and therefore has no "higher level".

Section II The right to a trial within a reasonable time

It is not sufficient to ensure access by citizens to State authorities: they must also be guaranteed a prompt reply. This is the aim of Article 29 (1) Cst. This provision covers all bodies vested with State power to which citizens are liable to

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[94] *ATF 124 IV 89.*

[95] *ATF 116 Ia 20; 109 Ia 166.*

[96] *ATF 121 II 282; 263.*

[97] *ATF 121 I 204; for consultation of files in tax matters, see ATF 119 Ib 18-9.*

[98] *ATF 124 I 185.*

[99] *Article 2 of Additional Protocol No. 7 to the ECHR; Article 15 (5) of United Nations Covenant II.*

submit complaints, ie it is not confined to the courts but also covers government departments. On the other hand, it does not cover parliaments: individuals can submit petitions to parliaments, which must "take cognizance" of them under the terms of Article 33 (2) Cst., but they are not empowered to pronounce on individual applications and therefore do not decide "cases" within the meaning of Article 29 (1) Cst. However, exceptions are always possible, as, for instance, when a Cantonal Council rules on the validity of a request for a referendum.

Article 29 (1) Cst. spells out a maxim which the Federal Court had long deduced from the old Article 4 Cst. and which is also stipulated in Article 6 (1) ECHR. The equality principle implies that members of the national legal service and civil servants must deal with all cases submitted to them and take the requisite action, even if this means declining jurisdiction or rejecting the application, if so required by law. In short, if an authority fails to study or reply to a request it is guilty of a formal denial of justice, in the narrow sense of the term[100]. This situation can arise, at least theoretically, in two different situations: either the body takes no action at all or else it is exceedingly dilatory in reaching a decision, though in practice it is often difficult to distinguish between the two. Nonetheless, it can legitimately be said that the citizen has a twofold right: first of all, he or she can, with certain exceptions, demand a formal decision from the authority in question, and secondly he/she can demand that it expedite its decision-making procedure.

a. The right to a fair trial

Broadly speaking, individuals submitting "cases" to a State official are justified in requesting that it be "dealt with" and "tried". This is an absolute right, which had already been established in case-law, albeit possibly in insufficient detail[101]. It is now set out explicitly. It signifies that the authority must not only make itself available to litigants but also give a decision in the form set out in law. If it fails in this obligation it is violating one of the citizen's constitutional rights.

Of course the official body is not always required to pronounce on the merits. If it wishes to decline jurisdiction it declares the application inadmissible. If its decision is legitimate it is unchallengeable, but if it is so flawed as to constitute a serious breach of the law, it is deemed to be arbitrary and treated as a substantive rather than a formal denial of justice[102]. On the other hand, according to case-law, if an authority unduly limits its power to examine a case it is guilty of a formal

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[100] *ATF 107 Ib 164; 103 V 193.*

[101] *ATF 117 Ia 116; 111 Ib 87; 107 Ib 164.*

[102] *ATF 92 I 81.*

denial of justice[103]. In this case, even if an application is, for instance, sent to the wrong address, submitted out of time or forwarded to a body lacking jurisdiction, it cannot remain unanswered. However, the Federal Court has established a derogation from this principle: an authority cannot be blamed for taking no action when it is obvious even to the layman that it lacks jurisdiction and where it has received the application owing to evident negligence on the part of the applicant. The Federal Court treats lack of action on the part of the authority as an actual denial of justice when such authority is required to perform a given task under the Constitution and the law. For example, Cantonal Governments cannot refuse to provide the courts with the police forces required for enforcing a given judgement. Were they to do so, this would constitute a denial of justice and violate the principle of the separation of powers.

In accordance with Strasbourg and Federal Court case-law, decisions must be accompanied by reasons if they are not to constitute a denial of justice[104]. This aspect of the matter is generally treated in conjunction with the right to a fair trial[105]. However, it has in fact more to with the right to a trial. It covers all legal fields: criminal judgements, including ancillary penalties[106], or refusal to terminate a penalty within the meaning of Article 43 of the Swiss Penal Code[107]; civil judgements[108], administrative judgements on such matters as land-use planning[109], cartels[110], tax penalties[111] or extradition[112]. Exceptions are few and far between: for instance, no reasons are needed for decisions on levels of expenditure[113]. The

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[103] *ATF 120 Ia 114; 117 Ia 6; 114 Ia 118; 106 Ia 71; 104 Ib 418.*

[104] *ATF 124 II 149; 123 I 34; 122 IV 14; 121 I 57; 119 Ia 269; 117 Ib 86.*

[105] *G. MÜLLER, Commentaire de la Constitution fédérale du 29 mai 1874, re. Article 4, nos. 112 ff.*

[106] *ATF 121 I 57.*

[107] *ATF 122 IV 15.*

[108] *ATF 116 II 632.*

[109] *ATF 124 II 149; 114 Ia 241.*

[110] *ATF 117 Ib 492.*

[111] *ATF 112 Ia 110; 111 Ia 4.*

[112] *ATF 111 Ib 149.*

[113] *ATF 111 Ia 1.*

extent of the obligation on the authority obviously depends on the nature of the decision: written reasons are not always absolutely necessary[114]; sentenced persons are not entitled to have the judgement translated into their language[115], and the court is not obliged to examine - or discuss - all the evidence produced by the parties.

b. Reasonable time

In many cases, justice delayed is justice denied. No procedural safeguards could be effective if State officials were allowed to postpone the action requested of them indefinitely. Therefore, excessive delays are treated as a denial of justice, which is now penalised under Article 29 (1) Cst. on the model of Article 6 (1) ECHR. In contrast to the plentiful Strasbourg case-law, the Federal Court has taken few decisions on this matter. Although the "reasonable time" principle is recognised[116], the issue is seldom raised in cases before the supreme court judges, who do not always work with exemplary promptness themselves and are therefore in no position to impose it on lower courts.

This rule applies to all State bodies: if they give rise to "unjustified delays" they are in breach of constitutional law[117]. However, it is in criminal procedure that the latter really comes into its own and lays down the strictest conditions, because of the threat to defendants, particularly if they are being held in custody. This is why the investigatory bodies and trial courts are required to work "without let-up" and must not remain inactive for months on end[118]. However, their conduct is not the only decisive factor - the complexity of the case and the defendant's attitude are also relevant. Since the cause of action derives from a fundamental right, the individual in question can only file a public-law appeal[119]; if this appeal is admitted, the sentence is reduced and sometimes the proceedings are discontinued, even in very serious cases[120].

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[114] *ATF 123 I 34; 121 IV 353; 111 Ia 4.*

[115] *ATF 118 Ia 467; 115 Ia 65.*

[116] *ATF 124 I 139; 121 II 306; 119 II 389; 119 Ia 323; 117 Ia 197; 113 Ia 420.*

[117] *ATF 121 II 306; 107 Ib 164; 103 V 194; 100 Ia 56.*

[118] *ATF 124 I 140.*

[119] *ATF 124 I 141; 191 IV 107.*

[120] *ATF 123 I 329; 122 IV 103, 111; 119 IV 107; 117 IV 124.*

Section III Prohibition of excessive formalism

The Constitution of 18 April 1999 does not mention the rule prohibiting excessive formalism which the Federal Tribunal has been applying for decades now. However, the constitutional drafter's intention is that the **principle** of such prohibition should be retained.

Established case-law treats any decision marked by undue formalism as being equivalent to a denial of justice. Where an authority uses a slight procedural defect as an excuse not to decide a case on the merits, it is failing in its duty and committing a formal denial of justice. Case-law infers from this that the authority is violating the principle of equal treatment set out in the old Article 4 Cst.[121]. This argument will remain valid under the new Constitution. It can now be inferred from Article 29 (1), which secures "fair treatment".

The Federal Court defines the concept as follows: proceedings are excessively formal when the strict application of the procedural rules cannot be justified by any interest worth protecting, becomes an end in itself and intolerably complicates the effective exercise of the substantive right or unacceptably hampers access to the courts[122]. This definition comprises two essential aspects.

Firstly, the **formalism** at issue here is understood solely in the context of procedural law. If the authority imposes excessively stringent conditions vis-à-vis the formal aspects of substantive legal documents, it may be infringing the law and acting arbitrarily, but it is not committing a formal denial of justice. For instance, a judge who imposes exaggerated formalities on the conclusion of a contract or the setting up of a firm is violating the Swiss Code of Obligations but not Article 29 (1) Cst., which applies exclusively to the rules governing the running of proceedings before an official body.

Secondly, the Constitution prohibits formalism that is "**excessive**", ie devoid of legitimate grounds. The criteria set out in the definition established by the courts serve as a guideline. These are not concurrent or alternative conditions but rather a list of factors enabling the "pros and cons" of the measure adopted to be weighed up. To be more precise, the Federal Court checks the decision complained of against the various factors relevant to the specific case: either the aim of the rule applied or its effects on implementation of substantive law. It is a case first of all of determining whether the form required by law is dictated by legitimate,

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[121] *For an old example, see ATF 46 I 304.*

[122] *ATF 121 I 179; see ATF 120 II 425; 119 Ia 7; 118 Ia 14; 113 Ia 87.*

sensible objectives, justified by the public interest or that of the parties, or manifestly unreasonable, being an "end in itself" which boils down to sheer pettifoggery. The second, subsidiary step is to weigh up the consequences of the legal requirement: the aim pursued by the legislator may be defensible, but the formalism may still be excessive if it achieves a result disproportionate to its raison d'être.

Given that it flows from Article 29 (1) Cst., the rule prohibiting excessive formalism has the same scope as the constitutional provision: it covers all proceedings before any kind of State body. It concerns not only courts but also administrative authorities and, more broadly, all officials subject to public law.

Paragraph III - The right to a hearing

The right to a hearing is a wide-ranging, complex and very general concept. This is why we would do well to analyse first of all the principle, then its scope and effect, and lastly its limits.

Section I The principle

The right to a hearing has long been inferred from the equality rule set out in the old Article 4 Cst., and is now recognised as such under Article 29 (2) Cst. Case-law formerly accepted that the main basis of this principle was in Cantonal law and that the Federal-law safeguard applied in the alternative[123]. This conception is now redundant. The right in question is independent and fundamental and can be directly invoked under a public-law appeal. Although, clearly, many Federal and Cantonal laws are devoted to this issue, generally providing sufficient protection for the respective interests of litigants, citizens require this constitutional right in order to ensure a minimum level of uniformity.

Section II Scope

Article 29 (2) Cst. applies to every single type of proceedings. It goes further than Article 6 (1) ECHR, which requires "a fair … hearing", but only in the determination of civil rights and obligations or of criminal charges. The fact is that administrative procedure is where citizens need most protection. Broadly speaking, the Codes of civil and criminal procedure contain specific and detailed provisions guaranteeing equality of arms and thorough presentation of all

[123] *ATF 108 Ia 191.*

evidence. On the other hand, laws governing the action of executive authorities are sometimes incomplete, even though the citizen's role in the processing of administrative cases often raises difficult problems. This is why the Federal Court has gradually extended the right to a hearing by administrative bodies[124] to the point of acknowledging that this right can only be restricted if it is liable to affect an overriding public interest[125]. The new Constitution should not change this practice: although on the one hand the right to a hearing in civil and criminal cases will continue to be "unconditionally"[126] guaranteed and will give rise to very few disputes, on the other, in the administrative field, the same right will be guaranteed, albeit with the discretion necessitated by the peculiar circumstances of each case.

At all events, the right in question is secured for all parties to proceedings. These parties are not necessarily private individuals: municipalities or public institutions can request a hearing where their legal or financial situation is at issue. Of course, applicants must adduce infringement of a legally protected interest, in the broad sense of the term[127]. On the other hand, they do not have to establish whether or not they expect a material advantage from a fresh decision[128].

This right is by definition exercised by persons taking part in proceedings, which must therefore be of particular concern to them[129]. For instance, if a man recognises a child as his daughter, he is entitled to be heard in the proceedings to change her name, even if the parents are simply living together as an unmarried couple[130]. It follows that the right only covers proceedings that will conclude with an actual decision. In principle, the authorities laying down the rules are not required to hear citizens, even those particularly affected by the legislation under consideration[131]. Development plans constitute an intermediate category:

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[124] *ATF 99 Ia 46.*

[125] *ATF 110 Ia 101; 106 Ia 74.*

[126] *ATF 97 I 617.*

[127] *ATF 110 Ia 75; 107 Ia 185.*

[128] *ATF 122 II 469; 121 I 232; 119 Ia 136.*

[129] *ATF 119 Ia 136.*

[130] *ATF 119 III 49.*

[131] *ATF 123 I 67; 121 I 337, 232; 119 Ia 141; 114 Ia 97; 107 Ia 275; 106 Ia 78.*

landowners whose interests are likely to be affected can, theoretically, request a hearing[132].

The right to a hearing is generally directed against executive bodies. Being vested with legislative power, Parliament is not subject to Article 29 (2) Cst. Nevertheless, it sometimes issues decisions of an individual nature. Since it cannot itself summon the interested parties to appear, it invites them to state their views either orally before a committee or in writing. Such protection has to be afforded to judges, law officers and civil servants under investigation by a parliamentary commission[133] and litigants applying for pardon[134]. On the other hand, case-law withholds such protection from the originators of requests for referenda, whose validity is to be assessed by Parliament[135]. In fact, the restrictive viewpoint adopted by the Federal Court on this issue is probably unjustified, because it involves a judicial type of proceedings in which the Referendum Committee has major interests to defend and must give its opinion on the interpretation of the text of the referendum request.

Section III Scope

The right to a hearing is very broad in scope, covering the whole proceedings from beginning to end. We must therefore deal with the various procedural stages separately.

a. Summons

Obviously, parties have to be summoned in a lawful manner to appear in court, normally at their usual place of residence, or where this is unknown, via an official announcement[136]. They must also be notified in good time of the dates of the hearings, so that they can arrange to attend[137]. However, forgetting to remove

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[132] *ATF 122 I 125; 121 I 232; 111 Ia 168; 107 Ia 276.*

[133] *Article 63 of the Federal law of 23 March 1962 on the procedure of the Federal Assembly and the form, publication and entry into force of legislative acts (RS 171.11).*

[134] *See ATF 118 Ia 104.*

[135] *ATF 123 I 67-70.*

[136] *ATF 104 Ia 465.*

[137] *ATF 86 I 13.*

the summons from one's letterbox is not a valid argument for adducing a violation of fundamental rights.

b. Assistance by counsel and representation

The **principle** is that in proceedings before State bodies litigants must always be allowed to seek the assistance of, or indeed be represented by a lawyer. However, exceptions are possible when the exercise of this right would infringe the public interest. In order to expedite proceedings, reduce costs and facilitate compromise solutions, the legislator sometimes prohibits the assistance of an agent; however, this measure is only compatible with the right to a fair trial if the parties are capable of providing their own defence[138]. On the other hand, assistance by counsel cannot be prohibited in important or complex cases. The **modalities** for exercising the right to be represented vary from one judicial field to the other[139].

c. Consulting the case-file

If a litigant is to defend his/her point of view with full knowledge of the facts, he/she must have access to the file on which the authority is to base its decision. In principle, this aspect of the right to a hearing concerns all items of evidence that will influence the outcome of the proceedings[140]: for instance, civil courts cannot give their decisions on the basis of examination of foreign legislation without notifying the parties of such legislation[141]. However, this aspect sometimes clashes with third-party interests and is therefore not absolute. For this reason we must consider the problems separately.

The right to consult a file begins and ends with the proceedings. Applicants can only obtain access to documents when no case is pending if they can adduce an interest which should be protected[142], provided the rights and interests of the community or other individuals will not be injured.

Even within a given set of proceedings, the judge is often called on to weigh up the diverging interests at issue: on the one hand, the legitimate claims of a party which is endeavouring to prove the merits of its case, and on the other, the concern to preserve internal or external State security, the confidentiality of

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[138] *ATF 105 Ia 294.*

[139] *Free legal aid raises different specific problems.*

[140] *ATF 124 I 49; 121 I 227.*

[141] *ATF 124 I 49.*

[142] *ATF 123 II 538; 122 I 161; 113 Ia 262, 4.*

private information on individuals and business secrets. The authority must be particularly careful about the situation of patients, ensuring that no information is provided on their illness without a compelling reason[143], and that of children, who may be heard by the court in the parties' absence[144].

Litigants cannot demand the communication of internal documents that do not constitute evidence and are not used for the formation of the judgement[145]. Candidates who have failed their law examinations may not request the production of other candidates' papers unless there is strong circumstantial evidence of bias in the appraisal of their performance[146].

To the extent that it is recognised, the right to consult the file includes the right to make copies, usually at the applicant's own expense[147]. Practice as regards the right to request translation of documents[148] or the judgement[149], or the assistance of an interpreter is more restrictive.

d. Taking of evidence

The right to a hearing has a twofold scope in this field: first of all, it enables litigants to produce their own evidence in support of their contentions, and secondly it allows them to help establish the evidence provided by another party or ordered by the court.

The parties are entitled to produce evidence provided it concerns relevant facts[150], is likely to be useful[151] and is produced in time and in the prescribed form[152]. In

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[143] *ATF 122 I 159-60.*

[144] *ATF 122 I 53, 56.*

[145] *ATF 117 Ia 96; G. MÜLLER, Commentaire de la Constitution Fédérale du 29 mai 1874, re Article 4, No. 109.*

[146] *ATF 121 I 225.*

[147] *ATF 117 Ia 424, 429; 116 Ia 325, 327 para. 3d; the old case-law was more restrictive: ATF 108 Ia 7.*

[148] *ATF 121 I 204; 118 Ia 464.*

[149] *ATF 115 Ia 64.*

[150] *ATF 115 Ia 64.*

[151] *ATF 124 I 208; 103 Ib 197.*

particular, parties may make statements in evidence and request that these be included in the minutes of proceedings[153]. In **criminal** proceedings, the defendant is entitled to request the appearance of defence witnesses[154] and the examination of prosecution witnesses[155]. Even where such witnesses are in fact infiltrators, there can be no guarantee on their anonymity or immunity from questioning[156]. Defendants must be allowed to demonstrate the veracity of facts concerning not only the offences themselves but also their personal circumstances and, subsequently the circumstances of the sentencing. Individuals detained on remand can apply for probationary measures when appealing against decisions not to release them[157]. Moreover, the court is required to create a complete file including all the evidence relating to investigations[158]. In **civil** proceedings, the judge is required to accept evidence provided on relevant facts[159], including rebutting evidence casting doubt on the soundness of the case in chief[160]. In **administrative** proceedings, the litigant has the same rights, even if the judge applies the official maxim and spontaneously examines all the *de facto* and *de jure* issues that he or she considers decisive[161].

Secondly, the parties can participate in the taking of evidence[162], for instance by countering the evidence adduced by the other party and assisting in operations, especially inspections of premises[163], and in the hearing of witnesses and experts.

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[152] *ATF 101 Ia 103.*

[153] *ATF 119 V 214; 112 Ia 370.*

[154] *ATF 118 Ia 327.*

[155] *ATF 121 I 306; 118 Ia 462; 116 Ia 291.*

[156] *ATF 118 Ia 458; 329 para. 2; for previous practice, see ATF 112 Ia 24; Eur. Court HR, Ludi judgement of 25 June 1992, Series A, p. 303.*

[157] *ATF 124 I 208; in this particular case the Federal Court ruled that there were no grounds for ordering a fresh hearing or a second expert opinion.*

[158] *ATF 115 Ia 97.*

[159] *ATF 114 II 289; 111 II 119.*

[160] *ATF 115 II 305.*

[161] *ATF 114 Ia 97.*

[162] *ATF 105 Ia 49; 104 Ia 71.*

[163] *ATF 120 V 360; 119 V 211; Ia 262; 116 Ia 97; 113 Ia 82.*

However, this right has its limits: it can be denied if its exercise would injure overriding third-party interests. For example, judges settle cases of assigning parental authority or right of access by hearing the child in the absence of his/her parents, who are subsequently given a short summary of the interview[164]. Again, inspections of premises which are either urgent or which would only be useful if unannounced are organised without the help of the persons concerned[165].

e. Defence

Litigants are entitled to plead in their defence. The following are the most general aspects and the most direct consequences of the right to a hearing: the right to speak, to adduce facts, to dispute the other party's statements, to develop legal arguments, to rebut the other party's arguments, to file pleadings, to reply and to make rejoinders. However, the problems vary from one legal field to the other.

In **criminal** cases, defendants must be invited to present their view on the offences charged, to describe their personal circumstances, to take part in the examination of witnesses and to comment on any evidence submitted[166]. Any authority invited to reconsider the case following a transfer order from the Federal Court must hear the defendant[167]. The same applies to any body empowered to withdraw driving licences following a criminal conviction[168].

In **civil** proceedings, on the other hand, written documents are very important and so in principle litigants are not entitled to an oral hearing. However, case-law does make exceptions, such as in cases where the person concerned wishes to comment on an expert opinion[169] or on his/her release from guardianship[170]. Parties are not entitled to address the plenary decision-making body[171], unless the law expressly provides for a special evidence-taking procedure[172].

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[164] *ATF 122 I 53.*

[165] *ATF 113 Ia 83; 112 Ia 6.*

[166] *ATF 121 II 216; 120 Ia 50; 118 Ia 458.*

[167] *ATF 119 Ia 139; IV 137.*

[168] *ATF 121 II 216.*

[111] *ATF 122 II 469; see, a contrario, ATF 117 II 346.*

[170] *ATF 117 II 379; 115 Ia 101.*

[171] *ATF 117 II 136; 115 II 133.*

[172] *ATF 115 II 129.*

Case-law in the **administrative** field takes account of the peculiarities of each individual case: the type of body holding jurisdiction, the nature of the proceedings and the importance of the private interests at stake. It is very difficult to summarise such a case-by-case approach. Persons applying for a pardon can demand communication of the relevant report and discuss it[173]. On the other hand, candidates for professional examinations have no access to the commission's report and are not entitled to a hearing before the decision[174]. Where the right of reply is concerned, the appeal body is not obliged to forward the respondent authority's reply to the applicant, unless insufficient reasons were given in the decision complained of[175]. Broadly speaking, unless otherwise provided, the established practice is that the right to a hearing does not comprise the right to an oral hearing[176].

Section IV Effects

Where the right to a fair trial has been infringed, the decision given is not immediately void but merely voidable, following the application by the injured party. However, while the Federal Court is able to quash the flawed decision, Cantonal administrative courts cannot always do so, and sometimes have to confine themselves to issuing a declaratory judgement on the lawfulness of the decision given. Moreover, the appeal body may decide not to invalidate the decision deemed unlawful where such invalidation would be detrimental to the certainty of the law or disproportionate to the circumstances of the case[177].

Section V Limits

None of the aspects of the right to a hearing is absolute. The limits are usually determined by practice, case by case, taking account of the peculiarities of each point at issue. However, three more general restrictions do emerge from case-law.

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[173] *ATF 118 Ia 104.*

[174] *ATF 113 Ia 288.*

[175] *ATF 111 Ia 3-4; see ATF 114 Ia 314.*

[176] *ATF 108 Ia 191.*

[177] *ATF 100 Ia 12; 97 I 88.*

The main point is that litigants cannot require the authority to deal with all the arguments they put forward, examine all their pleadings, or pronounce on each of their requests and submissions. The authority dealing with the case is not only entitled to remain strictly within the ambit assigned to it by law but also has discretionary powers to discard any elements it considers immaterial to the case in hand. It is therefore not obliged to elucidate irrelevant facts or adjudicate on questions that are not decisive in the case.

Secondly, it is legitimate to prevent abuse of the right to a hearing. In other words, this right cannot be successfully relied upon by a party acting in bad faith.

Parties deliberately failing to report a procedural defect are liable to have their case declared inadmissible, especially if this has posed a serious threat to the interests of a third party acting in good faith.

Lastly, the scope of the right to a hearing varies at different stages in proceedings. If this right is infringed by the first judge, this fault may be corrected by the higher courts[178]. The Federal Court holds that reparation is sufficient in two cases at least: where the Cantonal or Federal appeal body has adjudicated on the alleged infringement of the right to a hearing and referred the case back to the lower court, the application having been well-founded; and where the appeal body itself has allowed the injured party to defend his/her rights effectively, thus removing the defect. In the latter case, the appeal body must have the same investigatory powers as the first judge vis-à-vis all *de facto* and *de jure* problems and the litigant must therefore have suffered no injury.

Conclusions

I. The Constitution of the Swiss Confederation of 29 May 1874 did not expressly secure the right to a fair trial as such, nor even the main components of this right. This omission has now been made good by Articles 29 to 32 of the new Federal Constitution of 18 April 1999, coming into force on 1 January 2000.

II. In its previous case-law, the Swiss Federal Court derived the various elements of the right to a fair trial from the principle of equality (the current Article 4). In this way it developed the right to submit cases to the courts, the right to obtain a decision within a reasonable time and the right to a hearing, and also introduced free legal aid.

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[178] *ATF 124 II 138; 114 Ia 314; 110 Ia 82; 107 Ia 244.*

III. Swiss law considers the right to a fair trial and connected rights as fundamental rights with constitutional status, protected under the public law jurisdiction of the Federal Court.

IV. The right to a fair trial is both an autonomous right and a fundamental principle forming the basis of the other procedural safeguards, including the right to a hearing and legal aid.

V. The right to a fair trial is enormous in scope, covering all proceedings pending before an official body.

VI. The right to a fair trial concerns all procedural stages, right from the committal proceedings to the appeals stage.

VII. The right to a fair trial concerns not only courts in the strict sense of the term but all State authorities vested with decision-making powers.

THE RIGHT TO A FAIR TRIAL IN UNITED STATES LAW

United States Law Report by Jimmy GURULÉ

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I. Definition and Legal Force of the Right to a Fair Trial

The American criminal justice system is founded on the fundamental principle that every person regardless of his socio-economic status, race, religious beliefs, or gender is entitled to a fair trial. Former United States Supreme Court Justice Hugo Black cogently described the ultimate goal of the American scheme of criminal justice when he stated: "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[179] The substantive rights and procedural protections deemed essential to a fair trial are secured by the Fifth and Sixth Amendments of the United States Constitution. First, the Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Thus, a federal grand jury comprised of not less than 16 nor more than 23 common citizens, rather than a federal prosecutor or other law enforcement official engaged in ferreting out criminal activity, determines whether probable cause exists to

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[179] *Gideon v. Wainwright, 372 U.S. 335, 344 (1963).*

believe that a defendant has committed a serious federal offence and therefore should be required to stand trial.[180]

Second, the Fifth Amendment protects a defendant from being placed in jeopardy twice for the same offence. The constitutional prohibition against "double jeopardy" guarantees that a defendant shall not be prosecuted twice or receive multiple punishment for the same offence.[181] Thus, for example, if the defendant is acquitted at trial, the Government may not seek to prosecute him a second time for the same offence.[182] Additionally, the Fifth Amendment guarantees a defendant the right against self-incrimination. The Fifth Amendment states that a defendant "shall [not] be compelled in any criminal case to be a witness against himself."[183]

Finally, and perhaps most importantly, the Fifth Amendment provides that a defendant shall not "be deprived of life, liberty, or property, without due process of law."[184] The vague contours of the Due Process Clause have afforded defendants numerous procedural protections at trial not otherwise guaranteed by the Federal Constitution. For example, due process of law has been held to

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[180] *Rule 6(a)(1), Federal Rules of Criminal Procedure, elaborates on the composition of a federal grand jury. It provides: "The grand jury shall consist of not less than 16 nor more than 23 members." Additionally, unlike a petit jury, a grand jury need not reach a unanimous decision. Rule 6(f) requires that an indictment or true bill "may be found . . . upon the concurrence of 12 or more jurors." See generally, Jimmy Gurulé, Complex Criminal Litigation: Prosecuting Drug Enterprises And Organised Crime, § 7-1, at 301-306 (Michie 1996).*

[181] *In North Carolina v. Pearce, 385 U.S. 711, 717 (1969), the Supreme Court declared that the Double Jeopardy Clause "protects against a second prosecution for the same offence after acquittal. It protects against a second prosecution for the same offence after conviction. And it protects against multiple punishments for the same offence."*

[182] *In Brown v. Ohio, 432 U.S. 161 (1977), the Supreme Court construed the Double Jeopardy Clause to prohibit multiple prosecutions for a greater and lesser-included offence. The Court held that if in order to prove the greater offence, the government must prove each and every element of the lesser offence for which the defendant has been previously prosecuted, the second prosecution is barred by the Double Jeopardy Clause. Id. at 167-168.*

[183] *U.S. Constitution, Amend. V. It should further be noted that the United States Supreme Court has recently held that the Fifth Amendment's Self-Incrimination Clause does not extend to a defendant's real and substantial fear of foreign prosecutions. United States v. Balsys, 524 U.S. 666 (1998). Thus, for example, a defendant may be required to testify at a United States deportation hearing despite claims of possible future foreign criminal prosecution without violating the defendant's right against self-incrimination.*

[184] *Id.*

require that the Government bear the burden of proving the defendant's guilt beyond a reasonable doubt,[185] as well as disclose evidence in the possession of the Government that is material and exculpatory to the defendant.[186] Additionally, due process of law has been interpreted to guarantee the defendant a right to a trial presided over by an unbiased judge.[187]

The American system of criminal justice is distinctive, adopting a dualist view of criminal law. Depending on the nature of the offence, a defendant may be prosecuted in Federal or State court. However, Federal jurisdiction in criminal cases is limited and properly extends only where there is a sufficient Federal nexus, e.g., the Federal crime effects interstate or foreign commerce or implicates important federal interests.[188] Furthermore, under the "dual sovereignty" doctrine the same conduct may give rise to separate prosecutions by both Federal and State sovereigns.[189] As a practical matter, however, multiple prosecutions of this kind are rare and occur only under exceptional circumstances. For example, in the 1995 bombing of the Murrah Federal Building in Oklahoma City, Oklahoma, killing a total of 168 people and injuring hundreds more, defendant Terry Nichols was convicted in Federal court of conspiracy and involuntary manslaughter in the deaths of eight Federal law enforcement officers and received a life sentence. Dissatisfied with the outcome of the federal proceedings, a state prosecutor in Oklahoma City subsequently filed 160 murder charges against Nichols and

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[185] *In re Winship, 397 U.S. 358 (1970).*

[186] *Brady v. Maryland, 373 U.S. 83 (1963).*

[187] *Tumey v. Ohio, 273 U.S. 510 (1927).*

[188] *In his annual report on the state of the judiciary delivered on January 1, 1999, Chief Justice William H. Rehnquist sharply criticised Congress for federalising crimes already covered by State law. Rehnquist warned that the increasing federalisation of crime imposes heavy burdens on the federal judiciary and "threatens to change entirely the nature of our federal system." 64 Cr. L. Rptr. 256 (Jan. 6, 1999).*

[189] *The United States Supreme Court "has plainly and repeatedly stated that two identical offences are not the "same offence" within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." Heath v. Alabama, 474 U.S. 82, 92 (1985); see also United States v. Ali Rezaq, 134 F.3d 1121 (D.C. Cir. 1998) (the dual sovereignty doctrine applies to foreign prosecutions; double jeopardy does not prohibit criminal prosecution in the United States for air piracy following earlier prosecution in Malta for crimes related to air hijacking incident).*

The "dual sovereignty" doctrine rests on the notion that a defendant whose conduct violates the laws of two sovereigns has "committed two different offences by the same act." United States v. Lanza, 260 U.S. 377, 382 (1922).

announced he will seek the death penalty. Newsday, A13 (Aug. 22, 1999). *See also* Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. Rev. 693 (1994).

Persons prosecuted in State court are also entitled to due process of law. The right to due process is imposed upon the States by the Fourteenth Amendment, which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[190] "The due process clause requires that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[191] Many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.

The Sixth Amendment enumerates other fundamental rights afforded a Federal defendant at trial. Pursuant to the Sixth Amendment, a defendant is entitled "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature of the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the Assistance of Counsel for his defence."[192]

It should be emphasised that the rights afforded to a defendant prosecuted in Federal court are not necessarily guaranteed to a defendant in State criminal proceedings. The test for determining whether a right extended by either the Fifth or Sixth Amendments with respect to Federal criminal proceedings is also protected against State action by the Fourteenth Amendment's Due Process Clause has been phrased in a variety of ways. The relevant inquiry is whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"[193] whether it is "basic in our system of jurisprudence,"[194] and or whether it is "a fundamental right, essential to a fair

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[190] *U.S. Constitution, Amend. XIV.*

[191] *Brown v. Mississppi, 297 U.S. 278, 286 (1936) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).*

[192] *U.S. Constitution, Amend. VI.*

[193] *Powell v. Alabama, 287 U.S. 45, 67 (1932).*

[194] *In re Oliver, 333 U.S. 257, 273 (1948).*

trial."[195] The spacious language of the Due Process Clause of the Fourteenth Amendment has been construed by the United States Supreme Court to guarantee defendants prosecuted in State court the right to be free of compelled self-incrimination,[196] which is guaranteed by the Fifth Amendment. The due process principle has further extended to State defendants several of the procedural protections afforded Federal defendants under the Sixth Amendment, including the right to counsel;[197] right to a speedy and public trial;[198] right to confront opposing witnesses;[199] and the right to compulsory process for obtaining witnesses.[200] "Nor may a State, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.'"[201] Finally, due process of law required by the Fourteenth Amendment prohibits a conviction based on a confession shown to have been extorted by officers of the state by brutality and violence.[202]

While finding their origin in the United States Constitution, the scope of the fundamental rights afforded criminal defendants is often embellished by Federal legislation. For example, in *Tumey v. Ohio,*[203] the Supreme Court held that the Fourteenth Amendment's Due Process Clause guarantees a defendant the right to a trial by an impartial judge. In *Tumey,* the Supreme Court ruled that the tribunal's pecuniary interest in the outcome of the case denied the defendant due process of law.[204] However, the exact contours of the right to an impartial judiciary,

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[195] *Gideon v. Wainwright, 372 U.S. 335, 343-344 (1963); Malloy v. Hogan, 378 U.S. 1, 6 (1964); Pointer v. Texas, 380 U.S. 400, 403 (1965).*

[196] *Malloy v. Hogan, 378 U.S. 1 (1964).*

[197] *Gideon v. Wainwright, 372 U.S. 335 (1963).*

[198] *Klopfer v. North Carolina, 386 U.S. 213 (1967), In re Oliver, 333 U.S. 257 (1948).*

[199] *Pointer v. Texas, 380 U.S. 400 (1965).*

[200] *Washington v. Texas, 388 U.S. 14 (1967).*

[201] *Brown v. Mississippi, 297 U.S. 278, 286 (1936) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)).*

[202] *Brown v. Mississippi, 287 U.S. 278 (1936).*

[203] *Tumey v. Ohio, 273 U.S. 510 (1927).*

[204] *Id. at 532.*

including when a judge shall disqualify himself from a judicial proceeding, were not detailed with any degree of specificity by the Court in *Tumey*.

Following the Supreme Court's ruling in *Tumey*, Congress enacted 28 U.S.C. § 455, which provides for the disqualification of a Federal judge "in any proceeding in which his impartiality might reasonably be questioned."[205] The statute further delineates specific circumstances when a judge "shall" disqualify himself. Pursuant to 28 U.S.C. § 455, any justice, judge, or magistrate of the United States shall disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practised law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in the controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

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[205] *28 U.S.C. § 455(a) (1999).*

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.[206]

In this fashion, fundamental trial rights guaranteed by the United States Constitution may be complimented by Federal legislation with the latter defining the scope and proper application of the constitutional principle. It is therefore necessary that a lawyer practising criminal law in Federal court examine the United States Constitution, as well as relevant federal legislation to determine the scope of any substantive or procedural right deemed essential and fundamental to a fair trial.

Under United States law, the Federal Constitution is deemed paramount and pre-empts any inconsistent Federal or State legislation. Moreover, the landmark case of *Marbury v. Madison*[207] makes clear that the United States Supreme Court is the final interpreter of the Constitution, including any provisions implicating a defendant's right to a fair trial. Thus, the United States Supreme Court has the final say on whether Federal or State legislation, as well as any State or lower Federal court decision, unconstitutionally infringes on a defendant's fair trial rights. In short, Federal constitutional law, as interpreted by the Supreme Court, trumps any inconsistent Federal and State legislation, including conflicting state and lower Federal judicial decisions.[208]

At the same time, American criminal jurisprudence gives the Federal courts the last word on whether a defendant prosecuted in State court was afforded due process of law. Article 1, section 9, clause 2, of the United States Constitution establishes the procedural recourse for challenging a State criminal conviction based on a violation of the Due Process Clause of the Fourteenth Amendment. It provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it."[209] The Writ of Habeas Corpus or "Great Writ" has its roots in early English law and was incorporated into Federal constitutional law by the Framers of the United States Constitution.

Federal habeas review of State convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying State criminal

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[206] *28 U.S.C. § 455(b) (1999).*

[207] *Marbury v. Madison, 5 U.S. 137 (1803).*

[208] *It follows that State constitutional law supersedes conflicting state statutory law.*

[209] *U.S. Const., Art. II, § 9, cl. 2.*

proceedings. The writ of habeas corpus permits a State prisoner to challenge his conviction in Federal court on the grounds that his State conviction was obtained in violation of the Fourteenth Amendment Due Process Clause.[210] However, a writ of habeas corpus does not permit relitigation of the criminal case on the merits. In a recent United States Supreme Court decision, *Herrera v. Collins*, the Court held that actual innocence is irrelevant.[211] Moreover, a defendant must exhaust all State appeals before filing a writ of habeas corpus. If the Federal court finds that the State prisoner's due process rights were violated, the proper relief to be granted is reversal of the State conviction.

Finally, alleged abuses of the Writ caused Congress to recently enact the Antiterrorism and Effective Death Penalty Act of 1996, which imposes a one-year period of limitation on an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court.[212] Thus, a defendant is no longer afforded limitless opportunities to challenge his State conviction pursuant to a petition for writ of habeas corpus.

While State action may not lower the bar of Federal constitutional protections afforded a defendant at trial, States may properly seek to afford their citizens a greater degree of protection under their State constitutions than accorded under the Federal constitution. For example, the Supreme Court has recognised several

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[210] *See Schneckloth v. Bustamonte, 412 U.S. 218, 257 (1973) (Powell, J., concurring); Herrera v. Collins, 506 U.S. 390, 400 (1993) ("[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact.").*

[211] *Herrera v. Collins, 506 U.S. at 400.*

[212] *28 Antiterrorism and Effective Death Penalty Act of 1996, Publ. Law 104-132, amends 28 U.S.C. § 2244, and provides that the one-year limitation period for the filing of a writ of habeas corpus shall run from the latest of -*

(d)(1)(A) the date on which the judgement became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;
(C) the date on which the constitutional right asserted was initially recognised by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgement or claim is pending shall not be counted toward any period of limitation under this subsection.

exceptions to the Sixth Amendment right of confrontation, permitting the admission of hearsay evidence at trial in certain circumstances.[213] In *White v. Illinois,* the Supreme Court held that the Confrontation Clause of the Sixth Amendment does not require that, before a trial court admits testimony under the spontaneous declaration[214] and medical diagnosis[215] exceptions to the hearsay rule, the prosecution must either produce the declarant at trial or establish the declarant's unavailability.[216] However, several States have failed to be persuaded by the reasoning in *White* and have afforded their citizens greater protection under the State constitution than provided under the Federal constitution.

In *State v. Lopez,*[217] the New Mexico Court of Appeals joined two other State courts[218] in declining to follow the Supreme Court's decision in *White,* and instead embraced the standard set forth in *Ohio v. Roberts,*[219] which required proof of the declarant's unavailability prior to the introduction of a trial transcript of a witness not produced at trial but who had been subject to examination by defendant's counsel at a probable cause hearing. The court in *Lopez* explained:

[W]e believe that the decision in Roberts articulates the proper standard for New Mexico with regard to the rights of a criminal defendant . . . . "A showing of the declarant's unavailability is necessary to promote the integrity of the fact finding process and to ensure fairness to defendants. Although excited utterances have

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213 See, e.g., Maryland v. Craig, 497 U.S. 836 (1990) (holding that the Confrontation Clause of the Sixth Amendment does not categorically prohibit a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television).

214 Federal Rules of Evidence, Rule 803(2) permits hearsay testimony regarding "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition."

215 Federal Rules of Evidence, Rule 803(4) permits hearsay testimony regarding "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

216 White v. Illinois, 502 U.S. 346 (1992).

217 State v. Lopez, 926 P.2d 784, 789 (N.M. App. 1996).

218 See State v. Ortiz, 845 P.2d 547 (Haw. 1993); State v. Storch, 612 N.E.2d 305 (Ohio 1993).

219 Ohio v. Roberts, 448 U.S. 56 (1990).

certain guarantees of reliability, we also recognise that the right to confront an accuser should not be abandoned simply because the alleged incriminating state was made spontaneously. Thus, we choose to follow the Supreme Court test set forth in Roberts." *Ortiz,* 845 P.2d at 55. . . .

Thus, when a hearsay declarant is not present for cross-examination at trial, the confrontation clause of the New Mexico Constitution requires a showing that he or she is unavailable. Even then, the declarant's statement is admissible only if it bears adequate indicia of reliability.[220]

Finally, the right to a fair trial is not an autonomous right. As previously discussed, although in a different context, the right to a fair trial assumes the impartiality of the courts. In *Tumey v. Ohio*, the Supreme Court recognised that judicial impartiality is an essential component of due process of law.[221] Moreover, this right is protected by Federal legislation, 28 U.S.C. § 455, which requires that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned."[222] Disqualification may proceed *sua sponte* or on motion by the defendant or prosecutor.

II. The Right To a Fair Trial in Practice

While it is not uncommon for a criminal defendant to challenge his Federal or State conviction on the grounds that he was denied a fair trial, relatively few criminal convictions are overturned based on a judicial finding of a due process violation. As a preliminary matter, in order to preserve an issue for challenge on appeal a defendant must "'make a timely assertion of the right before a tribunal having jurisdiction to determine it.'"[223] This requirement is important because it affords the trial judge an opportunity to correct the claimed error. It further establishes a record of the trial court's ruling for review on appeal. Finally, the

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[220] *State v. Lopez, 926 P.2d 784, 789-90 (N.M. App. 1996) (quoting State v. Ortiz, 845 P.2d 547, 556 (Haw. 1993)).*

[221] *Tumey v. Ohio, 273 U.S. 510 (1927).*

[222] *28 U.S.C. § 455(a).*

[223] *United States v. Olano, 507 U.S. 725, 731 (1993) (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)). See also Rule 30 of the Federal Rules of Criminal Procedure, which provides that "[n]o party may assign as error any portion of the [jury] charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."*

rule that failure to object to a purported trial error constitutes a waiver of the legal infirmity reflects, in part, the adversarial nature of the American criminal justice system.

In the American adversarial process, the judge's role at trial is fairly circumscribed. For example, judges seldom raise challenges to the proceedings on their own motion or question government or defence witnesses during trial. Moreover, they address the jury only to explain legal rulings and give instructions on the relevant law governing the case. In the American system, the judge's role is to serve as an impartial and independent referee of the criminal proceedings, ruling on legal motions and objections when raised by the litigants.

The rule that no party may assign as error any matter unless the party objected thereto is mitigated by Federal Rules of Criminal Procedure 52(b), which allows plain errors affecting substantial rights to be noticed even though there was no objection.[224] As outlined by the Supreme Court in *United States v. Olano*, before an appellate court can correct any error not raised at trial, there must be "(1) 'error,' (2) that is 'plain,' and (3) that affect[s] substantial rights.'"[225] If all three conditions are satisfied, an appellate court may then exercise its discretion to notice a forfeited error, but only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."[226]

Under the American system, the scope of the right to a fair trial may depend on the nature of the criminal charges. For example, the Fourteenth Amendment does not guarantee the right to a jury trial in State petty criminal cases. In *Duncan v. Louisiana*, the Supreme Court declared: "Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offences."[227] Conversely, the right to be represented by counsel attaches regardless of the seriousness of the offence. In *Argersinger v. Hamlin*, the Supreme Court held "no person may be imprisoned for any offence, whether

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[224] *Fed. R. Crim. P. 52(b).*

[225] *United States v. Olano, 507 U.S. 725, 732 (1993) (internal citations omitted).*

[226] *Johnson v. United States, 520 U.S. 461, 467 (1997) (holding that trial judge's error in failing to submit materiality of false statement instruction to jury in prosecution for perjury did not affect defendant's substantial rights) (internal quotations omitted).*

[227] *Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (holding that a crime punishable by two years in prison is a serious crime and not a petty offence and thus appellant was entitled to a jury trial).*

classified as petty, misdemeanour, or felony, unless he was represented by counsel at his trial."[228]

The scope of a defendant's fair trial rights may further turn on the nature of the criminal proceedings. While Federal jury trials consist of twelve jurors, a six-person jury in a State criminal proceeding has been held to be consistent with the Sixth and Fourteenth Amendments.[229] Furthermore, a less-than-unanimous state verdict has been held to not offend the Fourteenth Amendment Due Process Clause.[230]

Finally, in a civil forfeiture trial, which is a quasi-criminal proceeding, the government's burden is substantially lower than in a criminal case.[231] In civil forfeiture, the government bears the burden of establishing probable cause to believe that the property in question is subject to forfeiture. The burden then shifts to the claimant to show by a preponderance of the evidence either that the property is not subject to forfeiture or that an affirmative defence exists. Moreover, in a civil forfeiture proceeding an indigent claimant is not entitled to appointment of counsel.[232]

The American system affords a defendant a "sliding scale" of constitutional protections during the various stages of the criminal proceedings. At trial, the substantive rights and procedural safeguards afforded a defendant are at their zenith. However, at the pre-trial litigation and sentencing stage of the

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[228] *Argersinger v. Hamlin, 407 U.S. 25 (1972).*

[229] *Williams v. Florida, 399 U.S. 78 (1970) (the Sixth Amendment mandates a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and provide a representative cross-section of the community, which purposes can be fulfilled by jury of six members).*

[230] *Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding the constitutional validity of a conviction based upon a nine to three verdict). While there has been legal debate on whether the Sixth Amendment requires a verdict by a unanimous jury, the issue has been rendered moot by enactment of federal legislation requiring a unanimous verdict. See Federal Rule of Criminal Procedure, Rule 31.*

[231] *See Austin v. United States, 509 U.S. 602 (1993) (holding that civil forfeiture under 21 U.S.C. §§ 881(a)(4) and (a)(7), for conveyances and real property, constitute punishment for a crime and therefore should be subject to the constraints of the Eighth Amendment's prohibition on "excessive fines");*

[232] *The Civil Asset Forfeiture Reform Act, H.R. 1658, 106th Cong. (1999), which is presently pending in Congress, would require court appointment of counsel based on a showing that the claimant is indigent.*

proceedings, a defendant is extended fewer protections. Finally, the accused is afforded even fewer rights and therefore is most vulnerable during the investigative stage. The right to counsel guaranteed by the Sixth Amendment illustrates the defendant's "sliding scale" of rights. The Sixth Amendment explicitly guarantees a defendant the right to legal representation at trial. The right to counsel has further been held to attach at "critical stages" of the prosecution. In *Kirby v. Illinois,* the Supreme Court ruled that the right to counsel was inapplicable to identification procedures held prior to the start of adversary judicial proceedings.[233] For purposes of determining when the right to counsel attaches, a "critical stage" in the proceedings has been interpreted to mean at or after the initiation of adversary judicial criminal proceedings, whether by formal charge, preliminary hearing, indictment, information, or arraignment.[234] Thus, line-up and show-up identification proceedings are not considered "critical stages" in the proceedings when conducted prior to the filing of criminal charges. The accused is therefore not afforded the right to counsel.

At the same time, a defendant is afforded a right to counsel at post-indictment, pre-trial proceedings, including, for example, a pre-trial detention hearing.[235] Since this proceedings take place after the filing of formal charges, they are considered "critical stages" in the proceedings.

Another example of the disparate application of rights during the criminal proceedings is illustrated by the Sixth Amendment which guarantees the right to confrontation of witnesses at trial. While hearsay evidence is occasionally admitted based on a particularised showing of reliability and necessity, admission of hearsay statements is strongly disfavoured at trial. Exclusion of hearsay evidence is the rule, while its introduction at trial is the exception. However, during pre-trial proceedings, including bail hearings and motions to suppress evidence, the rules of evidence are not applicable. Thus, hearsay evidence is regularly admitted, thereby denying the defendant the right to cross-examine witnesses.

The standard of proof is also less during pre-trial proceedings. For example, a determination of whether the defendant poses a flight risk for purposes of being released on bail is determined by the preponderance of the evidence standard.

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[233] *Kirby v. Illinois, 406 U.S. 682 (1972).*

[234] *Id.*

[235] *United States v. Salerno, 481 U.S. 739, 742 (1987); see also 18 U.S.C. § 3142(f) (providing that at the detention hearing, the accused has the right to be represented by counsel, and, if financially unable to obtain adequate counsel, to have counsel appointed).*

Whether a defendant should be detained pre-trial based on a finding that he poses a danger to the community is measured against the "clear and convincing evidence" standard of proof.[236] At a motion to suppress evidence, the preponderance of the evidence standard is generally applied.

Additionally, the procedural rights afforded a defendant at sentencing are less than at trial. In *Williams v. New York*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not require a judge to hold hearings and give a convicted person an opportunity to participate in those hearings to determine the sentence to be imposed.[237] Moreover, in *McMillan v. Pennsylvania*, the Supreme Court approved a State statute which imposed on the prosecution a preponderance burden of proving an aggravating factor for sentencing, rather than the heightened standard of beyond a reasonable doubt required to prove the defendant's guilt.[238]

The grand jury proceedings offer an additional example of the diminished rights afforded the accused during the investigative stage of the prosecution. During the grand jury proceedings, the rules of evidence do not apply and an indictment may be based wholly on hearsay evidence.[239] Furthermore, the Supreme Court has twice held that a witness is not entitled to have counsel present in the grand jury room when testifying, even if he is the target of the investigation.[240] Additionally, the exclusionary rule is not applicable in grand jury proceedings and the witness cannot avoid testifying on Fourth Amendment grounds.[241] Finally, the Double Jeopardy Clause of the Fifth Amendment does not prohibit returning an indictment when a prior grand jury refused to do so.[242]

Finally, due process rights essential to a fair trial generally do not apply to non-judicial authorities which carry out judicial functions. When held to apply, the

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[236] *18 U.S.C. § 3142(f).*

[237] *Williams v. New York, 337 U.S. 241 (1949).*

[238] *McMillan v. Pennsyvania, 477 U.S. 79 (1986).*

[239] *Costello v. United States, 350 U.S. 359, 364 (1955).*

[240] *See United States v. Mandujano, 425 U.S. 564, 581 (1976) ("Under settled principles the witness may not insist upon the presence of his attorney in the grand jury room."); In re Groban, 352 U.S. 330, 333 (1957) (same); see also Fed. R. Crim. P. 6(d).*

[241] *Calandra v. United States, 414 U.S. 338, 350-51 (1974).*

[242] *United States v. Williams, 504 U.S. 36, 49 (1992).*

defendant is afforded minimal due process protection. The issue frequently arises in prison disciplinary procedures. In *Wolff v. McDonnell*, Nebraska State inmates challenged the decision of prison officials to revoke good time credits without adequate procedures.[243] The Supreme Court ruled that the statute by which inmates earned good time credits that bestowed mandatory sentence reductions for good behaviour created a liberty interest in a "shortened prison sentence" that required that a prisoner be afforded minimum procedural protections prior to revoking such credits.[244]

In most prison disciplinary proceedings, the prisoner is not afforded even minimum due process protection. In *Sandin v. Conner,* the Supreme Court held that the defendant's "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest" protected by the Due Process Clause of the Fourteenth Amendment.[245] Even though punitive, it appears that only when the prison discipline "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" is due process implicated.[246]

III. Conclusion

The American criminal justice system is founded on the fundamental principal that every person is entitled to a fair trial. The rights considered essential to assuring a fair trial have been enshrined by the Framers of the Constitution in the Fifth and Sixth Amendments. However, realisation of the right to a fair trial requires much more than words memorialised on paper. Two hundred years after the adoption of the Federal constitution, the realisation of the fair trial rights guaranteed every defendant remains a work in progress. To this date, the principle of "due process of law" is an evolving concept. The realisation of the right to a fair trial requires at the very least the constant and vigilant efforts of an impartial judiciary, a highly professional defence bar, as well as government prosecutors having as their sole purpose and objective that "justice is done" in every case.

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[243] *Wolff v. McDonnell, 418 U.S. 539 (1974).*

[244] *Id. at 556.*

[245] *Sandin v. Conner, 515 U.S. 472, 486 (1995).*

[246] *Id. at 484. See also Pennsylvania Board of Probation and Parole v. Scott, 118 S. Ct. 2014, 2022 (1998) (holding that parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment).*

THE RIGHT TO A FAIR TRIAL IN SOUTH AFRICAN LAW South African Law Report by Mr Andrew SKEEN,

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Until 1994 the right to a fair trial was not constitutionally entrenched in South African Law. From 27 April 1994 a right to a fair trial was embodied in the Constitution.[247] In 1997 a new Constitution also entrenched and widened in ambit the right to a fair trial.[248]

Prior to 1994 the common-law and the Criminal Procedure Act[249] governed criminal procedure and the rights of an accused person to a fair trial. Parliamentary sovereignty, which pertained up to that time, enabled the legislature to curtail the rights of an accused person.[250] The Constitution is now supreme and the Criminal Procedure Act and other legislation pertaining to criminal trials must now be tested against the Constitution.

Section 39(2) of the 1996 Constitution provides that "... when interpreting any legislation, and when developing the common-law or customary law, every court tribunal or forum must promote the spirit, purpose and object of the Bill of Rights" (Chapter 2 of the Constitution).

Section 39(1) of the 1996 Constitution provides that in interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. The Constitutional Court has decided that the interpretation of the Constitution is fundamentally different to the interpretation of general legislation.[251] A Bill of Rights is a document *sui generis* and should be interpreted generously and not in a

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[247] *The Constitution of the Republic of South Africa Act 200 of 1993 (referred to as the interim Constitution); Section 25(3).*

[248] *The Constitution of the Republic of South Africa, Act 108 of 1996 (referred to as the 1996 Constitution; Section 35(3).*

[249] *51 of 1977.*

[250] *See, generally, Steytler Constitutional Criminal Procedure (1998) 1-6. Dugard Introduction to Criminal Procedure (1977).*

[251] *S v. Makwanyane 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).*

narrow or legalistic fashion.[252] Although the common-law is an important source of interpretation, the scope of a constitutional right should not be cut down by reading implicit restrictions into it so as to bring it into conformity with the common-law.[253]

Section 36(1) of the 1996 Constitution contains a limitation clause reading as follows: "The rights in the Bill of Rights may be limited only terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including - (a) the nature of the right; (b) the importance of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

The burden of justification rests on the legislature or the party relying on the legislation and not on the party challenging it,[254] and the factual allegations to substantiate the limitation must be proved on a balance of probabilities. A proportionality test is used considering the proportionate relationship between the right to be protected and the importance of the objective to be achieved by the limitation.[255] The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.[256] A clear connection between the stated purpose and the means of achieving it must exist and the "rational connection test" has been condoned as a useful screening test.[257]

I propose to set out the contents of s 35(3) and then to discuss them in detail:

> "(3)Every accused person has a right to a fair trial, which includes the right -
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> *(a)* to be informed of the charge with sufficient detail to answer it;
>
> *(b)* to have adequate time and facilities to prepare a defence;
>
> *(c)* to a public trial before an ordinary court;
>
> *(e)* to be present when being tried;

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[252] *S v. Zuma 1995 (4) BCLR 401 (CC).*

[253] *Per Kentridge AJ in S v. Zuma supra note 6.*

[254] *S v Makwanyane supra note 5.*

[255] *In re: Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC).*

[256] *S v. Bhulwana; S v Gwadiso 1995 (12) BCLR 1579 (CC).*

[257] *S v. Zuma supra note 6.*

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings*;*

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

Prior to the commencement of the Interim Constitution an accused person was entitled to a "trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law require. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice."[258]

Kentridge AJ, in *S v. Zuma*[259] acknowledged that the above dictum was a correct expression of the law prior to 27 April 1994. He indicted, however, that "since

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[258] *Per Nicholas AJA in S v. Rudman; S v. Mthwana 1992 (1) SA 343 at 387A.*

[259] *Note 6 supra at para 16.*

that date s 25(3) has required criminal trials to be conducted in accordance with just those notions of basic fairness and justice. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions. and justice". Kentridge AJ, further indicated that the right to fair trial is broader than the specific rights set out in the Constitution. In short, s 35(3) lists specific rights but they are not exhaustive.

Steytler[260] has identified two principles "which form the bedrock of a fair trial, which are not specifically mentioned in s 35(3). The first is that fair trial procedures should be adversarial allowing each party to fully participate in the proceedings, and the second is the equality of arms which means that an accused should have a fair opportunity to defend himself or herself when pitted against the resources of the state."

The Right to be informed of the charge

Section 35(3) of the 1996 Constitution provides that every accused person has the right to be informed of the charge with sufficient details to answer it.

In the case of an unrepresented accused the presiding officer should explain the competent verdicts that may result from the charge and this should be done before the accused is asked to plead.[261]

The summary procedure for contempt of court in terms of s 108 of the Magistrates' Court Act[262] does not violate the right to be informed of the charge.[263]

The Right to adequate time and facilities to prepare a defence

Section 35(3)(b) of the 1996 Constitution provides that every accused has the right to have adequate time and facilities to prepare a defence. This right was added to the specific rights listed in 1996.

In *S v. Nkabinde*[264] the accused was only able to prepare his defence by access to a monitored telephone and a consulting area which also was monitored. This was

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[260] *Note 4 supra at 215–216.*

[261] *S .v Chauke 1998 (1) SACR 354(V); S v. Kester 1996 (1) SACR 461 (B); S v. Simxadi 1997 (1) SACR 169 (C).*

[262] *32 of 1944.*

[263] *S v. Lavhengwa 1996 2 SACR 453 (W). An accused is, however, entitled to legal representation even if he or she is legally qualified; S v. McKenna 1998 (1) SACR 453 (W).*

[264] *1998 (8) BCLR 996 (N).*

held to violate both the rights in s 35(3)(b) as well as the right to privacy. The accused must show a particular need which must relate to the preparation of a defence.

The onus is on the accused to show why the particular facility is necessary.[265]

The aim of the right to adequate time to prepare a defence is to allow an accused "to arrive at a mature and unhurried decision on how to plead and conduct his case.[266]

The Right to a public trial in an ordinary court

Every accused person is entitled to a public trial in terms of s 35(3)(c) of the 1996 Constitution.[267] There are exceptions to the right to a trial in open court which are to be found in s 153 of the Criminal Procedure Act which provides that if it is in the interests of the security of the state, good order, public morals or the administration of justice that the proceedings should be held behind closed doors, the court may direct that the public or a class thereof shall not be present. It is further provided that the proceedings may be held in camera if there is a likelihood that harm might result to a witness. This has been interpreted restrictively requiring a reasonable possibility of such harm resulting.[268] When the complaint relates to an indecent act or extortion the complainant may testify in camera. Likewise where a witness is under 18 years of age the court may direct that the evidence be held in camera. Where the accused is under 18 years of age the case must be heard in camera.

In *Nel v. Le Roux*[269] the Constitutional Court observed that there were well recognised exceptions to the general rule that criminal proceedings take place in open court.

An ordinary court is one which complies with the description to be found in s 165(2) of the Constitution which provides that courts are "independent and subject only to the Constitution and the law, which they must apply without fear, favour or prejudice". In *S v. Colliers.*[270] Applications for leave to appeal need not be

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[265] *Steytler op cit note 4 supra at 235.*

[266] *Steytler op cit note 4 supra at 233 citing S v. Yantolo 1977 (2) 146 (E) at 150E; see also Van Niekerk v. Attorney-General, Transvaal 1990 (4) SA 805 (A).*

267 The same right is set out in s 152 of the Criminal Procedure Act 51 of 1977.

268 S v. Pastoors 1986 (4) SA 222 (W).

269 1996 (1) SACR 572 (CC).

270 1995 (8) BCLR 975 (C).

heard in public[271] but it is the established practice that appeals are heard in open court.

The Right to be tried without unreasonable delay

This right is set out in s 35(3)(d) of the 1996 Constitution and provides that an accused has the right for his or her trial to begin and conclude without unreasonable delay.

A number of decided cases following the USA decision in *Barker v. Wingo*[272] which dealt with the crime of a permanent stay of prosecution on the ground that the constitutional right to a fair trial within a reasonable time had been violated. This case indicated that the following four factors should be considered: (1) the length of the delay before the institution of the prosecution; (2) the reasons for the delay; (3) the assertion by the accused of his rights; and (4) the prejudice to the accused.

In *Sanderson v. Attorney-General, Eastern Cape*[273] the Constitutional Court held that the three most important factors to consider are; (a) the nature of the prejudice suffered by the accused; (b) the nature of the case; and (c) the systematic delay.

In considering the formulation in *Barker v. Wingo* the Constitutional Court said that there was need for circumspection when relying on foreign cases as South African society and criminal justice system differed from those in foreign jurisdictions. The fact that the vast majority of accused persons are unrepresented would gut the right if relief was denied because the accused did not assert his/her rights. It was also held that time not only conditions the relevant considerations but is conditioned by then. It is not helpful for the court to impose semi-formal time constraints on the prosecution. In *S v. Pennington*[274] it was held by the Constitutional Court that, although the period of anxiety which appellants undergo before finality, appellate delays were fundamentally different from trial delays. There is no question of prejudice as the appeal is decided on the record.

In *Wiid v. Hoffert*[275] the Constitutional Court set out its approach to a permanent stay of prosecution by stating that, in the absence of trial related prejudice, a claim for a permanent stay of prosecution must fail unless there are circumstances which render the case so extraordinary as to make a stay of prosecution an appropriate

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271 S v Pennington 1997 (4) SA 1076 (CC).

272 407 US 514 (1972).

273 1998 (1) SACR 227 (CC); 1997 (12) BCLR 1075 (CC).

274 Note 25 supra.

275 1998 (6) BCLR 656 (CC).

remedy. Section 342A of the Criminal Procedure Act gives certain remedies in the case of unreasonable delay.

The Right to be present when tried

Section 35(3)(e) of the Constitution provides that every accused has the right to be present when tried.

This right was added to the specific list of rights in the 1996 Constitution. Section 158 of the Criminal Procedure Act makes the same provision. An accused person cannot be tried in his or her absence.

There is, however, no right to be absent from one's trial. Section 159 of the Criminal Procedure Act provides that an accused may be removed from the court room if his or her behaviour makes the continuance of the trial impracticable. Section 160 allows for an examination of the record by the accused and re-examination of witnesses led in his or her absence if he or she returns to the proceedings.

The Right to choose and consult a legal representative and to be informed of this right promptly

This right is contained in s 35(3)(f) of the Constitution.

This right exists throughout from the first appearance in court to the determination of any final appeal. Section 35(3)(g) gives an accused person the right to have a legal practitioner assigned to him or her by the state and at state expense, if substantial injustice would otherwise result and to be informed of this right promptly.

(a) Representation at state expense

In *Legal Aid Board v. Msila*[276] the following approach to this question was adopted:

> "The questions which arise when what is in issue is whether an accused person is entitled to legal representation at State expense as envisaged in s 25(3)(e) are the following: Is the accused person in a position to pay for his legal representation, in which event he or she would or could appoint his or her own legal practitioner? If not, will substantial injustice otherwise result if he or she is not afforded legal representation at State expense? This latter question would involve, perhaps not exhaustively, the nature of the proceedings in question in all their ramifications, the potential consequences to the accused person and his or her ability to represent

[276] *1997 (2) BCLR 229 (SE).*

himself or herself. An affirmative answer to both the above questions would, in terms of s 35(3)(e), entitle the applicant as of right to legal representation at State expense."

As can be seen the emphasis is put on such factors as the personal situation of the accused, the seriousness of the charge and the simplicity or complexity of the case.[277] The provision of lawyers to be paid by the state is dealt with by the Legal Aid Board set up under the Legal Aid Act[278]. However, it has been held that a court is not bound by the Legal Aid Board means test but must independently consider whether a "substantial injustice" would result if the accused was not given representation at state expense.[279]

If the right to representation at state expense is upheld this does not allow the accused to pick and choose the lawyer of his or her choice.[280]

(b) The Right to be informed

This right should be properly explained by the judicial officer. A failure to do this will not automatically lead to the setting aside of the proceedings.[281] However, in some cases it has been held to be a fatal irregularity.[282]

(c) The Right to self-representation

This right exists at common-law and is exercised as a waiver of the right to legal representation. The waiver must be made knowingly and intelligently.[283] In such a case the court should assist an accused in presenting his case by explaining the purpose of various procedures such as cross-examination.[284]

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[277] *See S v. Vermaas 1995 (7) BCLR 851 (CC); 1995 (3) SA 391 (CC).*

[278] *22 of 1999 as read with the Legal Aid Guide which includes a means test.*

[279] *Msila v. Government of the Republic of South Africa 1996 (3) BCLR 362 (SE); 1996 (1) SACR 365 (SE).*

[280] *S v. Vermaas p 31 supra; S v. Lombard 1994 (2) SACR 104 (T).*

[281] *S v. Simanaga 1998 (1) SACR 351 (Ck); S v. Langa 1996 (2) SACR 153 (N); S v. Mabaso 1990 (3) SA 180 (A).*

[282] *S v. Gouwe 1995 (8) BCLR 968 (B); S v. Ramguonigiwa 1997 (2) BCLR (V).*

[283] *Mgcira v. Regional Magistrate Lenasia 1997 (2) SACR 711 (W); S v. Radebe: S v. Mbonani 1998 (1) SA 191 (T).*

[284] *S v. Tyebela 1989 (2) SA 22 (A).*

The Right to be presumed innocent, to remain silent and not to testify during the proceedings

Section 35(3)(*h*) of the 1996 Constitution provides that every accused person shall have the right to be presumed innocent and to remain silent and not to testify during the trial. Certain presumptions in favour of the state are to be found in various statutes and may run foul of the constitutional presumption of innocence. This is particularly so in the case of so-called reverse onus provisions which are found in some statutes, where the prosecution may be relieved of bearing the burden of proving all of the elements of a criminal charge. This may result in a conviction occurring despite the existence of a reasonable doubt. A reverse onus requires an accused to prove a certain fact on a balance of probabilities. The presumption of innocence has long been a fundamental component of our system of criminal law and procedure and the entrenchment of the presumption of innocence in terms of s 25(3)(*c*) must be interpreted in this context. Under the previous constitutional system the legislature was empowered to limit the principle and impose on an accused the burden of proving the absence of an element of an offence. Under the present constitutional system such a limitation would have to be justified under s 36 of the Constitution.

The Canadian case of *R v Oakes*[285] was cited with approval in *S v. Zuma*[286] in respect of the presumption of innocence where Dickson CJC indicated the following:

> "The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused person's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."

In *S v. Zuma*, Kentridge AJ indicated that Canadian cases on reverse onus provisions under the Canadian Charter of Rights and Freedoms were particularly

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[285] *1986 26 DLR (4th) 200.*

[286] *Note 6 supra in para 22.*

helpful to South African law because of their persuasive reasoning and because s 1 of the Charter is analogous to the South African limitation clause in s 33 of the interim Constitution.

In *R v. Oakes*[287] the Canadian Supreme Court considered a challenge of s 8 of the Narcotic Control Act. This section provided that on a charge of possessing a narcotic drug for the purpose of trafficking, the trial must be conducted in two parts. The prosecution must first prove possession of the narcotic beyond a reasonable doubt. Thereafter the accused must establish on a balance of probabilities that he did not possess the narcotic for the purpose of trafficking,

The issue for decision was whether s 89 of the Narcotic Control Act violated the presumption of innocence embodied in s 11(*d*) of the Charter. Dickson CJC considered the general nature of presumptions, which can be placed in two general categories: presumptions without basic facts, and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which must be drawn until the contrary is proved, whereas a presumption with a basic fact entails a conclusion to be drawn on proof of the basic fact. Basic fact presumptions, Dickson CJC indicated, can be further categorised into permissive and mandatory presumptions. A permissive presumption leaves it optional as to whether to draw the inference or not, whilst a mandatory presumption required the inference to be made. Rebuttable presumptions may be rebutted either (*a*) by the accused raising a reasonable doubt as to the existence of the presumed fact; (*b*) by the accused bearing an evidentiary burden to lead sufficient evidence to bring into question the truth of the presumed fact; or (*c*) the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact. Dickson CJC concluded that s 8 of the Narcotic Control Act was a basic fact presumption which was mandatory in its effect. The presumption was rebuttable by the accused, upon whom the legal burden of proof was placed to prove on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. This type of provision is often referred to as a "reverse onus clause".

After an examination of the common-law position, previous Canadian decisions, and the Universal Declaration of Human Rights of 1948 Dickson CJC decided that the presumption of innocence requires that s 11(*d*) of the Charter should have at the minimum three basic components: (i) an accused must be proved guilty beyond a reasonable doubt; (ii) the state bears the onus of proof; an (iii) prosecution must be carried out in accordance with lawful procedures and fairness.

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[287] *Note 39 supra.*

Dickson CJC then considered United States of America cases on reverse onus provisions and the presumption of innocence. In *Tot v. the United States*[288] Robert J outlined the following test:

> "[A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience."

In *Leary v. the United States*[289] Harlam J had indicated a more stringent test for invalidity:

> "[A] criminal statutory presumption must be regarded as 'irrational or arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

In the case of *County Court of Ulster County, New York v. Allen*[290] it was held that where a mandatory criminal presumption was imposed by statute the state may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt. Dickson CJC concluded:

> "In general one must, I think conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s 11(*d*). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue."

Consideration was then given to the question as to whether s 8 of the Narcotic Control Act could be upheld as a reasonable and demonstrably justifiable limitation under s 1 of the Charter. Dickson CJC indicated that the rights and freedoms guaranteed by the Charter are not absolute and it may become necessary to limit rights and freedoms in circumstance s where their exercise would be inimical to the realisation of collective goals of fundamental importance. It was

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[288] *319 IS 463 (1943) 467.*

[289] *395 US 6 (1969) 36.*

[290] *442 US 140 (1979) 167.*

held that the onus of proving that a limit on a right of freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests on the party who wishes to apply a limitation. The standard of proof required is the civil standard, namely proof on a balance of probabilities. A court would also need to know what alternative measures were available to the legislature for implementing the objective.

Dickson CJC said two criteria had to be satisfied:

"(1) The objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom;

(2) The party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves a proportionality test which has three component parts:

(a) the measures adopted must be carefully designed to achieve the object that is rationally connected;

(b) the means should impair as little as possible the right or freedom in question; and

(c) there must be proportionality between the effects of the measures and the objective."

Applying these to s 8 of the Narcotic Control Act, Dickson CJC indicated that the degree of seriousness of drug trafficking was a sufficiently important objective to warrant overriding a Charter right in certain cases. However, s 8 did not survive the rational connection test as the provision of a small quantity of narcotics does not support the inference of trafficking. It was thus found that s 8 was inconsistent with s 11(*d*) of the Canadian Charter and thus of no force and effect.

In *S v. Zuma* s 217(1)(*b*)(ii) of the Criminal Procedure Act was challenged on the grounds that it was in conflict with s 25 of the interim Constitution.

The provision reads as follows:

> "Provided —
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> ...
>
> *(b)* that where the confession is made to a magistrate and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question —
>
> (i) be admissible in evidence against such person if it appears from the document in which the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and

to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and

(ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto."

Subparagraph (ii) was under attack as the words "unless the contrary is proved" place an onus on the accused which must be discharged on a balance of probabilities. If at the end of the trial within a trial the probabilities are evenly balanced, the presumption prevails. This constitutes a reverse onus. Kentridge AJ, in delivering the judgement of the Constitutional Court, referred with approval to the approach adopted in the Canadian cases. Kentridge AJ examined the common-law rule that a confession must be made freely and voluntarily, which has a history of over three hundred years. The rule developed in reaction to the oppressive manner in which confessions were extracted by the court of the Star Chamber in the seventeenth century. At the same time the privilege against self-incrimination and the right to silence developed. Kentridge AJ concluded that the common-law rule in regard to the burden of proving that a confession was voluntarily made rested on the state and that it was an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself.

Kentridge AJ said that these rights are in turn the necessary reinforcement of the "golden thread" running throughout our criminal law that the prosecution must prove the guilt of the accused beyond a reasonable doubt. Reverse the burden, Kentridge AJ emphasised, and all these rights are seriously compromised. Kentridge AJ concluded that the common-law rule on the burden of proof is inherent in the rights mentioned in s 25 of the interim Constitution (the right not to make a confession, the presumption of innocence, and the right not to be compelled to be a witness against oneself) and forms part of the right to a fair trial. It was decided that s 217(1)(*b*)(ii) of the CPA violated the provisions of the interim Constitution and was invalid. It was also held that s 217(1)(*b*)(ii) was not a reasonable limitation under s 33 of the Constitution.

Section 21(1) (*a*)(i) of the Drugs and Drug Trafficking Act[291] provided that if it was proved that an accused was found in possession of more than 115 grams of dagga, it shall be presumed, until the contrary is proved, that the accused dealt in dagga. This provision was attacked in the Constitutional Court in *S v Bhulwana; S*

[291] *140 of 1992.*

v. Gwadiso[292] on the grounds that it imposed a reverse onus on an accused contrary to the presumption of innocence in terms of s 25(3)(*c*) of the interim Constitution. O'Regan J delivered the judgement of the court and traced the origin of the provision back to 1954, when the presumption was inserted into previous legislation. She concluded that the words "until the contrary is proved" constitute a reverse onus provision rather than an evidential burden. O'Regan J indicated that the effect of the provision is that once the state has proved that the accused was found in possession of an amount of dagga in excess of 115 grams the accused will have to show on a balance of probabilities that he was not dealing in dagga. Even if the accused were to raise a reasonable doubt, but failed to show on a balance of probabilities that he was not dealing, he must nevertheless be convicted of dealing. Thus the provision gives rise to a breach of s 25(3)(*c*) of the interim Constitution. In reaching this conclusion O'Regan J referred to *S v. Zuma* and the North American cases cited therein. The provision was held not to be a reasonable limitation in terms of s 33 of the interim Constitution and was declared invalid.

Where a competent court decides that statutory provision is contrary to a provision of s 35 of the Constitution it must then consider whether the provision is a reasonable and justifiable limitation. If it is held to be so, then the court must consider whether the limitation negates the essential content of the right. This involves a balancing test which includes the nature of the right, its importance to an open and democratic society, the purpose for which the right is limited, the importance of that purpose to society, the extent of the limitation, its efficacy, and whether the desired results could be achieved by other means less damaging. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.

In *S v. Bhulwana; S v. Gwadiso* it was held that, although the need to suppress the illegal drug trade is an urgent and pressing one, it was not clear how, if at all, the presumption furthers such an objective. There was no logical connection between the fact proved (possession of 115 grams of dagga) and the presumed fact (dealing). It was held that it was not logical to presume that a person found in possession of 115 grams of dagga is more likely than not to have been dealing in dagga. The court was advised that 115 grams would make between 50 and 100 cigarettes, which it would not be unreasonable for a regular user to possess.

In *S v. Zuma* the court found that the presumption was designed to prevent accused from attempting dishonestly to retract confessions which they made before a magistrate; and to prevent unduly long trials within trials. There was nothing before the court to show that the common-law rule caused substantial harm to the administration of justice and it was debatable whether the reverse

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[292] *1995 (1) BCLR 1579 (CC); see further S v. Julies 1996 (2) SACR 108 (CC).*

onus provision shortened trials within trials. It was concluded that the provision was not a reasonable and necessary limitation.[293]

The right to silence is a re-affirmation of the common- law stance that an accused person should suffer no penalty for remaining silent and is not expected to assist in the proof of his or her guilt. Section 196 of the Criminal Procedure Act provides that an accused shall not be called as a witness except on his own application.

In *S v. Scholtz*[294] it was held that an adverse inference could be drawn from a failure to testify and that this does not run foul of the right to silence. However, in *S v. Brown*[295] it was held no adverse inference could be drawn. However, an uncontradicted prima facie case could in appropriate cases constitute sufficient evidence against an accused. In this sense the exercise of the right to silence could have prejudicial consequences.

In *S v. Lavhengwa*[296] the court opined that in certain circumstances the failure to testify may constitute an independent fact that points to the guilt of the accused.

The right against self incrimination only applies to accused persons.[297]

Section 37 of the Criminal Procedure Act which allows for the taking of blood samples, fingerprints and the ascertaining of bodily features and the holding of identification parades is not a violation of this constitutional right as the prohibition only covers oral and written communications.

The Right to be tried in a language an accused understands, or if that is not practicable, to have the proceedings interpreted into that language (s 35(3)(*k*))

There are 11 official languages. Generally Afrikaans and English remain the languages of record.

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[293] In respect of cases where reverse onus clauses have been struck down see S v. Zuma note 6 supra; S v. Bhulwana; S v. Gwadiso note 46 supra; S v. Tulies note 46 supra; Scagill v. Attorney-General, Western Cape 1996 (11) BCLR 1445 (CC); S v. Coetzee 1997 (4) BCLR 437 (CC); S v. Ntsele 1997 (11) BCLR 1543 (CC) and S v. Mello 1998 (7) BCLR 943 (CC).

[294] 1996 (2) SACR 40 (NC).

[295] 1996 (11) BCLR 1480 (NC); 1996 (2) SACR 49 (NC).

[296] 1996 (2) SACR 453 (W).

[297] Ferreira v. Levin NO; Vryenhoek v. Powell NO 1996 (1) BCLR 1 (CC). Section 35(3)(j) of the Constitution gives an accused the right against self-incrimination.

The right does not embody the requirement that the trial be conducted in the language of the accused's choice. The right is plain, that is to say, the right merely requires that the accused be tried in a language he understands or, if that is not practicable, to have the proceedings interpreted into that language.[298]

The interpreter appointed must be competent.[299]

The Right to adduce and challenge evidence (s 35(3)(*i*))

The right to cross-examine is fundamental to the procedural system. Section 166 of the Criminal Procedure Act allows the court to set reasonable limits on cross-examination. Section 158 of the same Act provides that a court may order that evidence be given by means of close circuit television in certain circumstances provided that the accused and the prosecution retain the right to question the witness and to observe the reaction or the witness.

Section 170A of the Criminal Procedure Act allows witnesses under the age of 18 years are permitted to give evidence through an intermediary if the witness would be exposed to undue mental stress and suffering.

The issue of the constitutionality of this section was considered in *K v. The Regional Magistrate NO and others.*[300] Two grounds of challenge were put forward namely (a) that the intermediary was only required to convey the general purport of a question put in cross-examination thus impairing or limiting the effectiveness of cross-examination; (b) the physical separation of the complainant from the court room resulted in a violation of the accused's right to a public trial. The court held that although the effects of cross-examination may be blunted to some extent this did not mean that the accused is denied a right to a fair trial as the intermediary may be required by the court to convey the actual question not merely its general purport. The second point was rejected on the grounds that the mere fact that the complainant gives evidence in a separate room does not violate the right to a public trial.

Section 151 of the Criminal Procedure Act allows the accused to call witnesses.

The Right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted (s 35(3)(*l*))

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[298] *Mthelhuwe v. De Bruin NO and another 1998 (3) BCLR 336 (N).*

[299] *S v. Abrahams 1997 (2) SACR 47 (C).*

[300] *1996 (1) SACR 434 (E); 1996 (3) BCLR 402 (E).*

This confirms the common-law principle of nullum crimen sine lege which forms part of the principle of legality.

The Right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted s 33(3)[301]

It is the conduct charged rather than the definition of the offence that is important.[302]

An appeal for the increase in sentence passed by a court is constitutional.[303]

The Right to the least severe punishment of the prescribed punishment changes between the commission of the offence and the sentencing (s 35(3)(*m*))

The provision gives constitutional status to the common-law rule against retroactive application of a more severe punishment.[304]

The Right of appeal to, or review by, a High Court

The right of appeal from lower courts is in no way restricted[305] but leave to appeal is required in respect of decisions of the High Court.[306]

In *S v. Rens*[307] a constitutional challenge to this requirement was dismissed on the grounds that all persons appealing from or to a particular court are subject to the same procedure. It is not required that identical procedures be followed in respect of appeals from or to different tiers of courts.

Section 35(5) of the 1996 Constitution provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice

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[301] *Section 106(1)(c) and (d) of the Criminal Procedure Act contains a similar provision.*

[302] *McIntyre v. Pietersen 1998 (1) BCLR 18 (T).*

[303] *S v. Sondag 1995 (1) SA 497 (C); 1995 (4) BCLR 138 (C). See ss 309 and 310A of the Criminal Procedure Act 51 of 1977.*

[304] *R v. Mazibuko 1958 (4) SA 353 (A).*

[305] *Section 309(1) of the Criminal Procedure Act*

[306] *Section 316 (1) of the Criminal Procedure Act.*

[307] *1995 (2) BCLR 155; 1996 (1) SACR 105 (CC).*

At common-law the position was that all relevant evidence was admissible subject to a possible discretion to exclude improperly obtained evidence on the grounds of unfairness and public policy.[308]

The interim Constitution contained no express provisions relating to the exclusion of evidence unlawfully obtained. Two approaches to the issue developed. A strict exclusionary approach was adopted in *S v. Mathebula*[309] where it was held that evidence must be excluded if obtained in breach of a constitutional right unless its inclusion was justified by the limitation clause. It was further held that fair trial rights were constitutionally elevated and removed from the parameters of judicial discretion.

Another line of case followed a discretionary approach in terms of which judicial officers would exclude unconstitutionally obtained evidence. The cases were not consistent as to the basis on which the discretion had to be exercised.

In *S v. Melane*[310] it was suggested that the Canadian Test[311] that evidence must be excluded if its admission would bring the administration of justice into disrepute offered the best guide to the exercise of the discretion. In *S v. Motlatsi*[312] the public interest approach was preferred. The "good faith" exception was rejected. In *S v. Nombewu*[313] the fairness of the trial was considered to be decisive in deciding whether to admit the unconstitutionally obtained evidence.
Since the introduction of s 35(5) a number of cases have been decided.

In *S v. Mphala*[314] consideration was given to the balance between unfairness and the interests of the administration of justice. The need for a balance between the respect for the Bill of Rights by law enforcement agencies on the one hand and respect for the judicial process by the man in the street. It was said that the courts

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[308] *S v. Hammer and others 1994 (2) SACR 496 (C).*

[309] *1997 (1) BCLR 123 (W).*

[310] *1995 (2) SACR 141 (E); 1995 (5) BCLR 632 (E).*

[311] *Set out in s 24(2) of the Charter of Rights and Freedoms.*

[312] *1996 (1) SACR 78 (C); 1996 (2) BCLR 220 (C); followed in S v. Mayekiso 1996 (6) BCLR 1168 (C).*

[313] *1996 (2) (BCLR 1635 (E).*

[314] *1998 (1) SACR 654 (W).*

do not have to reflect public opinion but on the other hand should not disregard it. Perhaps, it was said, the main duty of the court is to lead public opinion.

In *S v. Soci*[315] the distinction between fairness and detriment to the interests of justice was further examined. Once it was shown that the evidence had been obtained in violation of a constitutional right the prejudice must be shown before it could be said that the admission of the evidence was unfair because a trial can hardly be unfair where there is no prejudice. However, under the second or alternative enquiry as to whether the admission of the evidence would otherwise be detrimental to the administration of justice a court had the duty to exclude the evidence even where there was no causal connection between the infringement and the obtaining of the evidence even if no prejudice was caused to the accused. It was held that this second approach was in line with the Canadian situation under s 24 of the Charter of Rights and Freedoms.

There has been no decision on s 35(5) to date given by the Constitutional Court.

Miscellaneous

Prior to 1995 it was generally accepted that the state possessed a "blanket docket privilege" in respect of statements obtained for the purpose of the prosecution.[316]

In *Shabalala v. Attorney-General, Transvaal*[317] this privilege was found to conflict with the right to a fair trial provisions of the Constitution.

The aforegoing is a brief and somewhat superficial overview of the right to a fair trial in South African law. Due to the constraints of space I have had to consider the issue in broad brush strokes.

THE RIGHT TO A FAIR TRIAL IN LITHUANIAN LAW

Lithuanian Law Report by Mr Stasys STAČIOKAS,

Judge at the Constitutional Court of the Republic of Lithuania

[315] *1998 (2) SACR 275 (E).*

[316] *R v. Steyn 1954 (1) SA 324 (A).*

[317] *1995 (2) SACR 761 (CC).*

In a state under the rule of law the right of an individual to defend his rights is unquestionable. In accordance with article 18 of the constitution of the Republic of Lithuania[318] "rights and freedoms of an individual are inborn". This constitutional concept presupposes fair judicial trial in which priority is given to the protection of rights of individuals.

The right to a fair trial is directly mentioned in the second part of article 31 of the Constitution of the Republic of Lithuania which provides that a person who is charged of a crime is entitled to a fair and public hearing by an independent and impartial tribunal. This norm fixes everyone's right to a fair trial only in criminal cases, so it seems that there are gaps of the law in Lithuanian legal system because the Constitution and other national laws don't set directly (or in other words - linguisticly) a right of a person to defend his violated interests by suit or administrative order. However, the text of the Constitution discloses the principle of the right to a fair trial. For example, the first part of article 30 of the Constitution runs: "A person whose constitutional rights or freedoms are violated have a right to apply to a court". The Constitutional Court of the Republic of Lithuania more than once have explained that meaning of a term "constitutional rights" have to be interpreted in a way of extension and to embrase civil and other rights of a person. Because "the Constitution is an integral and directly applicable act" (the first part of article 6 of the Constitution) so the provisions of the first part of article 30 of the Constitution give to everyone a right to defend his violated interests by suit or administrative order.

Additionally, the Lithuanian Parliament - the Seimas - ratified the Convention for Protection of Human Rights and Fundamental Freedoms[319] of 4 November 1950 on 27 April 1995. In accordance with the third part of article 138 of the Constitution "international agreements which are ratified by the Seimas of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania." Therefore international agreements which are ratified by the Seimas have the power of the national laws. Moreover, in the case of the conflict of national law and international agreement the second will have the priority against the national law.

So the first part of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms directly sets a principle of a right to a fair trial and provides everyone's right to a fair and public hearing within a

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[318] *The Constitution of the Republic of Lithuania, 25 October 1992 (referred to as the interim Constitution).*

[319] *The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.*

reasonable time by an independent and impartial tribunal established by law. Therefore the convention gives everyone an opportunity to defend his violated rights by suit or administrative order.

It is also possible to ascertain a content of this principle (which is very wide) while analysing articles 6, 29, 30, 31, 109, 117 of the constitution of the Republic of Lithuania and conformable articles of the Code of Civil procedure[320], the Code of Criminal procedure[321], 14 January 1999 Law on the Procedure of the administrative cases[322] or 31 May 1994 Law on Courts[323] of the Republic of Lithuania. A state guaranteeing a right to apply to a court for a legal defence has to ensure a fair, effective and skilled trial, and the respect of the rights of the parties. As the Constitutional Court of the Republic of Lithuania noted in 11 May 1999 ruling[324] a state must ensure that jurisdictional and other law applying institutions be unbiased and independent, that they attempt to establish the objective truth and that they pass their decisions on the basis of law only. This is only possible when the proceedings are public, the parties to the proceedings enjoy equal rights. The content of the principle consists of these regulations:

1) the pleadings of the parties have to be investigated by an independent and unbiased tribunal (*nemo judex in causa sua*), for example, a case can not be investigated by a judge who is interested in its outcome; the same judge can not investigate a case repeatedly;
2) a tribunal must be established by law, for example, unlawful composition of a tribunal is an unconditional ground to abolish a judgement;
3) everyone has a right to have the free assistance of an interpreter if he can not understand or speak the language used in court (article 117 of Lithuanian constitution);

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[320] The Code of Civil procedure of the Republic of Lithuania, 7 July 1964 (referred to as the interim The Code of Civil procedure).

[321] The Code of Criminal procedure of the Republic of Lithuania, 26 June 1961 (referred to as the interim The Code of Criminal procedure).

[322] The Law on the Procedure of the administrative cases of the Republic of Lithuania, 14 January 1999.

[323] The Law on Courts of the Republic of Lithuania, 31 May 1994 (referred to as the interim The Law on Courts).

[324] The ruling on the compliance of Article 259 of the Statute of the Seimas of the Republic of Lithuania with the Constitution of the Republic of Lithuania, 11 May 1999.

4) an investigation of a case must be public (article 117 of the Constitution);

5) a tribunal must hear each party (*audi alteram partem*) and prior to adoption of its decision must also hear the other party (*in audita altera parte*); an adoption of decision against a person who is not included to participate in a case or is not informed about a place and the time of a trial is an unconditional base for the abolition of a decision;

6) a court must adopt a decision within a reasonable time ("slow justice is bad justice");

7) a court must justify its decision;

8) the parties to the proceedings must enjoy equal rights; one party can not be more privileged than another;

9) each party must be informed promptly about a place and the time of a trial, about a place and the time of other legal procedures and about the actions of the other party;

10) it must be made a possibility for the parties to plead a case through a representative;

11) cases must be investigated by skilled judges;

12) if a person has no sufficient means to pay for legal assistance, the state must give it free;

13) the parties must be granted with a right to appeal, in their opinion, any unlawful and groundless decision of a tribunal;

14) a state must guarantee an execution of a valid court decision.

However it can be seen that the content of the principle is very wide, that's why it is infringed so often in judicial practice. A violation of the right to a fair trial can be seen in many ways: the parties are not promptly informed about a place and the time of a trial; a judge investigating a case is personally or in other way interested in its outcome; a person is not allowed to give arguments; a decision against a person who is not included to participate in a case is adopted; cases are investigated in a cabinet of a judge (unpublically) and so on.

The right to a fair trial is not an autonomous right; it is closely connected with other rights especially with the right to access to the courts. In accordance with article 4 of the Law on Courts "in the Republic of Lithuania all its citizens shall have the right to legal defence against attempt on life and health, personal freedom, honour and dignity, other rights and freedoms guaranteed by the Constitution of the Republic of Lithuania and its laws, as well as to legal defence against illegal actions or omissions of government institutions and

officers. Foreign nationals and stateless persons shall enjoy the same rights to legal defence as the citizens of the Republic of Lithuania unless the laws and international agreements provide otherwise. Enterprises and organisations shall also be entitled to legal defence." As with any principle, a principle of a the right to a legal defence can be formal and real. It is not enough only formally to guarantee a right of a person to apply to the courts, it's also necessary to create reasonable conditions to accomplish this right with no obstacles. Unfortunately, to make use of a right of a legal defence is not such a single thing in practice. Different factors aggravate it, such as: high taxes; an absence of free legal aid; a lack of highly skilled attorneys; the constant change and supplement of laws and so on. These and other reasons limit the effectiveness of the application of the principle.

The principle of the right to a fair trial also means that a case can be investigated only by a tribunal established by law. The third part of article 111 of the Constitution of the Republic of Lithuania forbids an establishment of courts with peculiar competency. So an establishment of various institutions which solve different pleadings is a violation of this principle.

Equality of all persons before the law, the court and the other state institutions or officials is set in article 29 of the Constitution of the Republic of Lithuania. This principle is fixed in article 2 of the Law on Courts, in article 6 of the Code of Civil procedure, in article 12 of the Code of Criminal procedure, too. The equal rights of the parties, during their pleading in court are one of the features of a fair trial. Article 6 of the Convention for the Protection of Human rights and Fundamental Freedoms stresses a necessity to ensure an investigation of a case under conditions of equality. Equality in a trial means that everybody has a right that his case would be investigated in courts of general competence under uniform regulations and within any discrimination. The court, as a state institution, is not and cannot be interested in the outcome of a case. But a state and a court must guarantee such a model of a trial which would ensure justice. It means that a state and a court must accord the same rights to both parties to argue their case in a trial. Therefore, firstly a court prior to adoption of its decision must hear out each party. Secondly, equality must be guaranteed to both parties: what is inadmissible for a plaintiff, must also be inadmissible for a defendant, and vice-versa.

The first part of article 117 of the Constitution of the Republic of Lithuania states that cases are investigated in all courts publicly. The same rule is emphasised in article 16 of the Code of Criminal procedure, and in article 10 of the Code of Civil procedure. But in order to protect the privacy of a person's family or personal life a case can be investigated in private. If a public investigation of a case might reveal a state or a professional or a commercial

secret a trial can also take place behind closed doors. The requirement to investigate cases publicly is fixed in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms: "judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Publicity of a trial is one of the guarantees of a fair trial. Only when a trial is public, is it possible to show that the rights of each party or a person are not violated, that both parties have had a chance to express their opinion and so there are less opportunities for judicial abuse. Secrecy of a trial, and its taking place behind closed doors, would make conditions for a court to act as a bureaucratic institution, and so public confidence in a court and public control of it would decrease. A public trial induces judges to observe the laws and it also induces other persons that participate in a case to behave fairly and tell only the truth. Publicity of a trial means that every adult person can participate in a trial. However, inviolability of private life requires to make some exceptions from a principle of publicity of a trial. That's why article 117 of the Constitution of the Republic of Lithuania and other conformable norms of Lithuanian legal system fix some restrictions of a principle of publicity of a trial.

Publicity of a trial reveals itself only when a case is actually tried. This principle is not applicable for an adoption of a decision of a court. The decision is always adopted in camera, it means in a consultation room, where only the judge or judges investigated a case can be present.

The second part of article 117 of the constitution of the Republic of Lithuania, the first part of article 9 of the Code of Civil procedure, the first part of article 15 of the Code of Criminal procedure, the first part of article 8 of the Law on Courts state that the trial goes on in the official State language in the Republic of Lithuania. All cases are tried in the State-Lithuanian language in courts. Anyone who does not know the Lithuanian language or does not knows it well enough is entitled to the right to hand in applications, to give explanations and evidence, to make a speech in court and to bring requests in his national or well-known language, to have the free assistance of an interpreter if he cannot understand or speak the language used in court. Fair accomplishment of this principle is an indispensable condition for the fulfilment of such principles as principle of equality of the parties, principle of direct participation and so on. Only by keeping to this principle strictly will it be possible to accomplish the

principle of a fair trial. Violation of the principle of procedural speech, for example, by the prohibition of speaking in the national language, or the prohibition of the right to have an interpreter, is an unconditional ground to abolish a court decision.The Constitutional Court of the Republic of Lithuania has more than once stressed the significance of the principle of the right to a fair trial in its rulings. The independence and impartiality of judges and courts is one of the most important elements of this principle. It was widely analysed in the 6 December 1995 ruling[325].

The first part of Article 5 of the Constitution establishes that "in Lithuania, the powers of the state shall be exercised by the Seimas, the President of the Republic and the Government, and the Judiciary". The content of this norm is disclosed in other articles of the Constitution. The competence of each institution of state power is established in accordance with its function, which is predetermined by the place of that power in the general system of powers and by its relationship with other powers.

One of the fundamental distinguishing characteristics of a democratic state is the principle of independence of the judiciary. All democratic states adhere to this principle, and as the historic facts illustrate, denial of this principle is an eminent feature of a totalitarian and authoritarian regime.

The second part of Article 31 of the Constitution stipulates that: "Every indicted person shall have the right to a fair and public hearing by an independent and impartial court". Thus, it is indispensable to safeguard the independence of courts in order to secure the human rights and freedoms in the first place. Parts 2 and 3 of Article 109 of the Constitution provide that: "When administering justice, judges and courts shall be independent. While investigating cases, judges shall obey only the law". Therefore, the assumption that independence is not a privilege, but one of the principal duties of judges and court, ensuing from the human right to an impartial arbiter in a dispute guaranteed by the Constitution, must necessarily be the criterion guiding the assessment of the independence of judges and court.

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[325] *The ruling on the compliance of the Government of the Republic of Lithuania Resolution No.465 "On partial amendment to the Government of the Republic of Lithuania Resolution No.124 'On the remuneration of officers of the courts of the Republic of Lithuania, the State Arbitration, the Prosecutor's Office, and the Department of State Control' of 3 March 1993" adopted on 31 March 1995, with the Constitution of the Republic of Lithuania, Part 1 of Article 46 of the Law on Courts of the Republic of Lithuania, Part 1 of Article 4 of the Law of the Republic of Lithuania on the Prosecutor's Office, the Law of the Republic of Lithuania on State Control, and the Law of the Republic of Lithuania "On the Official Salaries of Judges of the Courts of the Republic of Lithuania, Officers of the Prosecutor's Office, the State Arbiters, and Officers of the Department of State Control", 6 December 1995.*

The Constitution, the Law on Courts and other laws provide for the complex of safeguards guaranteeing the independence of judges and court. On the basis of these guarantees conditions should be created preventing anyone's interference with the actions of judges or the court while rendering an impartial and fair judgement. Impartiality of the judge is ensured not only by laws. The universally recognised code of judicial ethics establishes strict requirements of ethics (to be conscientious, discreet, attentive and to preserve dignity), professional qualifications (competence and impartiality) and other to judges. Thus, both the constitutional and other legal safeguards guaranteeing the independence of judges and the court, and the rules of judicial ethics create the basis for people's belief in the impartiality and objectivity of the court as the arbiter of disputes.

According to the detailed interpretation of the independence of judges and the court established in the second part of Article 109 of the Constitution and set forth in the Law on Courts and other laws of Lithuania, the following three groups of safeguards may be especially identified among the safeguards guaranteeing the independence of judges: a) those guaranteeing the security of tenure, b) guaranteeing personal immunity of a judge, and c) those securing social (material) guarantees of judges.

a) A judge who is fulfilling his duties conscientiously, is guaranteed by Article 115 of the Constitution that he will not be dismissed from the office on the grounds other than specified in this article (upon expiration of his tenure or reaching pensionable age as determined by law, for reasons of health and other). The security of the tenure is important since it permits the judge to remain independent from the government of the day and avoid the pressure to accommodate to the likely change of political power. On the other hand, Article 115 of the Constitution envisages two specific cases which constitute the grounds for dismissal of judge from the office: if his behaviour discredits his position as judge, and when judgement imposed on him by court comes into force. It means that judges must meet very strict professional and ethics requirements. Behaviour of judges in and outside the office should raise no doubt about their independence.

b) The second part of Article 114 of the Constitution says that judges may not have legal actions instituted against them, nor may they be arrested or restricted of personal freedom without the consent of the Seimas, or in the period between sessions of the Seimas, of the President of the Republic of Lithuania. Article 116 maintains that if the Chairperson (President) or judges of the Supreme Court or the Court of Appeals grossly violate the Constitution, break their oath, or are found guilty of an offence, the Seimas

may remove them from office according to impeachment proceedings. On the other hand, the judicial immunity also comprises their personal immunity from attempts to exert influence on them from outside. Article 114 of the Constitution establishes the liability for any attempts to prevent judges from conducting a fair and impartial hearing of the case.

c) Being arbiters of legal disputes, judges must be not only qualified professionals and have authority, but also be independent materially. For that end, laws of many countries provide for a separate procedure for establishment of salaries or various additional payments for judges on the basis of a uniform criterion. Usually their remuneration is of significantly higher amount than that of the officials. This tradition used to be practised in Lithuania as well. Higher salaries of the judges had been established by a separate law.

As it has been mentioned already, judges obey only the law while administering justice. It means that judges may not be encouraged or induced to conduct a case in a particular manner, since the judge has to establish the objective truth in a given case and on the basis of conclusive evidence to apply the law which is to be invoked. Furthermore, all judges enjoy equal status, only their responsibilities and functions differ, depending on which level of the judicial system they are working at.

A principle of a fair trial requires that a decision would be adopted only after a court has carefully heard out both parties of a pleading (*audiatur et altera pars)*. A principle of equality of the parties to the proceedings also requires to grant equal opportunities and measures of an offence and a defence for both parties. So, to investigate a case and to adopt a decision, ignoring arguments and reasons of one party, not to inform it about a trial, not to allow the party to speak at the trial would mean a violation of a principle of an equality of the parties to the proceedings. A court must react to each argument or motive of a party, discuss and appraise them in its decision. A court must follow a criterion of prudence in order to set such length for fulfilment different procedural actions which would allow to avail properly oneself of one's rights for the both parties.

We have not understood the discussed principle only dogmatically. A requirement to have out both parties does not mean that a court must wait till endlessness, while one or both parties will appear in a trial. A principle of an effective trial, a principle of the prohibition to abuse a trial, a principle of a defence of interests of a fair party require that a case would progress rapidly. The unfair party, which avoids to appear in a trial, and refuses to accept

summons or drags out a prompt investigation of a case in other ways loses the use of privileges which are granted by a right to be heard.

A principle of a right to be heard does not always require to hear out the party personally. A law allows for the parties themselves or their representatives to plead a case. The representative's participation in a trial means that the party accomplishes his right to be heard through a representative. But a court would defer an investigation of a case if the party so requests as the party cannot appear in a trial for valid reasons. The requirement to hear out both parties is very important in the respect of arguing. The parties know the circumstances of a case the best of all, so their explanations are very important means of proof in a case.

The principle of a right to be heard is realised the most evidently when a case is investigated orally. But it is also necessary to keep to the principle when a case is investigated according to a written material. A written requirement or retort of each party must be enclosed to a case and analysed carefully by a court in such cases.

The right to a fair trial applies not only to courts but it also applies to any other authority which carries out judicial functions. The Constitutional Court of the Republic of Lithuania considered the problem of the right to a fair trial during impeachment process in detail in the 11 May 1999 ruling[326].

The petitioner raised doubts whether Article 259 of the Statute of the Seimas which provides that the Seimas shall adopt the decision on the revocation of the mandate of a Seimas member after it has received a copy of an effective judgement of conviction by court, is in compliance with the Article 74 of the Constitution which provides that the mandate of the Seimas member is revoked in accordance with the procedure for impeachment proceedings. Besides, the petitioner stressed that it is provided for by Article 259 of the Statute of the Seimas that the decision on revocation of the mandate of a Seimas member is adopted at a routine sitting of the Seimas in the absence of the Seimas member whose mandate is being revoked.

The Constitutional Court ascertained that impeachment is one of the methods of self protection of a civic society. In the constitutions of democratic states impeachment is treated as a special procedure where the question of the constitutional responsibility of an official is decided. By providing for a special procedure for dismissal of the highest officials from office or that for revocation

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[326] *The ruling on the compliance of Article 259 of the Statute of the Seimas of the Republic of Lithuania with the Constitution of the Republic of Lithuania, 11 May 1999.*

of their mandate, one ensures public and democratic control over their activities, alongside, these officials are granted additional guarantees so that they can fulfil their duties on the basis of law. However, the Seimas, by implementing its discretion to establish a differentiated procedure for impeachment proceedings, is bound by the constitutional concept of impeachment. This concept presupposes fair judicial proceedings in which priority is given to the protection of the rights of individuals. This is only possible when the proceedings are public, the parties to the proceedings enjoy equal rights, while the pleadings in court, especially those regarding the rights of individuals, are decided by insuring that the said person should have the right and opportunity to defend his rights. In a state under the rule of law the right of an individual to defend his rights is unquestionable. Prior to adoption of its decision, the Seimas must also hear the other party (*audi alteram partem*).

Part 1 of Article 29 of the Constitution provides that all persons shall be equal before the law, the court, and other State institutions and officers, meanwhile Article 259 of the Statute of the Seimas does not provide that the impeached person is entitled to take part in the proceedings as the accused subject and to defend himself. In this case the absence of provision for such rights in the Statute means that they are restricted. For the impeached person no right is ensured to be acquainted with the charge due to which the question of his removal from office or revocation of his mandate of Seimas member is decided, no right is guaranteed to become acquainted with the procedure for deliberation of this question at the Seimas, no right to counsel nor any right to have other representatives is ensured, nor the right to present evidence having importance to the decision of the question of his constitutional responsibility, nor a right to take part in the pleadings, nor the right of the last replication, nor that of the final word. Such proceedings wherein the aforementioned rights are not guaranteed are not in line with the constitutional concept of impeachment.

The Constitutional Court has ruled that Article 259 of the Statute of the Seimas of the Republic of Lithuania in the scope whereby the right of the convicted person to take part in the impeachment proceedings as the impeached subject and his right to defence are restricted contradicts Article 74 of the Constitution of the Republic of Lithuania.

Summing up all what has been mentioned it must be stressed that the principle of a right to a fair trial is regulated universally in the Republic of Lithuania. On the other hand, both legislative and executive institutions, which are passing legal acts, cannot avoid mistakes and, of course, violations of the Constitution. But the Constitutional Court while fulfilling its role of safeguarding constitutional legitimacy and establishing constitutional control, ensures a

perfect regulation and a realisation of the principles fixed in the Constitution, and also a realisation of the principle of a right to a fair trial.

THE RIGHT TO FAIR TRIAL IN THE DECISIONS OF THE POLISH CONSTITUTIONAL TRIBUNAL

Polish Law Report by Mr Jerzy ONISZCZUK

Polish Constitutional Tribunal

I. Introduction

The Constitution of Poland of 2 April 1997 established the right to trial in Article 45. The said provision stipulated that "everyone has the right to trial and his or her case shall be examined at the court fairly and openly without an unjustified delay by a competent, independent, neutral court (Item 1). Openness of a trial might be excluded due to such aspects as public morality, state security and public order and to protect parties' private life or another significant private interest. A judgement shall be announced publicly." (Item 2).

Article 77, Item 2 of the Constitution stipulates that the Act may not deprive anyone of a possibility to claim his or her rights or freedoms violated through legal proceedings.

Provisions of the law that were applicable before the date on which the Constitution of 2 April 1997 came into force did not provide for the right to trial in a clear manner. Nevertheless, that right many times constituted the basis for the control made by the Constitutional Tribunal. That right was introduced based on the rule of a democratic law-observing state and the provision stipulating that the courts administer justice in the Republic of Poland (for example, the decision of 25 February 1992, K3/91).

The Tribunal emphasised that one of the fundamental assumptions for a democratic legal state is the rule providing for citizens' access to the court in which they can defend their interests before an independent judicial body that gives a judgement exclusively on the basis of the laws being enforceable in a particular state. The right of an individual to have a fair and public trial in which his or her rights of administrative and civic nature are examined and in which penal charges are levelled against him or her is derived directly from the said rule. Article 56, Item 1 of the past constitutional provisions that provided citizens with a possibility to be heard at the courts (for example, the decision as of 7 January 1992, K8/91, and as of 8 April 1997, K 14/96) also justified such an interpretation.

Opinions of the Tribunal concerning the principle of citizens' access to the court, given before the Constitution of 1997 came into force, are still up to date. The most recent decisions released by the Tribunal in which it refers to its earlier interpretations in regard to a right to trial illustrate this.

Under the binding Constitution of 1997, the Tribunal could interpret the right to trial in a very broad context. The following aspects were *inter alia* examined:

1. the contents of the right to trial,
2. subjective and objective scope of the right,
3. the terms and scope of acceptable limitation,
4. the interdiction to deprive a citizen of a possibility to claim his or her rights and freedoms through legal proceedings,
5. differentiation of "the right to trial" and the second instance legal proceedings. The Tribunal reconsidered also the issue of independence and objectivity of judges. It shall be also added that the Tribunal most often interpreted a right to trial as the access to a court and appropriate procedure pending before such a court.

II. The contents of the right to trial

The right to trial that was introduced before the Constitution of Poland which was resolved, the Tribunal on the basis of a democratic legal state rule, now is stipulated in the provisions of the said Constitution (Art. 45, Art. 77), which has been pointed out by the Tribunal. While considering the nature of the right to trial, the Tribunal decided that the contents of the right to trial could be found by examination of the doctrine itself, international standards of human rights contained in Art. 14 of the International Treaty on Civil and Political Rights, by Art. 6, Item 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and in previous decisions of the Tribunal. It is composed, in particular, of:

1) the right to have access to the court, i.e. a right to start the legal proceedings before the court- a body of a particular nature (independent, neutral),
2) the right to proper legal procedure development in compliance with the requirements of justice and openness,
3) the right to a court judgement, i.e. the right to have a binding decision made by the court that finds a solution to a particular case (judgement of 16 March, 1999 SK 19/98).

In the opinion of the Tribunal, the Constitution introduces the presumption of the court proceedings. Nevertheless, it doesn't mean that all limitations imposed on

the legal protection of individual's interests are not allowed. In special, extraordinary and exceptional conditions, the right to trial might collide with another constitutional provision that protects values whose importance is equal or even bigger to the operation of the state or individual's development. A necessity to take both constitutional provisions into account may justify the introduction of limitations on the subjective scope of a right to trial. These limitations are allowed in the absolutely required scope in a situation when materialisation of a given constitutional value is not possible otherwise. These limitations may be introduced exclusively by force of the Act and only when they are necessary in a democratic state to keep public order, protect natural environment, health and public morality or freedoms and rights of other persons (Art. 31, Item 3 of the Constitution). They may not also infringe the nature of these freedoms and rights on which they impose limitations.

The scope of limitations on the right to trial is also specified in Art. 77, Item 2 of the Constitution. This provision forbids a legislator to deprive a person to claim their rights and freedoms violated through legal proceedings.[327] Referring to its previous decisions (for example, K28/98, K41/97), the Tribunal decided in the judgement of 16 March 1999, SK 19/98 that a prohibition of preventing individuals from claiming their rights or freedoms violated through legal proceedings as provided in Art. 77, Item 2 was the element of a constitutional right to trial whose normative part is contained in Art. 45, Item 1 of the Constitution. The Tribunal drew attention to the organic relation between these two constitutional provisions and emphasised that the contents of Art. 77, Item 2 of the Constitution "constitutes a supplement to the constitutional feature of a right to trial" and that, in fact, a right to trial and the prohibition on the interdiction of legal proceedings is a measure employed to protect freedoms and rights.

In the opinion of the Tribunal, Art. 77, Item 2 of the Constitution means that limitations (described in Art. 31, Item 3 of the Constitution) may not exclude a legal procedure at all, since it would be obviously contradictory to Art. 77, Item 2 of the Constitution and these limitations - that would actually prevent a citizen from commencing a legal proceedings- shall be deemed unconstitutional (K28/97). For example, the Tribunal decided that a direct prevention of a citizen from starting a legal proceedings in an administrative court by the provisions due to the state security constitutes the breach of Art. 77, Item 2 in connection with Art. 184, Sentence 1 of the Constitution. At the same time, it is a limitation on the execution of the right to trial (Art. 45, Item 1 of the Constitution). Art. 45, Item 2 of the Constitution that gives a ground for exclusion of the open trial due to state

[327] *The Tribunal emphasised also that limitations on the right to be heard at court are also allowed by the International Treaty of Civil and Political Rights (Art. 14, Item 1, Sentence 2) and the European Convention on the Protection of Human Rights and Fundamental Freedoms (Art. 6, Item 1, Sentence 1).*

security sufficiently guarantees that the case will be examined by an objective and independent court. In the judgement of 27 January 1999, K1/98, the use in Art. 59 § 2 of the law on the structure of common courts examined the expression "service relationship of a judge maybe dissolved (…) by force of law if the legislative provision requires it to do so by reason of contract". The Tribunal decided also that it was contradictory to Art. 77, Item 2 of the Constitution, since it deprived judges arbitrarily of the right to trial that is a right of every citizen because it deprived a possibility to claim his/ her right to hold the office at court through a legal proceedings.

In the opinion of the Constitutional Tribunal, it is unacceptable that through legislature a citizen be deprived arbitrarily his/her rights and freedoms not only in reference to his/ her material and legal status but also a right to procedures providing a formal protection of his/ her rights that shall be applied in his/ her case.

The Tribunal also pointed out that according to Art. 77, Item 2 of the Constitution this interdiction refers to the contents of the Act. Therefore, the regulation preventing a citizen from claiming his/her right through a legal proceedings by the act of statutory nature is unacceptable. It also constitutes the breach of the rule of the Act's exclusiveness for regulation of the substance contained in Art. 31, Item 3 of the Constitution (the judgement of 16 March 1999, SK 19/98).

The Tribunal noted also that the constitutional right to trial is supported by other provisions of the Constitution. They form the group of securities that provide citizens with a right to have their cases fairly examined by independent and neutral courts. On the one hand, these securities contain the prohibition on the prevention of citizens from making claims through legal proceedings by means of statutory provision. On the other hand, these securities refer to the development and structure of the judicial authority and a position of judges – in order to make the right to trial real (for example, the decision of 27 January 1999, K1/98), Judgement of 14 June 1999, K11/98).

The Tribunal decided, for example, that in the second group of securities, Article 184, the first sentence of the Constitution was of a remarkable importance. The rule according to which the control over the activity of public administration is performed by: the Supreme Administrative Court (Pol. Abbreviation: NSA) and other administrative courts is derived from the said Article. The fact that the Constitution delegates the scope of the control over administration to the Act may not lead to the abolition of the right to trial. In the cases falling in the scope or method of public administration, the right to trial is executed directly by the administrative courts. Since, Article 184 of the Constitution states that the Supreme Administrative Court shall control in the scope or method specified by

the Act, therefore the Acts specifying the scope of such a control supplement the contents of Article 184, 1st sentence of the Constitution in such a way that the execution of the right to trial would be provided - by means of the administrative court cognition (Judgement K11/98).

The control defined in Article 184 of the Constitution is intended to provide citizens with the right to trial. Therefore, as the Tribunal emphasised, it is performed as the administration of justice in relation to the entities that vindicate claims in a courtroom. The Supreme Administration Court is, therefore, a constitutionally separated part of the judicial power, especially constituted for this purpose, and not the board of external control over public administration services, since the purpose of the public administration control is different. Such a control is exclusively performed with a public interest in mind and such public interest consists in preventing legal and purposeful activity of this administration for the sake of a common interest. As far as court supervision is concerned, its basic purpose is to administer justice. Such administration of justice consists mainly in the protection of rights and freedoms of an individual (legal entities), although, even these aims are taken into account by the administrative courts. This understanding of the structural position of administrative courts complies also- in the opinion of the Tribunal- with the wording of Art. 14, Item 1 of the International Treaty of Civil and Political Rights and with Art. 6, Item 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms.

The above arguments support - in the opinion of the Tribunal - the view that control of an administrative decision by the administrative court is a rule.

This view is compliant with the earlier standpoint of the Tribunal presented in the Judgement of 8 April 1997, K 14/96 (in this Judgement, attention has been already drawn to the Constitution of 1997). In the said Judgement, the Tribunal interpreted the intention of the current constitution legislator as the argument. It stated that the right to trial is clearly provided by the Constitution of 1997 (on the decision date, it was subjected to the approving referendum). In the opinion of the Constitutional Tribunal, the Supreme Administrative Court is a special court, and in a case when the Act stipulates the complaint directed to this court, "the constitutional right to trial shall be preserved irrespective of the fact that the competence of the Supreme Administrative Court in regard to decision-taking only checks if decisions comply with the law, that is narrower than the competence of the common courts". This court checks if a decision complies with the law in the light of a factual case situation at a moment when such a decision is given.

III. Subjective and objective scope of the right to trial

As far as objective and subjective scope of the right to trial is concerned, the Tribunal decided, *inter alia*, in the judgement of 9 June 1998, K28/97 that every individual and private law legal entity is the subject of the constitutional right to trial. According to Article 45, Item 1 and Article 77, Item 2 of the Constitution, the right to trial covers the "cases" concerning citizens and other entities of the said law.

Public law entities may benefit from the right to trial only when they don't act as public authority bodies but, like other entities, search for the protection of their rights on the private law ground. This standpoint that was expressed earlier, has been also adopted by the Tribunal on the ground of the current Constitution. Additionally, the provisions of the Constitution specify a very broad subjective scope of the right to trial. The right to trial is given to "everyone" (Article 45, Item 1), and "nobody" – even by statute- may be deprived of a chance to claim his or her rights through legal proceedings (Art. 77, Item 2). In this meaning, the right to trial is of a public nature, and departure from this rule is possible only on the basis of a clear and express constitutional decision (Judgement of 18th November 1998, K20/98).

The notion of a "case" covered by a right to trial has not been defined clearly either in the doctrine or in the decisions. Particular fields of law use this term in various ways. Thus, the doctrine does not provide any clear instructions for the interpretation of Article 45, Item 1 of the Constitution. Therefore, while interpreting this provision, one shall take Article 175, Item 1 of the Constitution into account. This Article states that: "Justice in the Republic of Poland is administered by: the Supreme Court, common courts and administrative courts and military courts". Judicial bodies shall solve legal disputes (disputes resulting from legal relations). The constitutional term "case", therefore, refers primarily to legal disputes between individuals or legal entities. However, the right to trial does not cover disputes in which no private law entity is involved (for example, K 28/97).

According to Art. 45, Item 1 of the Constitution, the intention of a legislator is clear: the right to trial shall cover the broadest possible scope of cases. Moreover, the interpretation directive that forbids narrowing interpretation of the right to trial results from the principle of democratic legal state (Decisions: of 21 January 1992, K8/91; of 29 September 1993, K17/92; of 8 April 1997, K14/96, judgements of 9th June 1998, K 28/97).

IV. The right to trial and a second instance legal proceedings

The issue of the "right to trial" and second instance nature of a legal proceedings appeared, *inter alia,* in the judgement of 8th December 1998, K41/97. The

Tribunal decided that a differentiation should be made: on the one hand - the general right to be heard at the court, and conditions referred to this right resulting from Article 45 of the Constitution, placed in Chapter II, and thought to be the instrument guaranteeing personal freedoms and rights; on the other hand - second instance rule in a legal proceedings specified in Article 176, Item 1 of the Constitution and contained in Chapter VIII.

Article 176, Item 1 provided for a second instance rule in regard to a legal proceedings, but since this provision was included in the chapter on courts thus it concerns only the cases submitted to the court competence by means of acts. The cases in the area of a disciplinary proceedings in regard to which there is no constitutional obligation to respect the rules directly resulting from Article 176, Item 1 of the Constitution since they are subjected only to a final control by the court and do not belong to the group of such cases.

The Tribunal is of the opinion that Article 45 of the Constitution, that provides the right to trial to everyone, does not connect this guarantee with two instance nature of legal proceedings during which a case is examined by the court, unless the case is subjected to the cognition of courts "from a beginning to the end". This provision shall be interpreted in close connection with Article 175 of the Constitution, in which the term "court" was given a narrow meaning and referred to the bodies operating within judicial authority and administering justice.

V. Independence and objectivity of judges

The aspect of independence and objectivity of the judges had appeared in the decisions of the Tribunal many times.

After the Constitution of 1997 came into force, the Tribunal that was considering the aspect of independence of courts and independence of judges decided that both these rules are specified in Art. 10 of the Constitution (power distribution rule). They are also defined in Articles 173 and 178, Item 1 of the Constitution. These provisions define *expressis verbis* both of these rules, i.e. Art. 173 - independence of courts, while Art. 178, Item 1 - independence of judges (for example, the judgement of 14 April 1999, K 8/99).

Before the Constitution of 1997 was enforced, the Tribunal that was considering irremovability of judges stated that the element of power distribution and the foundation for the construction of a democratic law-observing state is the irremovability of a judge from his / her office. Exceptional cases are specified by statute. Nevertheless, the legislative form is not enough, since the substantial grounds as well as the procedure for removing a judge from his / her office have to comply with the requirements resulting from the power distribution rule and

court independence rule. Regulations that contain unclear criteria that allow free interpretation and are deprived of procedural security, particularly court supervision, and delegate freely the power to remove a judge from the office to legislative or executive authority, would be contradictory to the constitutional rules. The meaning of independence is clearly defined and well rooted, which guarantees the objectivity of the decisions. It means the independence of the judge on the part of parties involved in a dispute as well as on the part of the state authorities. On the part of a judge, a correlative of the independence rule is a duty to be objective and that sometimes goes even further than the scope of independence. This rule refers to the influence of the external entities, while the duty to be objective forces a judge to resist the opinions resulting from his / her experiences, stereotypes and prejudices. Therefore, the failure of a judge to be independent also includes the lack of objectivity resulting from making a decision being taken by a judge dependent on the external entity. Independence is not exclusively a subjective right of a person who practices the occupation of a judge, since it is one of the conditions for a proper practice of the occupation. In this sense, the independence of a judge is also a guarantee of civil rights and freedoms. The independence rule does not stipulate only the rights of judges but also their duties. Behaviour that violates the independence rule is at the same time a misconduct punished in disciplinary proceedings defined in the law on the common court structure as the transgression of the dignity of the office. Such behaviour may lead to depriving a judge of the right to practice his/ her occupation (for example, the Decision of 9 November 1993, K11/93).

Independence of judges, according to the Tribunal, is a universal component and precondition of any law-observing state. A right of everyone to have his/ her case examined by the independent and objective court gives rise to it. In a direct sense, it means exclusion of any intervention in the legal proceedings from outside, and decisions taken shall be controlled exclusively in the form and according to the rules clearly defined in the legislature. The assumption that the law has been made after taking rules and procedures of a law-observing state into account is undoubtedly important in the law making process (Decision of 8 November 1994, P.1/94).

In the Judgement of 21 October 1998, K24/98, the Tribunal pointed out that the procedure for the exclusion of a Judge existed in Polish law. This institution is provided for in Art. 41, Section 1 of the Act of 6 June 1997, Penal Procedure Code. This provision stipulates that *index suspetus* shall be excluded upon his/ her request or upon the request of a party if the circumstance that might cause a doubt about his/her objectivity in a given case.

The Judgement of 27 January 1999, K1/98 dealt the most extensively with the aspect of a judge's independence and objectivity. In this Judgement, the Tribunal

considered also other content elements of everybody's right to have his / her case examined by an independent and objective court that is defined in Art. 45, Item 1 of the Constitution. In this Decision, the Tribunal dealt also with the aspect of constitutional conditions for the limitation of the Civil rights and freedoms held by judges, attorneys at law or public prosecutors.

In the opinion of the Tribunal, the said provision (Art. 45, Item 1) deals primarily not with the aspect of a judge's objectivity that is expected from a judge while the case of a citizen is pending in a court room, but with the aspect of the objectivity that is perceived "outside" of the judicial office, and which creates the image of objective court administering justice. In a case pending in a court room, a judge has to have a feeling of being objective ("subjective objectivity") and he/she has to guarantee that no doubts about his objectivity will be apparent ("objective objectivity"). As far as the image of justice administration is concerned, the external securities of objectivity are more material. The Tribunal pointed out such a differentiation had been already known to the legislature of the European Court of Human Rights, particularly on the basis of Art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. It is in the "interest" of justice administration, as emphasised in a progression of legislative works related to the objective objectivity of a judge that is visible outside of his/ her office. Nevertheless, it doesn't contradict the fact that the securities of objective objectivity are also required in the progress of a case pending.

As the Tribunal pointed out, from the perspective of Art. 45, Item 1 of the Constitution, the securities of a judge's objectivity in the case (subjective as well as the objective one) are of a remarkable importance. The procedure for judge exclusion is a tool for these securities. The creation of the image of objective judicial administration supports this process. Yet, such an image as well as the judge's exclusion procedure form the components of everybody's right to have his/ her case examined by an independent, objective court.

In the opinion of the Tribunal, there is a public interest (common interest) in creating the external image of judicial administration that makes society believe that the court is objective. Only courts in which the judges are objective and whose behaviour outside their office contributes to the creation of the image of objective judicial administration guarantee that a case will be examined fairly. Therefore, limitations imposed on the rights and freedoms of judges, attorneys at law, legal counsellors and public prosecutors due to the functions they perform in justice administration may be deemed to be constitutionally permissible, since the creation of a proper judicial administration image is crucial. Nevertheless, it doesn't mean *eo ipso* that these limitations comply with the Constitution. In a law-observing state, to these limitations there shall be applied certain requirements mentioned in Art. 31, Item 3 of the Constitution (the principle of proportionality).

According to the Tribunal, the objectivity of a judge is the indispensable feature of judicial power, and thus an attribute. If a judge loses this attribute, then he/ she loses qualifications to perform his/ her function. This objectivity means mainly that a judge stays objective and does not create a situation favourable to any of the parties or persons involved in the proceedings in the progress of case being examined at the court as well as in the decision taking process. Thus, he/she has the same approach to all persons involved in the proceedings. The attitude of an objective judge has to be also demonstrated outside of the court rooms in such a way that the image of the objective court be perceived by society. Therefore, while performing his/ her function, a judge is to come to a decision exclusively based on his/ her sense of justice and conscience.

In the opinion of the Tribunal, subjectivity is a mental state of the judge that might be demonstrated to various extent. Therefore, threats to objectivity can be identified to a limited extent. Since the reasons for subjectivity are various it is impossible to define them precisely. It results from the fact that the nature of every human makes him in various situations subjective, and he need not always be aware of it. Nevertheless, the point is whether there are actual situations which it is highly probable that a judge will be subjective and where it may be demonstrable. Thus, subjectivity might be caused by the possibility to exercise pressure on a judge, for example the existence or a possibility of the existence of personal relations with one of the parties or their attorney that might affect the decisions taken by a judge, and also other mental states of a judge affecting his/ her independence. These factors might result in the loss of personal independence of the judge to the extent that affects his/ her attitude towards the parties and the image of judicial administration perceived as an institution composed of objective judges.

Therefore, the Tribunal decided that a dependant judge might not be objective, since other persons, organisations or authorities can apply pressure on him/her because they have a legal and economic advantage over him/ her. This advantage is an effective tool for exercising pressure. If a judge suspects that pressure might be put on him/ her, then his/her personal independence might be threatened.

More or less formal personal relations with the parties and their attorneys constitute another reason for which a judge may be deemed as the one who does not guarantee the right to have a fair, objective judgement. Finally, a judge can turn out to be subjective due to his/her prejudices, resentments or ideological value system which make him/her lose his/her personal independence. Thus, as the Tribunal pointed out, the notion of objectivity has a very broad meaning, and objectivity might be threatened by the factors other than pressure put by any of the parties.

Yet, the personal independence of a judge consisting in acts performed by him/ her on the basis of the law and in compliance with his/ her own conscience and conviction (Art. 178, Items 1 and 3 of the Constitution) is materially important to the independence of the courts. The personal independence of a judge is, therefore, one of the most crucial elements of independence. By its nature, the objectivity of a judge is generally subjective, since it results from his/ her personal attitudes. In the opinion of the Tribunal, while establishing securities that are designed to protect against threats where objectivity is endangered, we shall primarily check whether these securities refer to nature of a threat connected with the individual or personal attitude of a judge. Then, it shall be checked whether the securities are necessary to protect objectivity, and if so, whether they contain only necessary and proportional limitations imposed on the rights and freedoms of the judges. These requirements refer to procedural securities in the case pending as far as official exclusion or exclusion upon the request of the parties, as well as to securities connected with the image of an objective judge perceived by society. In both cases, a priority shall be given to the limitations imposed on freedoms and rights of a judge that concern the personal attitude of a judge and allow us to assess this attitude and not those limitations that are based on statutory assumptions that decide in advance that a judge cannot be objective. Only when these first limitations turn out to be insufficient, can the later ones be deemed to be a necessary requirement.

According to the Tribunal, the securities of a judge's objectivity, as far as the creation of the image of the administration of justice is concerned are constitutionally allowed if:

1) they are justified by the threats to society as far as moral and ethical behaviour of judges appointed to administer justice is concerned[328],

[328] *According to the Tribunal, provisions that are supposed to provide security in this area, have to refer to a social awareness, and thus, also the expectations and fears of society through which judicial administration in a given period is perceived by society. These are the conditions that are not of a legal nature but which give the structural grounds for the legal position of a judge, attorney at law, legal counselor or a public prosecutor. Support and protection of a judge's objectivity might require legislative regulation depending on: 1) the moral and ethical attitude of judges, 2) an assessment of the above attitude by a society that is deeply rooted in its consciousness. It shall be also checked whether it is possible to prevent effectively particular threats to a judge's objectivity if we employ legal measures. Therefore, we can expect the reaction of a legislator, i.e. establishment of security measures that will minimize these threats to a judge's objectivity that can be effectively prevented as far as occurrence and existence are concerned- in all areas where there are justified fears that the image of objective justice administration is threatened.*

2) furthermore, a legislator should tend to use those securities that make assessment of individual attitude of a judge possible and not *a priori* and "objectively" attribute a feature of subjectivity to him/ her,

3) furthermore, a legislator tends to impose limitations that are not absolute interdictions, i.e. *causing* 'automatically' irreversible effects from a viewpoint of the persons on whom such limitations are imposed. [329]

Considering the kinds of Civil rights and freedoms on which limitations shall be imposed on the basis of provisions in K 1/98 that have been appealed against, the Tribunal has noted that the regulations contained in the Constitution and appropriate provisions of international agreements concerning the protection of marriage, family, equality, the right to a private and family life including the right to decide about one's own personal life (including selection of a spouse), right to have access to public service, and those that refer to Civil freedom to choose a place to live and reside, as well as the freedom to select and practice occupation are important. The Tribunal attributed special importance to some provisions, i.e. Art. 47 of the Constitution providing for the protection of private and family life and the right to decide about one's personal life; Art. 60

[329] *The extent and scope of protective and securing regulation- in the opinion of the Tribunal- depends on a supreme decision taken by a legislative authority that may decide whether the ethical attitude of judges can cause threats as far as the creation of an objective administration of justice image in the social consciousness is concerned and whether there are social fears in this area and to what extent they are justified. The legislative authority has to respect the separateness of judicial authority and take into account the fact that the regulation preventing subjectivity is a definite interference in the private life or even intimate sphere of a citizen's life. This obliges a legislator to be very careful and act with due diligence, so the limitation on Civil rights and freedoms in the areas of private and family life be adequate and proportional to nature of threats that were supposed to be prevented by means of imposing these limitations. They must be necessary, i.e. these limitations may not impose excessive burdens on a citizen. The requirements of "so called" decent legislation also has to be met. It means that, first of all a legislator has to use the securities of objectivity that by force of law don't deprive a judge of the right to assess his/ her individual attitude from a viewpoint of the creation of the image of an objective court. According to the Tribunal, provisions that deprive a judge of such rights arbitrarily are those that assume a priori that a judge who is in the situation specified by the law has to be deemed to be subjective, i.e. causing justified fears of society as far as the image of the administration of justice is concerned. The Art. 15 of the Act on Public Prosecutor's office that prohibits a person whose spouse is an attorney at law to act as the Public Prosecutor protects a public interest in a similar manner as far as the right of everyone to have his/her case examined fairly in the meaning of Art. 45, Item 1 of the Constitution, despite the fact that these persons perform functions in judicial administration other than judges. In the opinion of the Tribunal, we should reconsider whether the criteria by which these limitations shall be examined are uniform or whether with regard to judges we have limitations and prohibitions that result from the grounds other than in the case of attorneys at law and legal counsellors, despite the fact that all these limitations were intended to guarantee the objectivity of a judge.*

providing for the right to have equal access to public service and Art. 65, Item 1 providing for the freedom of choice and practice of an occupation as well as the freedom to choose a workplace. The Tribunal stated also that a decision with regard to these rights and freedoms will be conclusive for deciding whether the provisions appealed against comply with the Constitution or not, and therefore, whether other Articles of the Constitution are breached or not.

While contemplating the contents of Art. 47 of the Constitution, the Tribunal saw that in this doctrine the authors emphasised many times that the aspects of privacy were those that could be interfered by public authorities and not by other entities. Interference is to be considered of an arbitrary nature, i.e. not necessary, *inter alia,* due to state security or protection of another persons' rights and freedoms, if it interferes into private life without any respect to family relations, the right to contact closely related persons and family integrity. Although the interests (elements of privacy) that are protected on the basis of Art. 47 of the Constitution and Art. 8 of the Convention on Protection of Human Rights and Fundamental Freedoms may not be enumerated and listed precisely [330], in the case concerned it had been proven that aspects of the protection of family life such as the durability of the family and marriage (in connection with the declaration contained in Art. 18 of the Constitution) based on the emotional and economic relations of spouses and other family members and relatives as well as the freedom to contract marriage[331] and to select a spouse these prohibit and protect against the unacceptable and arbitrary interference by public authorities that have already occurred as well as those that a person interfered might expect in the future.

The Tribunal decided that the provisions appealed against concern all spheres of privacy mentioned above, except those that refer to the violation of privacy as far as selection of a spouse is concerned. Thus, interdictions resulting from the provisions appealed against undoubtedly impose limitations on family relations in the aspect of private and economic life, and undermine the strength of these relations and the durability of a family. They impose limitations on the practice of an occupation and development of professional contacts with other people. These limitations not only undermine the strength of the already existent relations but also the prospects of these relations in the future.

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[330] *The Constitution Tribunal quoted at this point: M. Safjan, Prawo do ochrony życia prywatnego [in:] Podstawowe Prawa Jednostki i Ich Sądowa Ochrona /tł. Right to protect private life [in:] Fundamental Rights of an Individual and Legal Protection of These Rights/, Warsaw 1997, p. 128.*

[331] *The Constitutional Tribunal quoted at this point Art. 23, Item 2 of the International Treaty of Civil and Political Rights and Art. 12 of the Convention on Protection of Human Rights and Fundamental Freedoms.*

As far as a privacy violation is concerned, the Tribunal has decided that it is not enough to prove that the provisions appealed against don't concern them, but in order to state that this privacy violation is unacceptable, one shall prove that the interference in this sphere was of an arbitrary nature, since it was not necessary and was not proportional to the purposes and values that were supposed to be achieved by means of such interference. The Tribunal referred the same criteria in regard to the limitations imposed on the right to have access to public service by all citizens (Art. 60 of the Constitution), and to the freedoms of selecting and practising an occupation provided for in Art. 65, Item 1 of the Constitution. There is no doubt that the provisions appealed against impose limitations on this right and freedom, which doesn't mean that such a limitation is illegal.

In the opinion of the Tribunal it was the legislator's intent that the existence of marriage ties and ties resulting from kinship or affinity is to constitute *a priori* and to cause a threat to objectivity to the extent that justifies limitations imposed on many rights and freedoms of these persons. This is a material feature that is supposed to differentiate in a qualified manner those personal ties from other formal and informal ties connecting a judge to society in such a way that prohibitions of an absolute nature have been introduced.

Any prohibitions on sitting as a judge by a person whose spouse practices the occupation of an attorney at law or legal counsellor in the legal counsellor's office and in the general or civil partnership set up exclusively by legal counsellors and attorneys at law or in the partnership in common whose partners are exclusively legal counsellors or legal counsellors and attorneys at law, provided that exclusive scope of these partnerships' activity is provision of legal assistance is - in the opinion of the Tribunal - no adequate to a threat of a judge's objectivity. The provisions appealed against assume arbitrarily that the fact of being married to a legal counsellor or attorney at law form the kind of personal relations that generally and not individually exclude objectivity of a judge in advance. On the other hand, these provisions - also arbitrarily - decide that other personal relations of a judge with other persons do not require so strict a legal interference.

The Tribunal noted that the securities that would make individual assessment of a judge's attitude compared to the interest being the objective justice administration and would provide a judge to be heard at court had been disregarded. Moreover, judicial administering bodies have been deprived of the right to act in order to create a proper image of the proper administration of justice. Thus, prohibitions resulting from the provisions appealed against deprive arbitrarily judges as well as attorneys at law, legal counsellors and public prosecutors of these rights. The arbitrary nature of these provisions is also reflected in the unproportional severity of these provisions.

As the Tribunal pointed out, these provisions are, therefore, inappropriate to the nature of a threat to judge's objectivity. The grounds for this prohibition are completely detached from the identified and personal nature of threat to objectivity caused by personal ties between a judge and other persons who might affect his/ her opinion or attitude, so he/she ceases to be objective and just.

The Tribunal brought the same objections with regard to the prohibition of being a judge by a person whose relative up to the second degree of kinship or akin of the first degree practices the occupation of an attorney at law, legal counsellor in a manner specified by statute. In addition, these objections get even stronger due to the fact that kinship ties, and particularly affinity ties make the ground for arbitrary, statutory decision about a threat to judge's objectivity that is even more detached from the individual features of attorney's character and his/ her will.

In the opinion of the Tribunal, state security reasons as well as the protection of rights and freedoms of other persons don't require such a limitation of Civil rights on freedoms of judges, attorneys at law, legal counsellors and public prosecutors. Therefore, Art. 31, Item 3 of the Constitution has been breached.

Similarly, the Tribunal assessed the absolute interdiction of being a public prosecutor by a person whose spouse practices the occupation of an attorney at law, no matter whether and how constitutional right of a citizen to be heard at court would be violated as a result of this the obligation of a public prosecutor to guard legality and to prosecute would be threatened.

In the opinion of the Tribunal, the charge of breach of Art. 31, Item 3 of the Constitution through violence of privacy constitutes a separate basis for stating that provisions appealed against are not constitutional without a necessity to quote Art. 2 of the Constitution in order to justify such a statement.[332]
In the opinion of the Tribunal, keeping the appearance of objectivity of a judge whose spouse is an attorney at law or legal counsellor due to the need to exclude might lead - if a number of such marriages is big - to the impediment of the administration of justice on the area of a given court's competence, which is not in accordance with the right held by every citizen to be heard at court. A judge, whose spouse is an attorney at law or legal counsellor, has to do his/ her best in order to show that there are no grounds for considering him/ her to be subjective and that his/ her image perceived by society make society perceive the administration of justice as a well organised process that serves the interests of citizens in the best possible way. Therefore, he/ she has to take into account the

[332] *In the meaning of Art. 2: Republic of Poland is a democratic law-observing state that carries social justice rules into effect.*

possibility that the legislative power may impose further limitations on his/ her freedoms. Nevertheless, as the Tribunal emphasised, these limitations have to be imposed with a preservation of a judge's right to try, and priority shall be given to the securities giving a possibility to assess his/ her attitude individually.

In the opinion of the Tribunal, the prohibitions contained in the provisions appealed against shall be deemed to be not adequate, and thus unnecessary and unproportion breaching a right to privacy provided for in Art. 47 of the Constitution and breaching Art. 31, Item 3 of the Constitution, since these prohibitions are not necessary to execute the civil right to trial.

The Tribunal found also that Art. 8 of the Convention on Protection of Human Rights and Fundamental Freedoms had been breached, since a public authority had interfered into the private and family life of judges, public prosecutors, attorneys at law and legal counsellors in the area in a manner that is not necessary to provide state security or protect rights and freedoms of other persons, and is unacceptable.

Moreover, the Tribunal pointed out that limitations had been also imposed on the freedom to select and practice their occupation by attorneys at law and legal counsellors within meaning of Art. 65, Item 1 of the Constitution. Moreover, access of Polish citizens to the public service in the meaning of Art. 60 of the Statute have been limited, which does not comply with the Constitution. The prohibitions referred to the practice of an occupation by attorneys at law and legal counsellors shall be examined in connection with the appropriate provisions of the law on common court structure applicable to judges, since these provisions are interdependent and they supplement each other.

SUMMING UP

Summing Up by Mr Dominique ROUSSEAU

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It is particularly difficult for me to make a summary of our work over the past few days, firstly because our discussions have covered a lot of ground, and secondly because each of the participants has been able to draw his/her own conclusions from our proceedings. My task is therefore an impossible one because either I must repeat what has already been said, which would be tedious, or I must take advantage of my situation to "write" a new report which would not be fair to any of you. I therefore trust you will be patient while I attempt to do the impossible.

The right to a fair trial is meaningless if it is not considered in relation to a specific act, namely the act of passing judgement, an act which is very ordinary but which at the same time inspires fear. It is ordinary because we all pass judgement: we all pass judgement on our neighbours, we all pass judgement on our parents, teachers pass judgement on their students, the students pass judgement on their teacher, our whole life long we pass judgement on others. In our daily lives we all believe ourselves capable of recognising who is lying, who is telling the truth, what is right, wrong, beautiful or ugly, who behaves well and who behaves badly. In our daily lives we are constantly judging one another. It may be an ordinary, everyday act, but for that very reason it also inspires fear because of its possible consequences. I am not necessarily referring to religion (though it is worth noting that in all religions God's judgement is awaited with dread because it leads to either heaven or hell) - the act of passing judgement is an act which inspires fear because it results in either great joy or sadness. The last judgement, "God's judgement", is not the only judgement that inspires fear. Man's judgement surely does so to the same extent, if not more, since it takes place here and now. It is the judgement we regularly pass on one another and which gives us a good or a bad reputation. It is also the judgement passed by courts and which results in either prison or freedom for the accused. It is this frightening aspect of the consequences of the act of passing judgement that has given rise to the requirement of a fair trial.

At the beginning of the seminar we asked ourselves: why is a seminar on the right to a fair trial being held here in the Czech Republic? And my colleague Philippe Blacher remarked that perhaps it was not merely a coincidence that we had chosen to study this subject in the country of Franz Kafka. The right to a fair trial is therefore a requirement, one which derives directly from the importance of passing judgement and the power such an act entails. However, there are conflicting approaches to this requirement - the right to a fair trial - and it is not applied to everyone. When we accuse our neighbour - of playing his music too loud, for example - we do not seek to obey the rules of fairness, we do not try to discuss the problem with him or to find out why he turns the volume up so loud; we pass judgement on him and immediately find him guilty. We only seek to conduct such a trial fairly in a particular setting, namely in the courts where cases are heard in the institutional setting of trial by professional judges. And even then, the right to a fair trial is often disputed, for it is not necessarily accepted by public opinion as a necessary or unquestionable right. Some people consider the right to a fair trial, particularly in criminal cases, to be "the murderer's right", the right that benefits murderers. For example, the decision in the Dutroux case to dismiss the investigating judge from the case because he had eaten with the victim's family was fully justified in the eyes of jurists but was obviously not understood by the public at large: to their mind, Dutroux was guilty beyond all doubt and was therefore not entitled to a fair trial. The right to a fair

trial is, therefore, a continual battle against lynching and barbarity and must be promoted, made more widespread, explained and supported by arguments because we cannot be sure that it immediately corresponds to the way in which the public believe a trial should be conducted.

Because it is a battle won by the rule of law and also because it is never really internalised, i.e. accepted by public opinion, the right to a fair trial is a right which must be defended. This right, if I think of the past two days' reports and discussions, is a right that has two faces, like Janus: a technical face, ie a procedural right, and a philosophical face, i.e. a right of judicial policy which expresses a certain ideal of justice.

1. From the technical point of view, the right to a fair trial is a complex right

A. Complex firstly because the **sources of this right** vary greatly from one country to the next. In some countries the right to a fair trial is enshrined in the Constitution, as in Hungary, Spain, Armenia, Lithuania, Croatia and Cyprus; in others, the right to a fair trial is also set out in the Constitution but only indirectly, i.e. by reference to Article 6 of the European Convention on Human Rights, as in Austria and Romania; sometimes the right to a fair trial is not set out in the Constitution at all, as in Switzerland, Italy and France. These differences prompt two remarks.

Firstly, the role of the **European Convention on Human Rights** in the development and recognition of the right to a fair trial, a role which is **both important and limited**. It is important because a number of new constitutions, particularly in central and east European countries, are based directly on Article 6 of the Convention, which has provided a general definition of the procedural guarantees for a fair trial. At the same time, however, the influence of the European Convention must be seen in perspective: the right to a fair trial, as Professor Matscher says in his report, existed prior to the European Convention on Human Rights in national, judicial and legal traditions, and in countries where the right to a fair trial is not enshrined in the Constitution, there is nevertheless a doctrine, a judicial theory, which recognises the right to a fair trial. In other words, I believe that there is an important lesson to be drawn from the relationship between constitutional traditions, national legal traditions and the European Convention. There is perhaps too great a tendency to consider this relationship as working only in one direction, i.e. that the Convention has imposed this principle on constitutional traditions and nation states. Our discussions have shown that the situation is in fact more complicated, more complex from the technical point of view. There is also a movement from the bottom to the top, from national constitutional traditions towards the European Convention on Human Rights and

the Strasbourg Court. It is important to take full account of this dual relationship insofar as the Convention embodies all that the various states have in common in terms of constitutional principles and fundamental rights. The Convention does not impose specific laws or principles but is a synthesis of the various national constitutional traditions, from which it draws inspiration.

Secondly, **judges have a very great ability to infer the right to a fair trial from general principles**. Switzerland and Italy, for example, have shown that the right to a fair trial has been inferred from the principle of equality and the rights of the defence so that, as the Italian judge said, "the incorporation in the Italian Constitution of the right to a fair trial would not make much difference". In France, too, the right to a fair trial has been inferred from the rights of the defence; it is a judicial creation based on an extension or interpretation of the rights of the defence. The right to a fair trial is therefore a complex right from the technical standpoint because it has various national, judicial and international sources, origins or inspirations, which are sometimes difficult to combine.

B. The second aspect of the complexity of the right to a fair trial concerns its *definition*. In some respects, and rather provocatively, the right to a fair trial does not actually exist but is merely a word, an expression, a shell. The right to a fair trial does not exist in its own right; what does exist, on the other hand, is the principle of hearing both parties, the principle of equality of arms and the right to be informed of the charges in one's own language; what does exist is the right to a public hearing, the right to be heard by an impartial and independent judge and the right to be represented by a lawyer. In other words, the right to a fair trial, as a procedural right, is a right which combines several rights and which can, at the same time, produce new rights. The right to a fair trial appears to be a "matrix" right, a sort of matrix principle, which incorporates a number of rights and can also give rise to new rights.

Even if certain elements do not currently form part of the definition of the right to a fair trial, there is no reason to think that judicial interpretations will not introduce new elements. For example, reasoned judgements are not always considered part and parcel of the right to a fair trial, but they could become so; the right of appeal, which, as we have said, does not really form part of the right to a fair trial, could become so; and, since our South African colleague raised the question, why not also the inquisitorial or adversarial nature of proceedings? The day may come in Europe when in order for a trial to be fair, it will have to be conducted in accordance with either the inquisitorial or the adversarial procedure. The very principle of the right to a fair trial offers infinite opportunities for introducing or inferring other rights. In France the question has been raised as to whether publishing photographs of the accused in handcuffs is consistent with the principle of a fair trial. In other words, the freedom of the press might be restricted so as to

protect the right to a free trial, which would consequently no longer be limited to the judicial sphere only but require that everything concerning and surrounding the trial must guarantee that the accused is fairly treated. The right to a fair trial is therefore a complex right because it is difficult to define and is composed of different elements.

2. The political or philosophical aspect of the right to a fair trial expresses a certain ideal of justice

A. What judges probably dread most is to see their judgement overturned on grounds of failure to secure the right to a fair trial; this procedural defect is certainly the worst thing of which a judge could be accused. Imagine the Papon trial made null and void not because the sentence was considered too long or too short but because the judge had not observed the rules guaranteeing a fair trial; imagine the Pinochet trial made null and void not because the judges had misinterpreted a convention but because they had failed to secure the right to a fair trial. If judges are haunted by this possibility, it is precisely because this right is not only a technical right but a right which expresses the democratic nature of a court. It is one of the rights by which we define a democratic society, and this ideal of justice is reflected in *the constant widening of the scope of the right to a fair trial*.

To begin with, the right to a fair trial covered a limited area, ie criminal proceedings. It was subsequently extended to cover civil cases, too, and now also covers the public branch of litigation, since administrative and constitutional disputes must respect the right to a fair trial, ie the adversarial nature of proceedings, the rights of the defence and equality of arms, for example. The right to a fair trial is spreading to all branches of litigation and, according to the national reports we have heard, even beyond. According to both the Swiss report and the Italian judge's statement, not only the courts but all authorities responsible for settling disputes must guarantee the right to a fair trial. A judgement handed down by the French Court of Cassation on 5 February 1999 quashed a decision by the Stock Exchange Operations Board because the rapporteur for the case had been present during the consideration of the judgement. The Stock Exchange Operations Board is neither a court nor an administrative body; it is a hybrid body, modelled on American agencies, ie an independent administrative authority on which the Court of Cassation imposed the duty to guarantee the right to a fair trial and whose decision it quashed not because it was wrong but because the rapporteur had been present during the consideration of the judgement. The right to a fair trial therefore now extends beyond the purely judicial sphere because it expresses a certain ideal of justice and constitutes a requirement of the rule of law that applies not only to courts but to all authorities responsible for handing down a decision.

B. *The more freedom a judge has in deciding on issues concerning problems of society, the more important the right to a fair trial becomes*. No one would deny that judges' powers are increasing as laws become less prescriptive. As the law imposes fewer constraints, judges obviously have more freedom to interpret the law. In these circumstances, the nature of the right to a fair trial is also changing; it is no longer simply a procedural right but also a substantive right - the right to be heard, the right to speak, the right to defend one's case - which may change the nature or definition of a democratic society.

Society is experiencing a crisis, particularly for want of a frame of reference. It is becoming increasingly difficult to say that a specific decision is the right decision or a fair decision, and this applies to all spheres of daily life: medically assisted procreation, cloning, abortion, etc. What is the right decision in each of these fields? As it is increasingly difficult to know whether a decision is the right decision, the way in which decisions are taken, ie the procedure and the exchange of arguments, must meet the requirements of justice. If it is no longer possible to say in advance what the right decision is, the requirements of justice must concern the way in which the decision is prepared. The assumption is that the more equitable the decision procedure and the more opportunity the parties have to present their arguments on an equal footing, the more chance there is that the decision itself will be fair. In other words, in endeavouring to establish whether a trial has been fair, we should no longer consider the substance of the decision itself but the way in which the decision was reached. It would be a major achievement if the right to a fair trial became not only one aspect by which a democratic society is defined but an integral part of our legal or democratic culture, not only a technical aspect but "something" which is part of our very being, our way of life and of respecting one another.

This is why our work should be more widely disseminated than it has been to date. I think it would be a good idea if steps were taken to ensure that our discussions on the right to a fair trial were more widely.