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Some facets of the Right to a Fair Trial -- a Strasbourg insider's view

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Introduction

Last year, when addressing a number of Polish judges at a conference in Warsaw[2] on the subject of the "reasonable time" requirement of Article 6 of the European Convention on Human Rights (ECHR),[3] I made the following introductory observation:

> The idea of justice within a reasonable time has, of course, an ancient lineage, particularly in the English common law tradition. Already in 1215, on a beautiful meadow at a place called Runnymede, more or less mid-way between Windsor and Staines[4], King John was promising to his barons in the iconic Magna Charta: *Nulli vendemus, nulli negabimus aut differemus rectum vel iusticiam* – to no one shall we sell, to no one shall we deny or delay, right or justice. Sir Edward Coke (Attorney General for England and Wales and later Chief Justice of the King's Bench – 1596-1616) said of this expression that it meant that "…every subject for injury done to him *in bonis, in terris, vel persona,* by any other subject, be he ecclesiastical or temporal without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay."[5] So, why is the reasonable time requirement so important? Basically because the effectiveness of any legal system is at stake with every case, civil or criminal, that is pending before a court; a lack of effectiveness brings about a lack of credibility in both the legal and the judicial systems; and such lack of credibility undermines the very notion of the rule of law.

The "reasonable time" requirement, however, is only one aspect of a broader concept of justice, a concept that is sometimes as clear as it is elusive, as simple as it is complex. Judges are at the forefront of the administration of justice; and judges believe that whenever they are administering justice -- whether sitting in

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[1] Chief Justice Emeritus, Malta; Judge, European Court of Juman Rights, Strasbourg.

[2] The conference, on the topic *Excessive Length of Court Proceedings*, was held in Warsaw on 23 June 2017. It was organised by the Polish Ministry of Justice and the Faculty of Law of the University of Social Sciences and Humanities (Uniwersytet SWPS), under the honorary patronage of the First President of the Supreme Court of Poland, the President of the Supreme Administrative Court of Poland, and the National School of Judiciary and Prosecution.

[3] "6(1). In the determination of his civil rights 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. Judgment 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."

[4] As one of the original documents says, *Ronimed inter Windlesoram et Stanes*.

[5] Coke, *Second Inst.*, pp. 55-56.

open court hearing submissions, or deliberating in chambers, or writing a judgment or drafting an interim measure -- the party or parties who have applied to them or who have been summoned before them, are getting a fair hearing and, on the merits, a fair deal. And in most cases the parties do, including, of course, the party cast. But how do you define a fair hearing or a fair trial? Is this defined solely by reference to the codes of civil or criminal procedure, or by reference to some other domestic law -- like a Constitution -- or perhaps by reference to some international instrument or instruments?

One of the advantages of being a member of an international court like the European Court of Human Rights (ECtHR) is to have to deal with a variety – one could say without fear of contradiction, a bewildering variety – of legal systems, and to see how each of them measures up or otherwise to the minimum standards laid down by the ECHR. I say minimum standards, because Article 53 of the Convention[6] makes it clear that the High Contracting Parties may, either through internal law or in virtue of other international instruments, accord higher standards of human rights protection. And the striking thing is that all these legal systems – all 47 of them – are measured against provisions of the Convention which are drafted in minimalistic terms.

A look back in time

However, the case law of the ECtHR over the last 57 plus years has shown that even provisions drafted in minimalistic terms can be interpreted and applied in such a way as to provide extensive human rights protection which is not perhaps immediately apparent. Take the very headnote of Article 6 – *Right to a fair Trial*. Every trial conducted must be fair. That sounds self-evident. But does Article 6 imply something more than simply that the conduct of a trial must be fair? Does it also imply that there is a right of access to a court, as a prerequisite for the initiation of proceedings which, once initiated, have to be fairly conducted? Up to the early seventies, that is almost 20 years after the Convention was signed in Rome and more than 750 years after King John had signed Magna Charta at Runnymede, the United Kingdom Government was still denying that

[6] "53. Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

there was a general right of access to a court as a fundamental human right. The issue came to a head in *Golder v. the United Kingdom*, 21 February 1975.[7] Golder, who was serving a relatively long prison sentence at Parkhurst Prison on the Isle of Wight, wanted to communicate with his lawyers in order to initiate proceedings for libel and defamation against a prison officer. At the time, Prison Regulations in England and Wales prohibited any correspondence with solicitors as regards convicted prisoners without the special permission of the Home Secretary, which in this case was refused to Golder. Golder alleged that both his Article 6 rights and his right to private life protected by Article 8 had been infringed. The British government was horrified by this allegation:

> The United Kingdom Government respectfully submit to the Court that Article 6 para. 1 (art. 6-1) of the Convention does not confer on the applicant a right of access to the courts, but confers only a right in any proceedings he may institute to a hearing that is fair and in accordance with the other requirements of the paragraph. The Government submit that in consequence the refusal of the United Kingdom Government to allow the applicant in this case to consult a lawyer was not a violation of Article 6 (art. 6). In the alternative, if the Court finds that the rights conferred by Article 6 (art. 6) include in general a right of access to courts, then the United Kingdom Government submit that the right of access to the courts is not unlimited in the case of persons under detention, and that accordingly the imposing of a reasonable restraint on recourse to the courts by the applicant was permissible in the interest of prison order and discipline, and that the refusal of the United Kingdom Government to allow the applicant to consult a lawyer was within the degree of restraint permitted, and therefore did not constitute a violation of Article 6 (art. 6) of the Convention.[8]

The ECtHR would have none of it. It established in unequivocal terms that Article 6 incorporated a right of access to a court, on the strength of the principle that where rights are conferred these must be practical and effective, and not merely theoretical or illusory – it somehow recalls the maxim, well known also to the common law, *ubi ius, ibi remedium* – which is properly reflected, in the context of the rights and freedoms protected by the Convention, in Article 13.[9] Moreover – and this is another reason why *Golder* stands as a landmark judgment – it also affirmed that the interference with prisoners' private lives must not exceed what is ordinarily and reasonably required by the exigencies of imprisonment. Otherwise restated, a convicted prisoner is deprived of his liberty by way of punishment, but he is not sent to prison to be punished beyond that loss of liberty.

[7] App no 4451/70.
[8] *Golder v. the United Kingdom*, 21 February 1975, § 22.
[9] "13. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Right of access to a court

Golder has spawned hundreds of cases dealing with aspects of this pre-requisite to a fair trial, that is to say with the "right of access" to a court in civil proceedings. Access to a court for the purposes of Article 6, can only a arise in respect of disputes – *contestations* in the French text – over civil rights and obligations which can be said, at least on arguable grounds, to be recognised under domestic law – the right of access, in other words, cannot of itself guarantee any particular content for those rights. Therefore, the civil right or obligation must have a basis in domestic law. For example, in *Powell and Rayner v. the United Kingdom*, 21 February 1990,[10] where a statute provided that no action for nuisance and trespass would lie in respect of the ordinary incidents of flights of aircraft which conformed with reasonable height requirements and navigation regulations, the ECtHR found that as a result of this exclusion of liability the applicant house owners – who had the misfortune of having their houses a couple of miles from the end of runways at Heathrow airport and exactly in direct alignment with those runways – could not claim to have a substantive right under English law to obtain relief for continuous and incessant exposure to aircraft noise. That restriction or limitation imposed by statute could not be said to infringe their right of access to a court under Article 6. While the Court has admitted that the right of access to a court, even where there is an arguable claim based on domestic law, may be subjected to certain limitations, it has repeatedly stated that those limitations must not restrict or reduce the access left to the individual to such an extent that the very essence of the right of access is impaired. In this respect the Court often applies the proportionality test and asks itself whether a reasonable relationship of proportionality exists between the means employed for the restriction and the aim sought to be achieved by that restriction. Limitations on access as regards minors and persons of unsound mind, bankrupts, and vexatious litigants have been acknowledged as pursuing legitimate aims and therefore as not being incompatible, in principle, with Article 6. Likewise, security for costs and court fees, provided that they are not excessive, would not run foul of this human rights provision. Also restrictions in connection with appeal proceedings – while the ECHR does not guarantee a right of appeal in civil proceedings (in criminal proceedings this right of appeal was introduced by Protocol no 7 which only came into force in November of

[10] App no 9310/81.

1988),[11] where such a right exists – as it does in all the jurisdictions of the High Contracting Parties (with sometimes two levels of appeal, i.e. appeal and cassation) – proceedings on appeal must also ensure that the trial is fair. States, however, have a wide margin of appreciation as to the limitations imposed in connection with appeals – both as regards formal as well as substantial limitations – but again these limitations must not impair the very essence of the right of access to a court. Before I leave this rather theoretical area, reference can be made to two cases which highlight the complexity, no less than the importance, of the issue: *Fayed v. the United Kingdom*, 21 September 1994,[12] and *Stanev v. Bulgaria*, 17 January 2012.[13]

In *Fayed* the Article 6 issue revolved around the immunity of civil servants from being sued for damages in defamation proceedings in connection with official reports (it was called, at the time, the defence of privilege). In this case independent inspectors had been appointed by the Secretary of State for Trade and Industry to investigate a public company and its take-over bid of another company, and their report was made public. The applicants – the Fayed brothers – maintained that the report was defamatory and had caused them damages (the Inspectors had concluded, among other things, that the applicants had dishonestly misrepresented their origins, their wealth, their business interests and their resources to the Secretary of State, the Office of Fair Trading, the press, to the shareholders of the company they wanted to take over, and to their own advisers). Before the Strasbourg court the applicants pleaded a breach of Article 6 because they were effectively denied the right of access to a court. The Court rejected this contention after examining the aim of the limitation of the defence of privilege, and all the procedural safeguards enshrined in the law regarding the conduct of such investigations. The ECtHR said:

> § 81…The risk of some uncompensated damage to reputation is inevitable if independent investigators in circumstances such as those of the present case are to have the necessary freedom to report without fear, not only to the authorities but also in the final resort to the public. It is in the first place for the national authorities to determine the extent to which the individual's interest in full protection of his or her reputation should yield to the requirements of the community's interest in independent

[11] Protocol No 7: "2(1). Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
"(2). This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

[12] App no 17101/90.

[13] App no 36760/06.

> investigation of the affairs of large public companies. The applicants' argument would amount to reading into Article 6 para. 1 (art. 6-1) an entitlement to have a report such as the one in the present case not published until after a full judicial hearing repeating, doubtless over a longer time-scale, the same fact-finding exercise as that already carried out by the Inspectors. Such an entitlement could effectively destroy the utility of informing the public of the results of the administrative investigations provided for under section 432 (2) of the Companies Act 1985. Having found the aim of not only making but also publishing Inspectors' reports to be legitimate, the Court cannot apply the test of proportionality in such a way as to render publication impracticable.
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> § 82. In the light of the foregoing considerations, the Court cannot find that, in the exercise of their responsibility of regulating the conduct of the affairs of public companies, the national authorities exceeded their margin of appreciation to limit the applicant brothers' access to the courts under Article 6... either as regards the state of the applicable law or as regards the effects of the application of that law to the brothers. Having regard in particular to the safeguards that did exist in relation to the impugned investigation, the Court concludes that a reasonable relationship of proportionality can be said to have existed between the freedom of reporting accorded to the Inspectors and the legitimate aim pursued in the public interest.

Stanev concerned something entirely different. Mr Stanev was partially legally incapacitated on the basis of a report (later found to be not entirely correct) that he had been suffering for a long time from schizophrenia, and that he was unable to manage his own affairs adequately or realise the consequences of his actions. A local council officer was appointed as his legal guardian since his family did not want to assume responsibility for him. His guardian, without in any way consulting him, placed Stanev in a care home for men in a remote mountain region. The director of the home later became his guardian. Stanev attempted several times to apply to the courts to have his capacity restored but was always told that he could only act either through his guardian, or public authorities – like the mayor of the locality or the public prosecutor – who could bring the necessary action. None of these wanted to act, and of course he could not even obtain judicial review of the mayor's or public prosecutor's refusal to act because his guardian did not want to act! In other words, he faced a brick wall. The ECtHR noted that under Bulgarian law, no legal distinction was made between those partially and fully deprived of legal capacity and that there was no possibility of automatic periodic review of whether the grounds for placing a person under guardianship remained valid. In addition, in Mr Stanev's case the measure in question was indefinite. Although the right of access to the courts was not absolute and restrictions on a person's procedural rights, even where the person had been only partially deprived of legal capacity, might be justified, the right to ask a court to review a declaration of

incapacity was one of the fundamental procedural rights for the protection of those who had been partially deprived of legal capacity. It followed that such people should in principle have direct access to the courts. Article 6 § 1 had therefore to be interpreted as guaranteeing in principle that anyone in Mr Stanev's position had direct access to a court to seek restoration of his or her legal capacity. As direct access of that kind was not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation, the ECtHR found that there had been a violation of Article 6 § 1 regarding Mr Stanev.

Whether fish or fowl – or neither

There is, however, a downside to the way that Article 6 is structured, beginning as it does with placing side by side "civil rights and obligations" – the civil limb of Article 6 – and "criminal charge" – the criminal limb. A lot of energy has, over the years, been expended by the Court to try and delineate what exactly amounts to the one and the other. As far the civil limb is concerned, while it is clear that the expression includes all those disputes between private individual which are classified as civil in domestic legislation, the ECtHR has also held that the expression "civil rights and obligations" has an autonomous meaning which does not depend on the classification of the dispute under domestic law. Domestic law may categorise a dispute as being of a "public law nature", but this is not decisive. What the Court will do is to look at the substantive content and the substantive effect of the right in question, and not at its classification under domestic law, and if the result of the proceedings is decisive for private rights and obligations, then it is immaterial whether under domestic law the proceedings are classified as "public law proceedings". Thus, for instance, proceedings which had to do with the permission to sell private land, or with permission for running a private clinic, or for obtaining a building permit on private land, or proceedings regarding the ownership and use of religious buildings, or proceedings connected with obtaining a licence to serve alcoholic beverages – all these have been held to fall under the civil limb of Article 6. Likewise, disciplinary proceedings before professional bodies where the right to practice the profession is at stake; or claims against the state for negligence – in this respect there have been a spate of cases against France, because under French law (at least until some time ago) these actions were always regarded as of a public nature, and were dealt with not by the ordinary courts but by the administrative courts and the *Conseil d'Etat*. Disputes concerning social

assistance and social welfare matters, including proceedings relating to an employee's dismissal by a private firm, proceedings concerning social-security benefits (even on a non-contributory basis), and proceedings concerning compulsory social-security contributions – all these have been held to fall under the civil limb of Art. 6.

What about proceedings concerning public servants – their engagement and their dismissal? Initially, the case law of the Commission[14] and the ECtHR was one of 'hands-off': the special relationship between these people and the State, the special bond of loyalty that, in theory, was meant to exist between them, meant that proceedings involving public servants were outside the field of civil rights and obligations. Slowly, however, the Court began to change attitude, beginning in 1999 with the Grand Chamber case of *Pellegrin v. France*, 8 December 1999.[15] More recently, the Court, in *Vilho Eskelinen and Others v Finland*, 19 April 2007,[16] adopted an entirely new approach, shifting the burden of proof upon the State concerned. According to this new approach in order for the respondent State to be able to rely on the applicant's status as a civil servant to exclude the application of Article 6, two conditions had to be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. The mere fact that the applicant was in a sector or department which participated in the exercise of power conferred by public law was not in itself decisive. In order for the exclusion to be justified, it was not enough for the State to establish that the civil servant in question participated in the exercise of public power or that there existed, to use the words of the Court in the *Pellegrin* judgment, a "special bond of trust and loyalty" between the civil servant and the State as employer. The State would also have to show that the very subject matter of the dispute in issue was related to the exercise of State power, or that it had called into question the special bond. Thus, there could in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in

[14] The European Commission on Human Rights, which from 1954 up to its abolition in 1998 with the coming into force of Protocol 11, acted as a "filter" for applications before the ECtHR.

[15] App no 28541/95. See in particular §§ 59 and 60 of *Pellegrin* which trace the *iter* of the, sometimes conflicting, previous case law.

[16] App no 63235/00.

question. There is therefore now, in effect, a presumption that Article 6 applies in cases of disputes involving civil servants.[17]

Yet some matters still remain definitely excluded from the civil limb of Article 6, while at the time clearly also not falling within the criminal limb. Tax-proceedings is the pre-eminent category, closely followed by immigration matters – matters relating to entry, residence and removal of aliens, proceedings concerning the granting of political asylum and deportation. Also extradition proceedings, and proceedings relating to the granting of passports and nationality – all these matters fall within the so-called hard core of public-authority prerogatives, and therefore are outside the ambit of the civil limb of Article 6.

Independent and impartial tribunal

It will be immediately apparent from the wording of Article 6(1)[18] that the ECHR, unlike Section 10 of the Constitution of Mauritius, or, for that matter, Article 39 of the Constitution of Malta,[19] does not require that a criminal charge be necessarily decided by a court, that is to say a tribunal integrated within the standard judicial machinery of the country concerned. A High Contracting Party may set up special tribunals to deal with specific subject matters, including criminal matters, which can be more appropriately handled outside the ordinary court system. What is important, in order to ensure compliance with the requirements of Article 6, are the guarantees, both substantive and procedure, which are in place. In general, a tribunal must have general jurisdiction to examine all questions of fact and of law, and its decision must have binding effect, that is, may not be altered by a non-judicial authority to the detriment of one party. It must also be a tribunal "established by law". The significance of this expression is intended to ensure that

[17] See in particular § 62 of the *Vilho Eskelinen*.

[18] See f.n. 2, above.

[19] Section 10(1) and (8) of the **Constitution of Mauritius**: "(1) Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law…(8) Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time." Article 39 (1) and (2) of the **Constitution of Malta**: "(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law…(2) Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time." The common Westminster matrix is evident.

the judicial organization in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament. The lawfulness of a tribunal encompasses also its composition. Thus, for instance, in the case of *Oleksandr Volkov v. Unkraine*, 9 January 2013,[20] the practice of tacitly renewing judges' terms of office for an indefinite period after their statutory term of office had expired and pending their reappointment was held by the ECtHR to be contrary to the principle of a "tribunal established by law". The procedure governing the appointment of judges could not be relegated to the status of internal practice.

Of course a tribunal, or indeed a court, may be independent on paper but in practice it may not be so. The ECtHR has repeatedly held that it will look at what really happens on the ground and will not be limited to the wording of the domestic law; any other approach would mean that it would be relinquishing its supervisory function. Thus in a number of cases the Court has sought to establish whether individual judges were really free from undue influences both from outside the judiciary and from within. Internal judicial independence requires that judges be free from directives or pressures from fellow judges or from those who have administrative responsibilities in the court (who could also be judges themselves), such as the president of the court or a president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary, in particular vis-à-vis their judicial superiors, may lead the ECtHR to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified. A very curious situation arose in a case coming from Lithuania: *Daktaras v Lithuania*, 10 October 2000.[21] Up until the late nineties, the law in that country allowed a first instance judge whose decision had been reversed or varied on appeal to write to the president of the Supreme Court requesting him to present a petition to the Supreme Court to have the decision of the court of appeal set aside, and to reinstate the judgement of the first instance court. If the President of the Supreme Court agreed, he would then file the said petition with the Criminal Division of the Supreme Court asking it to quash the decision on appeal. The same President would also appoint a judge rapporteur, as well as a chamber of three judges of the Criminal Division to consider the petition. The point in issue was a trivial one – whether the applicant was to be considered a principal or an accomplices in the crimes of which he had

[20] App no 21722/11.
[21] App no 42095/98.

been found guilty – but the punishment would not have changed. Rather unsurprisingly, the Supreme Court allowed its President's petition and reverted to the first instance decision that the applicant was a principal, something that the applicant had contested on appeal. In finding a violation of Article 6 in such a situation, the ECtHR referred to an earlier case against the United Kingdom – *Findlay v the United Kingdom*, 25 February 1997[22] – where it had found that a court-martial had been held in breach of Article 6 because the tribunal lacked both independence and impartiality in view of the significant role played by the convening officer before and during the hearing: the convening officer convened the court and appointed its members who were subordinate to him in rank and who fell within his chain of command. It is true *Findlay* was a case involving of "lay judges" (military officers), whereas in *Daktaras* one was dealing with professional judges; but by his actions the President of the Supreme Court had in effect taken up the prosecution case and moreover was free to appoint whoever he wanted both as rapporteur and to sit on the three judge court to hear his own petition; and the Strasbourg court's conclusion was inevitable:

> § 38. In the light of these circumstances, the Court finds that the applicant's doubts as to the impartiality of the Supreme Court may be said to have been objectively justified. Consequently, there has been a breach of Article 6 § 1 of the Convention.

Presumption of innocence

A cursory look at paragraph (2) of Article 6[23] would seem to suggest the obvious – that here we are talking about a procedural guarantee fundamental to criminal trials. Yet this provision has been the subject of a number of cases which highlight the different approaches to the principle of the presumption of innocence in the 47 jurisdictions supervised by the ECtHR. A number of cases brought against France – *Salabiaku v. France*, 7 October 1988; *Pham Hoang v. France*, 25 September 1992; *Klouvi v. France*, 30 June 2011[24] – have dealt with presumptions of fact or of law. In *Salabiaku*, for instance, where the applicant took delivery of a locked trunk which was eventually found to contain drugs, he was subject to a presumption of responsibility. The ECtHR, departing slightly from the views expressed by the

[22] App no 22107/93.
[23] "6(2). Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."
[24] App nos 10519/83, 13191/87 and 30754/03 respectively.

Commission[25], made it clear that presumptions of law or of fact were, in principle, not incompatible with the ECHR:

> § 28…Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider ([in] paragraph 64 of [its] report), paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law…Article 6 para. 2 does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

Since, however, the French courts enjoyed a freedom of assessment and gave attention to the facts of the case, actually quashing on appeal one of the convictions, the ECtHR found that there was no violation of Article 6(2). The ECtHR's approach has been that, provided that presumptions are not irrebuttable but leave a sufficient margin for the accused to prove his innocence nonetheless, then such presumptions are not in violation of Article 6(2). However, where the accumulation of obstacles to prove one's innocence (by rebutting the presumption) is almost insurmountable, as was the case in *Klouvi*, the conclusion was different. In this case the applicant was convicted of malicious prosecution because her criminal complaint alleging sexual harassment by her employer had been subject to a decision of "non lieu" – lack of evidence to go to trial. The ECtHR found that, in effect, the applicant had been subjected to a double presumption of guilt, significantly undermining the presumption of innocence: not only was her complaint stopped by the authorities from taking its course, but that very fact had created before the trial court a factual presumption, which was relied upon to convict her, that she must have known that her complaints against her employer had no foundation. This, and in particular the reliance on the presumption or assumption derived from the "non-lieu", removed from the trial court any role or freedom in assessing the facts and issues. The rule that can be derived from many examined by the ECtHR is that in employing presumptions in criminal law, the

[25] See f.n. 9, above.

signatories to the ECHR are required to strike a balance between what is at stake and the rights of the defence – in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved. In tax matters, for instance, the application of certain presumptions, resulting in surcharges of a penal nature which are enforced even before there has been a final decision on the merits of an appeal against assessment, even if difficult (but not impossible) to rebut have been held by the Court not to violate the presumption of innocence (see *Janosevic v. Sweden*, 23 July 2002).[26]

Walking a tightrope

The presumption of innocence provision in the Convention has also been given a particular interpretation which has made the lives of some judges in the States parties to the convention particularly difficult and uncomfortable. It all began with a Swiss case – *Minelli v. Switzerland*, 25 March 1983.[27] In this case, the ECtHR affirmed for the first time in unequivocal language that this presumption was not merely a procedural guarantee to be applied in the conduct or, in the course of, a trial, but could extended also to statements made both before a trial had even commenced as well as to – and one could say, and *especially* to – statements made after a trial in which a person has been acquitted. In *Minelli*, a domestic court, in declining to follow the usual practice of awarding costs to the accused who had been acquitted, remarked that he "very probably" would have been convicted but for the termination of proceedings due to the rules of prescription. The ECtHR found a violation of Article 6(2). From that case onwards, a long series of cases has held that statements by public authorities before a trial indicating, directly or indirectly, that a particular person had committed an offence, as well as similar statements made after the person's acquittal, would run foul of Article 6(2). A few years ago, in the case of *Allen v. the United Kingdom*, 12 July 2013,[28] the Grand Chamber of the ECtHR had a golden opportunity before it to re-assess carefully the applicability of Article 6(2) and to limit its application to the situations that really matter – to my mind, situations which could prejudice the conduct of a trial, and therefore, by necessary definition, to situations occurring *before* or *during* the trial, but not after the case is over and done with through an acquittal. Unfortunately it

[26] App no 34619/97. In *Janosevic,* however, the ECtHR did find a violation of Article 6(1) in respect of the right of access to a court as well as in respect of the length of the proceedings.
[27] App no 8660/79.
[28] App no 25424/09.

failed to do so. The case concerned a woman who had been convicted for the manslaughter of her four month old son, and sentenced to three years imprisonment. The Criminal Division of the Court of Appeal quashed her conviction, on the basis of new medical evidence, as being unsafe. She applied for compensation under the (English) Criminal Justice Act 1988 which provided that compensation was to be paid to someone convicted of a criminal offence but who has the conviction subsequently reversed on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice. Her request was refused. She applied for judicial review. The High Court said that, in reversing the decision of the trial court, the Court of Appeal had merely said that the new medical evidence "created the possibility" that a jury "might properly acquit" Ms Allen, and therefore found no reason to vary the decision of the Secretary of State to refuse her compensation. To compound the problem, when she appealed to the Court of Appeal, this court added that the acquittal decision did "not begin to carry the implication" that there was no case for Ms Allen to answer, and concluded that the test for a "miscarriage of justice" had not been made out – the implication being "You are still probably guilty, but it could not be proved beyond reasonable doubt" – hence the conviction was unsafe. The Grand Chamber found that there was no violation of Article 6(2), but refrained from re-setting the theoretical parameters of this provision of the Convention, limiting itself instead to listing, in a non-exhaustive way, instances in which this provision would apply.[29]

I was part of the Grand Chamber which unanimously found a no violation in this case. However my concern was, and still is, with one particular situation or instance (referred to in that judgment as when where Article 6(2) would apply): when the alleged victim of a crime files for civil compensation against the person who has been acquitted in the criminal proceedings. In fact I was the only one of the seventeen judges who filed a separate concurring opinion. In my view, the Grand Chamber was most unhelpful to judges in domestic jurisdictions deciding such compensation claims when it merely said that whether or not there is a violation of Article 6(2) would depend on whether "the national decision on compensation [contains] a statement imputing criminal liability to the respondent party". The full text of the relevant paragraph is the following:

[29] See § 98 of that judgment.

> § 123. In cases involving civil compensation claims lodged by victims, regardless of whether the criminal proceedings ended in discontinuation or acquittal, the Court has emphasised that while exoneration from criminal liability ought to be respected in the civil compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. However, if the national decision on compensation were to contain a statement imputing criminal liability to the respondent party, this would raise an issue falling within the ambit of Article 6 § 2 of the Convention… This approach has also been followed in cases concerning civil claims lodged by acquitted applicants against insurers…

The ECtHR is in effect saying: "it all depends on what you say and how you say it". To my mind, that is just playing with words, and is most unhelpful. The reality is that in most proceedings for civil compensation following an acquittal in criminal proceedings (or, indeed, when there has been no criminal prosecution at all), for the national court to find for the plaintiff and against the defendant it must find not only that the material element (*actus reus*) of the offence was committed by the defendant, but that the moral element (*mens rea*) of that offence[30] was also present. It is true that in the civil proceedings the standard of proof will be less strict than in criminal proceedings – on a balance of probabilities, and not beyond reasonable doubt – but that is not really saying much as far as popular perception of guilt or innocence, and therefore of the existence or otherwise of criminal liability, is concerned. Bottom line: judges at national level are made to walk a linguistic tightrope in cases where they have to adjudicate on such compensation claims; they have to make sure that they do not use what the ECtHR will eventually categorise as "unfortunate language", although even then it may decide that the language used was not "unfortunate enough"! This is exactly what happened in a relatively recent case, *Müller v. Germany*, 27 March 2014,[31] where a Chamber of the ECtHR expressed itself in the following terms:

> § 46…However, when regard is had to the nature and context of the particular proceedings, even the use of some unfortunate language may not be decisive. The Court's case-law provides some examples of instances where no violation of Article 6 § 2 has been found even though the language used by domestic authorities and courts was criticised (see *Allen*, cited above, § 126; *A.L. v. Germany*, no. 72758/01, §§ 38-39, 28 April 2005 and *Reeves v. Norway* (dec.), no. 4248/02, 8 July 2004).

As I tried to explain in my partly dissenting opinion in *Müller*, to speak of "unfortunate language used", and then to distinguish between unfortunate

[30] In whatever form: positive direct intent, positive indirect intent, or mere *culpa.*
[31] App no 54963/08.

language that is in violation of the presumption of innocence and unfortunate language which is not, merely shoves the problem into the realm of the aleatory.

Conclusion

Article 6 of the ECHR is, arguably, pivotal for the Rule of Law in the 47 jurisdictions represented at the Council of Europe. Not surprisingly, since the ECtHR was set up in 1959 this provision has had the dubious privilege of being the one most frequently invoked by applicants before the Strasbourg organs and the one in respect of which the ECtHR has pronounced the highest number of violation judgments.[32] A leading jurist in the Registry of the ECtHR, Dr Karen Reid, opines that this high percentage of applications reflects the fact "that it is in the court that most people are likely to come into contact, in a significant manner, with the power and authority of the State as it administers civil and criminal justice."[33] There are many other facets of Article 6, besides the ones dealt with in this short paper, which would be worth exploring, notably what does or does not amount to a "reasonable time" (particularly in the context of criminal proceedings and where bail has been denied) and how the "minimum rights" mentioned in paragraph (3) of Article 6 dovetail into the fairness requirement of paragraph (1). All that, however, would require two entirely separate papers.

[32] "More than 40% of the violations found by the Court have concerned Article 6 of the Convention, whether on account of the fairness (17.35%) or the length (21.34%) of the proceedings. The second most frequently found violation has concerned the right to liberty and security (Article 5)," *Overview – 1959 - 2016 – ECHR* (European Court of Human rights, Strasbourg, March 2017), p. 6.

[33] Reid, K. *A Practitioner's Guide to the European Convention on Human Rights* Sweet & Maxwell (London), 4th Ed, 2012, p. 81.