ALEXANDER B BLADES

# SECTION 27(1) OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990: A NEW CHARTER OF ADMINISTRATIVE JUSTICE

LLB(HONS) RESEARCH PAPER

BILL OF RIGHTS (LAWS 537)

LAW FACULTY
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CONTENTS

## ABSTRACT

This paper focuses upon the meaning of section 27(1) of the New Zealand Bill of Rights Act 1990, which guarantees the right to "natural justice". To this end the paper undertakes an analysis of the meaning of Article 14(1) of the International Covenant on Civil and Political Rights, since section 27(1) is designed to implement Article 14(1) in New Zealand's domestic law. Furthermore, because of the close relationship between Article 14(1) of the Covenant and Article 6(1) of the European Convention on Human Rights, the paper embarks upon a careful study of the jurisprudence of the European Court of Human Rights with a view to clarifying the meaning of Article 14(1) of the Covenant. The paper then considers the impact of Article 14(1) of the Covenant upon the meaning of section 27(1) of the Bill of Rights, and concludes that the right to natural justice under section 27(1) applies in a wider range of situations, and has a more extensive content, than does the right to natural justice at Common Law.


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*The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 19,000 words*

# I INTRODUCTION

This paper focuses upon the meaning of section 27(1) of the Bill of Rights, which guarantees the right to the "observance of the principles of natural justice" in the determination of a person's rights, obligations and interests. It identifies the appropriate approach to the interpretation of section 27(1) of the Bill of Rights. Since section 27(1) is designed to implement Article 14(1) of the International Covenant on Civil and Political Rights (hereafter the "Covenant")[1] in New Zealand's domestic law, an analysis of that Article is central to this enquiry.

In order to gain a full understanding of the meaning of Article 14(1) of the Covenant, it is necessary to consider the meaning of Article 6(1) of the European Convention on Human Rights (hereafter the "European Convention"),[2] since Article 6(1) of the European Convention is modelled on Article 14(1) of the Covenant. To this end, the paper embarks upon a detailed study of the jurisprudence of the European Court of Human Rights under Article 6(1) of the European Convention.

The paper then considers the impact of Article 14(1) of the Covenant upon the meaning of section 27(1) of the Bill of Rights. It establishes that section 27(1), properly interpreted by reference to Article 14(1) of the Covenant, affords much more extensive procedural protections to those affected by decision-making processes than does the Common Law.

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1 999 UNTS 171.

2 213 UNTS 221.

## II ARTICLE 14(1) OF THE COVENANT

This Part of the paper focuses on the meaning of Article 14(1) of the Covenant. To this end, it analyses the practice of the Human Rights Committee under Article 14(1) of the Covenant. It also embarks upon a detailed study of the jurisprudence of the European Court under Article 6(1) of the European Convention, since that jurisprudence is of central importance to the proper interpretation of Article 14(1) of the Covenant. Part III of the paper will consider some of the implications of the conclusions reached in this Part for the meaning of section 27(1) of the New Zealand Bill of Rights.

### *A Article 14(1) of the Covenant: Interpretation*

The material part of Article 14(1) provides:

> . . . . In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . . . .

The Covenant does not define any of the terms contained in this sentence. What is meant by "rights and obligations in a suit at law"? What do "independent" and "impartial" denote? What counts as a "tribunal" for the purposes of Article 14(1)? In attempting to resolve these questions the practice of the Human Rights Committee, established under Article 28 of the Covenant, is of central importance.

The Human Rights Committee is responsible for supervising the implementation of the Covenant. States Parties must report periodically to the Committee "on the measures they have adopted which give effect to the rights [contained in the Covenant] and on the progress made in the enjoyment

of those rights".[3] The Committee discusses the reports with the Representatives of the State Party concerned; and the discussions are documented in the summary records of the meetings of the Committee. This reporting system is the primary means by which the implementation of the Covenant is supervised.[4] Under Article 40(4) of the Covenant the Committee is empowered to make such "general comments as it deems appropriate".[5] Moreover, the Committee's powers have been further extended by the Optional Protocol to the Covenant.[6] Where a State Party ratifies the Protocol, the Committee is competent to receive and consider individual communications alleging violations of the Covenant by that State Party.[7]

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3 Article 40(1) of the Covenant.

4 See M N Shaw *International Law* (3ed, Grotius, Cambridge, 1991) 209; and generally D McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press, Oxford, 1991).

5 General comments of the Committee are intended to promote co-operation between States Parties in the implementation of the Covenant, summarise the experience of the Committee in examining States Parties' reports and draw the attention of States Parties to matters relating to the improvement of the reporting procedure and the implementation of the Covenant: UN Doc CCPR/C/18; and see above n 4, Shaw, 209-210.

6 999 UNTS 302.

7 The Optional Protocol does not stipulate what is the legal status of views adopted by the Committee. Shaw asserts that "[t]he Committee . . . is not a court with the power of binding decision on the merits of cases": above n 4, Shaw, 212; but Brownlie has argued that views adopted by the Committee "in substance involve decisions of law and fact, and the Respondent State has a duty to produce explanations and to report the remedial steps which may have been taken": I Brownlie (ed F M Brookfield) *Treaties and Indigenous Peoples* (Oxford University Press, Oxford, 1992) 93. Tomuschat comments:

> Legally, the views formulated by the Human Rights Committee are not binding on the State party concerned which remains free to criticize them. Nonetheless, any State party will find it hard to reject such findings in so far as they are based on orderly proceedings during which the defendant party had ample opportunity to present its submissions. The views of the Human Rights Committee gain their authority from their inner qualities of impartiality, objectiveness and soberness. If such requirements are met, the view of the Human Rights Committee can have a far-reaching impact, at least *vis-à-vis* such governments which have not outrightly broken with the international community and ceased to care any more for concern expressed by international bodies. If such a situation arose, however, even a legally binding decision would not be likely to be respected.

C Tomuschat "Evolving Procedural Rules: The UN Human Rights Committee's First Two Years of Dealing with Individual Communications" 1 HRLJ 249, 255 (1980). See also P R Ghandhi "The Human Rights Committee and the Right of Individual Communication" (1986) 57 BYIL 201, 248-251.

Pocar argues persuasively that States must comply with the Committee's views, on the basis that Article 2(3) of the Covenant requires States to provide an "effective remedy" for a violation of the Covenant, and the Optional Protocol provides a machinery to establish the existence of a violation: F Pocar "Legal Value of the Human Rights Committee's Views" (1991-92) 7 CHRYB 119. See also J B

The practice of the Human Rights Committee under the Covenant is, accordingly, of central importance to the proper interpretation of Article 14(1). It is noteworthy that the Committee has received and considered numerous communications alleging violations of Article 14(1) of the Covenant;[8] and has issued a General Comment in respect of Article 14 as a

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Elkind "The Optional Protocol: a Bill of Rights for New Zealand" [1990] NZLJ 96, 100; J B Elkind "The Optional Protocol and the Covenant on Civil and Political Rights" [1991] NZLJ 409, 410. Elkind's view ([1990] NZLJ at 100) that "the Committee is unquestionably regarded as a law-determining agency for obligations arising under the Covenant" is supported by Article 2(3) of the Covenant.

The Committee itself has recognised a link between Article 2(3) of the Covenant and the Optional Protocol. For example, in adopting its views in *Edgar A Cañón García* v *Ecuador*, the Committee stated: "[i]n accordance with the provisions of Article 2 of the Covenant, the State party is under an obligation to take measures to remedy the violations [of Articles 7, 9, and 13 of the Covenant] suffered by Mr. Cañón García": Comm No 319/1988, UN Doc CCPR/C/43/D/319/1988 (1991), p 5, para 6.2. The Committee has established a procedure to follow up State implementation of its views. For example, in the *Cañón García* communication, the Committee indicated that:

> [it] would appreciate receiving from the State party, within ninety days of the transmittal to it of this decision, all pertinent information on the results of all its investigations, as well as on measures taken to remedy the situation, and in order to prevent the repetition of such events in the future.

*Id*, p 5, para 7. A number of States are complying with this procedure: see, for example, GAOR, 38th Sess, Supp No 40, UN Doc A/38/40 (1983), pp 249 (Canada), 254 (Mauritius), 255 (Finland); GAOR, 44th Sess, Supp No 40, UN Doc A/44/40 (1989), p 149 (Finland); GAOR, 45th Sess, Supp No 40, UN Doc A/45/40 (1990), Vol 2, pp 207 (Dominican Republic), 209 (Ecuador and Finland); GAOR, 46th Sess, Supp No 40, UN Doc A/46/40 (1991), p 174 (Finland, the Netherlands, Columbia, Peru and Trinidad and Tobago).

It is also noteworthy that, during the discussion of Canada's first report to the Committee, the Canadian Representative Mr McPhail said that:

> in his country's opinion, the Committee's questions and comments, whether in the context of the Covenant or of its Optional Protocol, could have a significant impact and help to increase the understanding of the States parties of their obligations under the Covenant.

*Summary Record of the Human Rights Committee*, 9th Session, UN Doc CCPR/C/SR 205, p 2, para 2 (1980). Further, a New Zealand Ministry of Foreign Affairs discussion paper states that "[t]he Human Rights Committee is a less political and lower profile body than the [Commission on Human Rights] but it plays an important role in *ensuring compliance* with the Covenant": Discussion Paper for Ministry of Foreign Affairs, "New Zealand and International Human Rights", May 1988, p 7, para 26 (emphasis added).

8 *Bazzano* v *Uruguay*, Comm No 5/1977, GAOR, 34th Sess, Supp No 40, UN Doc A/34/40 (1979) 124; *International Covenant on Civil and Political Rights. Human Rights Committee. Selected Decisions Under the Optional Protocol* (United Nations, New York, 1985) Vol 1 (hereafter "SD Vol 1"), 40; *Sequeira* v *Uruguay*, Comm No 6/1977, GAOR, 35th Sess, Supp No 40, UN Doc A/35/40 (1980) 127; SD Vol 1, 52; *Lanzo de Netto et al* v *Uruguay*, Comm No 8/1977, GAOR, 35th Sess, Supp No 40, UN Doc A/35/40 (1980) 111; SD Vol 1, 45; *Altesor* v *Uruguay*, Comm No 10/1977, GAOR, 37th Sess, Supp No 40, UN Doc A/37/40 (1982) 122; SD Vol 1, 105; *Z Z* v *Canada*, Comm No 17/1977, SD Vol 1, 19 (inadmissible); *Pinkney* v *Canada*, Comm No 27/1978, GAOR, 37th Sess, Supp No 40, UN Doc A/37/40 (1982) 101; SD Vol 1, 95;

whole.[9] Important principles have emerged. In *Morael* v *France*[10] the Committee stated:

> . . . the concept of a fair hearing in the context of Article 14 (1) of the Covenant should be interpreted as requiring a number of conditions,

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*Weinberger Weisz* v *Uruguay*, Comm No 28/1978, GAOR, 36th Sess, Supp No 40, UN Doc A/36/40 (1981); SD Vol 1, 57; *Touron* v *Uruguay*, Comm No 32/1978, GAOR, 36th Sess, Supp No 40, UN Doc A/36/40 (1981) 120; SD Vol 1, 61; *Pietraroia* v *Uruguay*, Comm No 44/1979, GAOR, 36th Sess, Supp No 40, UN Doc A/36/40 (1981) 153; SD Vol 1, 76; *Borda* v *Colombia*, Comm No 46/1979, GAOR, 37th Sess, Supp No 40, UN Doc A/37/40 (1982) 193; SD Vol 1, 139; *Salgar de Montejo* v *Colombia*, Comm No 64/1979, GAOR, 37th Sess, Supp No 40, UN Doc A/37/40 (1982) 168; SD Vol 1, 127; *Cubas* v *Uruguay*, Comm No 70/1980, GAOR, 37th Sess, Supp No 40, UN Doc A/37/40 (1982) 174; SD Vol 1, 130; *K L* v *Denmark*, Comm No 81/1980, SD Vol 1, 28 (inadmissible); *Estrella* v *Uruguay*, Comm No 74/1980, GAOR, 38th Sess, Supp No 40, UN Doc A/38/40 (1983) 150; *International Covenant on Civil and Political Rights. Human Rights Committee. Selected Decisions Under the Optional Protocol* (United Nations, New York, 1989) Vol 2 (hereafter "SD Vol 2"), 93; *Vasilskis* v *Uruguay*, Comm No 80/1980, GAOR, 38th Sess, Supp No 40, UN Doc A/38/40 (1983) 173; SD Vol 2, 105; *Y L* v *Canada*, Comm No 112/1981, GAOR, 41st Sess, Supp No 40, UN Doc A/41/40 (1986) 145; SD Vol 2, 28 (inadmissible); *C A* v *Italy*, Comm No 127/1982, GAOR, 38th Sess, Supp No 40, Un Doc A/38/40 (1983) 237; SD Vol 2, 39 (inadmissible); *Mpandanjila* v *Zaire*, Comm No 138/1983, GAOR, 41st Sess, Supp No 40, Un Doc A/41/40 (1986) 121; SD Vol 2, 164; *Thomas* v *Uruguay*, Comm No 139/1983, GAOR, 40th Sess, Supp No 40, Un Doc A/40/40 (1985) 196; SD Vol 2, 168; *Magri de Cariboni* v *Uruguay*, Comm No 159/1983, GAOR, 43rd Sess, Supp No 40, UN Doc A/43/40 (1988) 184; SD Vol 2, 189; *J K* v *Canada*, Comm No 174/1984, GAOR, 40th Sess, Supp No 40, UN Doc A/40/40 (1985) 215; SD Vol 2, 52 (inadmissible); *S H B* v *Canada*, Comm No 192/1985, GAOR, 42nd Sess, Supp No 40, UN Doc A/42/40 (1987) 174; SD Vol 2, 64 (inadmissible); *Avellanal* v *Peru*, Comm No 202/1986, GAOR, 44th Sess, Supp No 40, UN Doc A/44/40 (1989) 196; *Hermoza* v *Peru*, Comm No 203/1986, GAOR, 44th Sess, Supp No 40, UN Doc A/44/40 (1989) 196; *Morael* v *France*, Comm No 207/1986, GAOR, 44th Sess, Supp No 40, UN Doc A/44/40 (1989) 210; *F G G* v *the Netherlands*, Comm No 209/1986, GAOR, 42nd Sess, Supp No 40, UN Doc A/42/40 (1987) 180 (inadmissible); *H C M A* v *the Netherlands*, Comm No 213/1986, GAOR, 44th Sess, Supp No 40, UN Doc A/44/40 (1989) 267 (inadmissible); *Robinson* v *Jamaica*, Comm No 223/1987, GAOR, 44th Sess, Supp No 40, UN Doc A/44/40 (1989) 241; *Bolanos* v *Ecuador*, Comm No 238/1987, GAOR, 44th Sess, Supp No 40 (1989) 246; *B de B et al* v *the Netherlands*, Comm No 273/1989, GAOR, 44th Sess, Supp No 40, UN Doc A/44/40 (1989) 286 (inadmissible); *J H* v *Finland*, Comm No 300/1988, GAOR, 44th Sess, Supp No 40, UN Doc A/44/40 (1989) 298 (inadmissible); *R M* v *Finland*, Comm No 301/1988, GAOR, 44th Sess, Supp No 40, UN Doc A/44/40 (1989) 300 (inadmissible); *van Meurs* v *the Netherlands*, Comm No 215/1986, GAOR, 45th Sess, Supp No 40, UN Doc A/45/40 (1990) Vol 2, 55; *Guesdon* v *France*, Comm No 219/1986, GAOR, 45th Sess, Supp No 40, UN Doc A/45/40 (1990) Vol 2, 61; *Cadoret & Le Bihan* v *France*, Comm Nos 221/1987 and 323/1988, GAOR, 46th Sess, Supp No 40, UN Doc A/46/40 (1991) 219; *Sawyers, M & D McLean* v *Jamaica*, Comm Nos 226/1987 and 256/1987, GAOR, 46th Sess, Supp No 40 (1991) 226 (inadmissible); *D S* v *Jamaica*, Comm No 234/1987, GAOR, 46th Sess, Supp No 40, UN Doc A/46/40 (1991) 267 (inadmissible); *Reynolds* v *Jamaica*, Comm No 229/1987, GAOR, 46th Sess, Supp No 40, UN Doc A/46/40 (1991) 235; *D S* v *Jamaica*, Comm No 304/1988, GAOR, 46th Sess, Supp No 40, UN Doc A/46/40 (1991) 281 (inadmissible); *Z P* v *Canada*, Comm No 341/1988, GAOR, 46th Sess, Supp No 40, UN Doc A/46/40 (1991) 297 (inadmissible); *Barzhig* v *France*, Comm No 327/1988, GAOR, 46th Sess, Supp No 40, Un Doc A/46/40 (1991) 262; *M T* v *Spain*, Comm No 310/1988, GAOR, 46th Sess, Supp No 40, UN Doc A/46/40 (1991) 284 (inadmissible).

9 GAOR, 39th Sess, Supp No 40, UN Doc A/39/40 (1984) 143.

10 Above n 8, *Morael*.

> such as equality of arms, respect for the principle of adversary proceedings, preclusion of ex officio reformatio in pejus,[11] and expeditious procedure.[12]

Moreover, in *Gilboa de Reverdito* v *Uruguay*[13] it was emphasised that

> . . . procedural guarantees for a "fair and public hearing by a competent, independent and impartial tribunal" *must be scrupulously observed*.[14]

However, apart from these statements of principle and some other brief comments concerning the concept of "rights and obligations in a suit at law",[15] the Human Rights Committee is yet to articulate a detailed interpretation of Article 14(1). Its practice, to date, does not provide clear answers to the many issues of interpretation arising under the Article. In the absence of clear directions from the Human Rights Committee, the jurisprudence of the European Court of Human Rights under Article 6(1) of the European Convention assumes, it is suggested, a position of great importance. The jurisprudence of the European Court is directly relevant to the proper interpretation of Article 14(1) of the Covenant. How can that be so?

The wording of Article 6(1) of the European Convention is strikingly similar to that of Article 14(1) of the Covenant . The relevant part of Article 6(1) reads:

> 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. . . . .

This similarity is no coincidence. It must be appreciated that the drafters of Article 6 of the European Convention in their second draft literally

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11 *Ex officio* correction worsening an earlier verdict.

12 Above n 8, *Morael*, 219, para 9.3.

13 Above n 8, *Gilboa de Reverdito*.

14 Above n 8, *Gilboa de Reverdito*, 131, para 7.2.

15 See below, text accompanying n 19.

reproduced the text of an earlier draft of Article 14 of the Covenant.[16] The French text was ultimately adopted without alteration. In the English text, however, "rights and obligations in a suit at law" was changed, at the eleventh hour, into "civil rights and obligations". It appears that the drafters of Article 6(1) abandoned the Article 14(1) formulation only because "civil rights and obligations" was thought to be a better translation of the French text, and not because a change in meaning was intended.[17] There is a strong argument, therefore, that both provisions lay down an identical obligation. In any event, the close nexus between articles 14 and 6 is unmistakable.

Apart from the close connection between the texts of articles 14(1) and 6(1), there is another, even more compelling reason for referring to the jurisprudence of the European Court when interpreting Article 14(1) of the Covenant. The Human Rights Committee itself has clearly implied that the jurisprudence of the European Court is of central importance to the proper interpretation of Article 14(1). That the Committee holds this view emerges from a passage in *Y L* v *Canada*,[18] where the Committee made the following

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16 Doc CM/WP 1 (50) 2; A 915; *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (Martinus Nijhoff, The Hague, 1976) Vol 3, 284-285.

17 The French text of articles 6(1) and 14(1) is identical: both articles read "*droits et obligations de caractère civil*". See P van Dijk "The interpretation of "civil rights and obligations" by the European Court of Human Rights - one more step to take" in F Matscher and H Petzold eds, *Protecting Human Rights: The European Dimension. Studies in honour of G J Wiarda* (2ed, Carl Heymanns Verlag K G, Köln, 1990) 131, 138 (footnote omitted):

> In the French text of Article 6, in fact, the [Article 14] formula was adopted without any change. In the English text "rights and obligations in a suit at law" was altered, at the very last stage of the drafting, into "civil rights and obligations". The reason for this is not traceable, but one may assume that "suit at law" was not the obvious equivalent of "*de caractère civil*" in the eyes of continental lawyers (and of the linguists involved).

See also J E S Fawcett *The Application of the European Convention on Human Rights* (2ed, Clarendon Press, Oxford, 1987) 127-128; P van Dijk and G J H van Hoof *Theory and Practice of the European Convention on Human Rights* (2ed, Luwer, Deventer, 1990) 298-299; D J Harris "The Application of Article 6 (I) of the European Convention on Human Rights to Administrative Law" (1974) 47 BYIL 157, 176-179; and J B Elkind and A Shaw *A Standard for Justice* (Oxford University Press, Auckland, 1986) 134.

18 Above n 8, *Y L* v *Canada*.

comment in relation to the meaning of the words "rights and obligations in a suit at law":

> In the view of the Committee the concept of a "suit at law" or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon . . . .19

Anyone who has studied the jurisprudence of the European Court under Article 6(1) could not help but recognise the influence of the Court's jurisprudence upon the Committee's reasoning in this passage. The European Court has consistently held that, in determining whether rights and obligations are "civil" rights and obligations within the meaning of Article 6(1), only the nature of the rights and obligations is relevant; and that the character of the parties to the proceedings, and of the body which is invested with jurisdiction to determine the dispute, is of little consequence.[20] In this passage the Committee is adopting those same criteria as a test for determining whether rights and obligations are rights and obligations "in a suit at law" within the meaning of Article 14(1) of the Covenant. This cannot be coincidental. It is clear, it is suggested, that the European Court's jurisprudence is informing the Committee's interpretation of Article 14(1). The influence of the European Court's jurisprudence is also visible in the Committee's General Comment on Article 14(1). In one passage the Committee advises the States Parties to the Covenant that:

> . . . States parties should specify [in their reports] the relevant constitutional and legislative texts which . . . ensure that [the courts] are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislature.[21]

N.B. FOR CHILDREN - RICHARDS - WARD NOT ME (SEE JUSTICE GEWDALL, 30 May 1997, Judicial Conference.)

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19 Above n 8, *YL* v *Canada*, 148, para 9.2 R. W - NOT SEE ME.

20 See below, text accompanying n 75.

21 Above n 9, 143-144, para 3.

Again, the European resonances are unmistakable. The manner in which judges are appointed and the duration of their terms of office are key reference points for the concepts of independence and impartiality under Article 6(1) of the European Convention.[22] Moreover, the European Court also attaches great importance to the requirement that judges be independent from the executive, as well as from the parties to the proceedings.[23] This provides further indication that the Human Rights Committee considers the European jurisprudence to be of central importance to the proper interpretation of Article 14(1) of the Covenant.

Moreover, a significant development has been the preparation of a preliminary draft declaration on the "Right to a fair trial and a remedy" by Messrs Chernichenko and Treat,[24] special rapporteurs appointed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.[25] The draft declaration's principal provision, which proclaims, *inter alia*, the right to a fair and public hearing in the determination of a person's "rights and obligations in a suit at law", is a near-replica of Article 14(1) of the Covenant.[26] Significantly, in clarifying and elaborating upon the content of that provision, the draft declaration unmistakably draws upon the wording of Article 6(1) of the European Convention and the

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22 See below, text accompanying nn 216-226.

23 See below, text accompanying nn 214-234.

24 "Draft declaration on the right to a fair trial and a remedy", UN Doc E/CN 4/Sub 2/1993/24/Add 1 (25 June 1993).

25 Messrs Chernichenko and Treat were appointed "to prepare a brief report on existing international standards pertaining to the right to a fair trial" and to recommend "which provisions guaranteeing the right to a fair trial should be made non-derogable": see brief preparatory report, UN Doc E/CN 4/Sub 2/1990/34, 1, para 1. See also their preliminary report, UN Doc E/CN 4/Sub 2/1991/29; and progress reports, UN Doc E/CN 4/Sub 2/1992/24 and Add 1-3 and E/CN 4/Sub 2/1993/24 and Add 1-2.

26 The material part of the provision provides:

> In the determination of any criminal charge against a person, or of the person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . . . .

Above n 24, 6, para 1.

jurisprudence of the European Court. For example, the terms "rights and obligations in a suit at law" and "civil rights and obligations" are used interchangeably; in defining "rights and obligations in a suit at law", the draft declaration states that "[p]roceedings as to civil rights and obligations do not require that both parties to the proceedings be private persons".[27] The special rapporteurs have clearly used both the wording of Article 6(1) of the European Convention and the case-law of the European Court as reference points in defining a term drawn directly from Article 14(1) of the Covenant. The preliminary draft declaration provides further evidence of the close relationship between Article 14(1) of the Covenant and Article 6(1) of the Convention; and it supports the view that the jurisprudence of the European Court is of central importance to the proper interpretation of Article 14(1).

Accordingly, in the absence of clear directions from the Human Rights Committee, it is necessary and appropriate to draw upon the jurisprudence of the European Court of Human Rights under Article 6(1) of the European Convention when interpreting Article 14(1) of the Covenant. The Court's jurisprudence is relevant, not only because of the close nexus between the articles as reflected in the drafting history of Article 6(1), but also because the Human Rights Committee itself has clearly indicated that the jurisprudence is of central importance.

As will be seen, the jurisprudence of the European Court of Human Rights under Article 6(1) of the European Convention is an invaluable guide to the meaning of Article 14(1) of the Covenant. In the light of that jurisprudence, the following conclusions may be drawn as to the meaning and acope of Article 14(1) of the Covenant.

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27 Above n 24, 21, para 74(b)(ii).

(a) Article 14(1) applies whenever a dispute arises in respect of a person's "rights and obligations in a suit at law".[28]

(b) These must be rights and obligations "which can be said, at least on arguable grounds, to be recognised under domestic law".[29]

(c) Article 14(1) may apply to disputes arising in respect of either an interference with an existing right, the scope of an existing right, the mode of exercise of an existing right, or whether a right actually exists.[30]

(d) The concept of "rights and obligations in a suit at law" in Article 14(1) of the Covenant may be equated with the concept of "civil rights and obligations" in Article 6(1) of the European Convention.[31]

(e) The concept of "rights and obligations in a suit at law" must be given an autonomous meaning. This means that it must be interpreted independently of the domestic law of any particular State Party to the Covenant. The concept of "rights and obligations in a suit at law" includes, but is not limited to, "private" rights and obligations.[32]

(f) In determining whether rights and obligations are rights and obligations "in a suit at law", only the nature of the rights is relevant. The character of the domestic law which governs the dispute, of the authority which has jurisdiction to determine the dispute, and of the parties to the dispute, is of little or no consequence.[33]

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28 See below, text accompanying nn 39-40.

29 See below, text accompanying n 41.

30 See below, text accompanying n 42.

31 See discussion above, text accompanying nn 16-17.

32 See below, text accompanying nn 73-74.

33 See below, text accompanying nn 75.

(g) Whenever a dispute arises in respect of a person's "rights and obligations in a suit at law", that person has a right under Article 14(1) to submit the dispute for determination to a tribunal which meets the various requirements of the Article. Article 14(1) guarantees not only a fair hearing in proceedings which are already pending, but also a right of access to a tribunal in order to bring proceedings in the first place.[34]

(h) The tribunal need not be a "court of the classic kind". The concept of a "tribunal" in the substantive sense of the term denotes bodies which exhibit common fundamental features, namely:

- independence of the executive;
- independence of the parties to the dispute;
- adequate duration of members' term of office; and
- proceedings which afford the necessary guarantees.[35]

(i) The "independence" of the tribunal must be assessed by reference to four criteria, namely:

- the manner of appointment of its members;
- the duration of its members' term of office;
- the existence of guarantees against outside pressures; and
- whether the body presents the appearance of independence.[36]

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34 See below, text accompanying nn 111-188.

35 See below, text accompanying nn 189-213.

36 See below, text accompanying nn 214-234

(j) The "impartiality" of a tribunal is assessed both subjectively and objectively. As regards subjective impartiality, the personal impartiality of the members of the tribunal is presumed until the contrary is proved. In assessing objective impartiality, it is necessary to take into account whether there is an appearance of impartiality and the internal organisation of the tribunal.[37]

In order to explain these conclusions more fully, a careful analysis of the jurisprudence of the European Court under Article 6(1) of the European Convention is required.[38]

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37 See below, text accompanying nn 235-248.

38 *Ringeisen* v *Austria (No 1)* 1 EHRR 455; *De Wilde, Ooms and Versyp* v *Belgium* 1 EHRR 373; *Golder* v *United Kingdom* 1 EHRR 524; *Winterwerp* v *the Netherlands* 2 EHRR 387; *Airey* v *Ireland* 2 EHRR 305; *König* v *Federal Republic of Germany* 2 EHRR 170; *Buchholz* v *Federal Republic of Germany* (1981) 3 EHRR 597; *Le Compte, Van Leuven and De Meyere* v *Belgium* (1982) 4 EHRR 1; *Sporrong and Lönnroth* v *Sweden* (1983) 5 EHRR 35; *Silver* v *United Kingdom* (1983) 5 EHRR 347; *Albert and Le Compte* v *Belgium* (1983) 5 EHRR 533; *Zimmerman and Steiner* v *Switzerland* (1984) 6 EHRR 17; *Pretto* v *Italy* (1984) 6 EHRR 182; *Axen* v *Germany* (1984) 6 EHRR 195; *Öztürk* v *Germany* (1984) 6 EHRR 409; *Sramek* v *Austria* (1985) 7 EHRR; *Rasmussen* v *Denmark (1985)* 7 EHRR 371; *Guincho* v *Portugal* (1985) 7 EHRR 223; *Campbell and Fell* v *United Kingdom* (1985) 7 EHRR 165; *James* v *United Kingdom* (1986) 8 EHRR 123; *Lithgow and Others* v *United Kingdom* (1986) 8 EHRR 329; *Feldbrugge* v *the Netherlands* (1986) 8 EHRR 425; *Deumeland* v *Germany* (1986) 8 EHRR 448; *Benthem* v *the Netherlands* (1986) 8 EHRR 1; *Lechner and Hess* v *Austria* (1987) 9 EHRR 490; *Erkner and Hofauer* v *Austria* (1987) 9 EHRR 464; *W* v *United Kingdom* (1988) 10 EHRR 29; *R* v *United Kingdom* (1988) 10 EHRR 74; *O* v *United Kingdom* (1988) 10 EHRR 82; *H* v *United Kingdom* (1988) 10 EHRR 95; *B* v *United Kingdom* (1988) 10 EHRR 87; *Pudas* v *Sweden* (1988) 10 EHRR 380; *Poiss* v *Austria* (1988) 10 EHRR 231; *H* v *Belgium* (1988) 10 EHRR 339; *Ettl* v *Austria* (1988) 10 EHRR 255; *Bodén* v *Sweden* (1988) 10 EHRR 367; *Olsson* v *Sweden* (1989) 11 EHRR 259; *Gillow* v *United Kingdom* (1989) 11 EHRR 335; *Bock* v *Germany* (1990) 12 EHRR 247; *Langborger* v *Sweden* (1990) 12 EHRR 416; *Powell and Rayner* v *United Kingdom* (1990) 12 EHRR 355; *Eriksson* v *Sweden* (1990) 12 EHRR 183; *Unión Alimentaria Sanders S A* v *Spain* (1990) 12 EHRR 24; *H* v *France* (1990) 12 EHRR 74; *Allan Jacobsson* v *Sweden* (1990) 12 EHRR 56; *Mats Jacobsson* v *Sweden* (1991) 13 EHRR 79; *Martins Moreira* v *Portugal* (1991) 13 EHRR 517; *Skärby* v *Sweden* (1991) 13 EHRR 90; *Obermeier* v *Austria* (1991) 13 EHRR 290; *Vernillo* v *France* (1991) 13 EHRR 880; *Tre Traktörer Aktiebolag* v *Sweden* (1991) 13 EHRR 309; *Philis* v *Greece* (1991) 13 EHRR 741; *Moreira de Azevedo* v *Portugal* (1991) 13 EHRR 721; *Håkansson and Sturesson* v *Sweden* (1991) 13 EHRR 1; *Fredin* v *Sweden* (1991) 13 EHRR 784; *Capuano* v *Italy* (1991) 13 EHRR 271; *Baraona* v *Portugal* (1991) 13 EHRR 329; *Santilli* v *Italy* (1992) 14 EHRR 421; *X* v *France* (1992) 14 EHRR 483; *Editions Periscope* v *France* (1992) 14 EHRR 597; *Tomasi* v *France* (1992) 14 EHRR 1; *Oerlemans* v *the Netherlands* (1993) 15 EHRR 561; *Helmers* v *Sweden* Unreported, 29 Oct 1991, 22/1990/213/275; *Wiesinger* v *Austria* Unreported, 30 Oct 1991, 38/1990/229/295; *Brigandì* case Unreported, 19 Feb 1991, 2/1990/193/253; *Zanghì* case Unreported, 19 Feb 91, 3/1990/194/254; *Vocaturo* v *Italy* Unreported, 24 May 1991, 8/1990/219/281; *Caleffi* v *Italy* Unreported,24 May 1991, 27/1990/218/280; *Pugliese* v *Italy (No 2)* Unreported, 24 May 1991, 25/1990/216/278; *Cesarini* v *Italy* Unreported,, 12 Oct 1992, 77/1991/329/402; *Salerno* v *Italy* Unreported,

## *B Article 6(1) of the European Convention*

### *1 "rights and obligations"*

Article 6(1) provides that, "[i]n the determination of his civil rights and obligations", everyone is entitled to a fair and public hearing by a tribunal which meets the various requirements of the Article. This presupposes that a dispute[39] has arisen, and that the subject-matter of the dispute concerns a person's "rights" and "obligations".[40] It is important to consider, therefore, what is meant by the concept of "rights and obligations", since the guarantees of Article 6(1) will not apply if the subject-matter of the dispute does not concern "rights and obligations". Significantly, the European Court of Human Rights has consistently held that Article 6(1) extends only to disputes over rights and obligations "which can be said, at least on arguable grounds, to be recognised under domestic law".[41] Accordingly, the concept of "rights and obligations" denotes rights and obligations which arguably exist under the domestic law of the State Party concerned. This principle has two important implications.

First, it means that Article 6(1) may apply to disputes in which it is the actual *existence* of a right which is at stake, as well as to disputes in which either an interference with an existing right, or the scope or manner of exercise of an

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12 Oct 1992, 84/1991/336/409; *Giancarlo Lombardo* v *Italy* Unreported, 26 Nov 1992, 85/1991/337/410; *Francesco Lombardo* v *Italy* Unreported, 26 Nov 1992, 76/1991/328/401; *de Geouffre de la Pradelle* v *France* Unreported, 16 Dec 1992, 87/1991/339/412; *Salesi* v *Italy* Unreported, 2 Feb 1993, 11/1992/356/430; *Schuler-Zgraggen* v *Switzerland* Unreported, 24 June 1993, 17/1992/362/436.

39 The concept of "dispute" is interpreted in a broad sense; a difference of opinion between the parties is sufficient, provided that it is "genuine and of a serious nature": above n 38, *Benthem*, 8, para 33.

40 The rights and obligations must also be "civil" in character if Article 6(1) is to apply. The meaning of the word "civil" in the context of Article 6(1) is discussed below, text accompanying nn 68-110.

41 See, for example, above n 38, *James*, 157, para 81.

existing right, is at stake.[42] Where a dispute arises as to whether a right exists, and the person asserting the existence of the right makes out an arguable case that the right does indeed exist, Article 6(1) is triggered,[43] with the result that the person asserting the right's existence is then entitled to have the dispute determined by a tribunal which meets the various requirements of Article 6(1). This point may be illustrated by comparing two scenarios. Suppose, in our first scenario, that a doctor's practising certificate is revoked by the relevant professional authority, with the result that the doctor is precluded from practising the medical profession. The doctor challenges the revocation on the basis that, for example, it was unlawful. In this scenario, the doctor has a right, pursuant to his certificate, to practise the medical profession. Whether the doctor has a right to practise the medical profession is, accordingly, not at issue; what is at issue is whether the alleged interference with his right was lawful. There is clearly a dispute in respect of a right "which can be said, at least on arguable grounds, to be recognised under domestic law".[44] Indeed, it is unarguable that the doctor has the right to practise. Accordingly, Article 6(1) applies: the dispute as to whether the interference with his right was lawful must be determined by a tribunal which meets the various requirements of the Article.

Now consider a second scenario. Suppose an uncertified doctor applies to the professional authority for a practising certificate, and the authority refuses to give him one. In this scenario the dispute does not relate to an alleged *interference* with the doctor's right to practise. The dispute relates to whether or not such a right actually *exists*. The doctor is asserting that he has the right

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42 See, for example, above n 38, *Le Compte, Van Leuven and De Meyere*, 16, para 44; above n 38, *Benthem*, 8, para 32.

43 Providing that all other requirements of Article 6(1) are satisfied; for example, the right whose existence is in dispute must be "civil" in character: see discussion below, text accompanying nn 68-110.

44 See, for example, above n 38, *James*, 157, para 81.

to a practising certificate. Article 6(1) is applicable to this dispute also, provided that the doctor makes out an arguable case that he has a right to practise. In order to make out such a case, he will need to show that he arguably fulfils the criteria on the basis of which the authority will decide whether or not to grant him a practising certificate. If the doctor is able to make out an arguable case, Article 6(1) will be triggered, and he will be entitled to have the dispute determined by a tribunal which meets the various requirements of the Article. Accordingly, Article 6(1) draws no distinction between disputes where it is the actual existence of a right which is at stake, and disputes where it is an interference with an existing right, or the scope or manner of exercise of an existing right, which is at issue. Both types of dispute are treated as disputes in respect of "rights", with the result that, in each case, the guarantees of Article 6(1) apply.

Thus in *Håkansson and Sturesson* v *Sweden*[45], where the applicants had been refused a statutory permit to retain their property, the Court held that a "right" was at stake in the ensuing dispute, since it was "quite clear that the applicants considered themselves entitled, under the relevant statutory provisions, to the grant of the necessary permit".[46] In *Neves e Silva* v *Portugal*,[47] moreover, the Court concluded that the applicant had mounted a "sufficiently tenable" argument that he had a right under the relevant legislation to compensation for culpable conduct on the part of the administrative authorities.[48] In both cases, therefore, the respective applicants were entitled under Article 6(1) to have the dispute concerning the existence of the right determined by a tribunal meeting the various

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45 Above n 38, *Håkansson and Sturesson*.

46 Above n 38, *Håkansson and Sturesson*, 15, para 60.

47 Above n 38, *Neves e Silva*.

48 Above n 38, *Neves e Silva*, 542, para 37.

requirements of the Article. This was because the rights could "be said, at least on arguable grounds, to be recognised under domestic law".[49]

What is the position, however, where the asserted right is said to derive from a statutory provision which confers a wide discretion with few or no express criteria to guide the decision-maker? Suppose a statutory provision empowers a minister to grant social welfare benefits "to such persons as he or she thinks fit". Could a prospective beneficiary claim on the basis of this provision that he or she has a right, at least on arguable grounds, to receive a benefit? Some may argue that it is a nonsense to speak of "rights" in this context, since the receipt of a benefit depends entirely upon the subjective choice of the decision-maker. Given that there are no objective criteria to which the exercise of the discretion can be tied down, how can any prospective benficiary make out an arguable case that he or she meets the criteria on which the decision to grant a benefit is based? The European Court of Human Rights has refused to accept, however, that an arguable right cannot derive from a discretionary power. In *Allan Jacobsson* v *Sweden*,[50] for example, it was held that the applicant could arguably have claimed a "right" to a building permit despite the discretion left by the Swedish Parliament to the administrative authorities. Dismissing the Government's argument that the applicant could not claim any "right" to build before a permit had been granted,[51] the Court noted:

> True, the issue of a permit under these circumstances would have involved the exercise of a certain discretion by the authorities, but their discretion would not have been unfettered: they would have been bound by generally recognised legal and administrative principles.[52]

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49 See, for example, above n 38, *James*, 157, para 81.

50 Above n 38, *Allan Jacobsson*.

51 Above n 38, *Allan Jacobsson*, 70, para 69.

52 Above n 38, *Allan Jacobsson*, 70, para 69. See also above n 38, *Pudas*, 388, para 34; above n 38, *Mats Jacobsson*, 85, para 32; above n 38, *Skärby*, 94, para 20; above n 38, *Tre Traktörer Aktiebolag*, 319, paras 39-40; above n 38, *Håkansson and Sturesson*, 15, para 60.

In view of the reasoning in this passage it is difficult to conceive of a discretion which could be regarded as unfettered, since all decision-makers are "bound by generally recognised legal and administrative principles", such as the duty to act fairly, reasonably and according to law.[53] The Court's approach, it is suggested, is surely correct, because it ensures that there is no incentive for national legislatures to confer wide, open-ended discretions in order to evade the requirements of Article 6(1).[54]

A second implication of the principle that Article 6(1) extends only to disputes over rights and obligations "which can be said, at least on arguable grounds, to be recognised under domestic law" is that a State is able, without violating Article 6(1), to decide not or no longer to recognise a certain right in its domestic law, with a view to excluding the operation of the Article. This is illustrated by *James* v *United Kingdom*.[55] In that case, the applicant landlords had been deprived of the ownership of their properties through the exercise by their tenants of rights of acquisition conferred by the Leasehold Reform Act 1967. The applicants argued that there had been a breach of Article 6(1), in that there had been no opportunity to challenge the tenants' rights of acquisition on the basis of hardship or individual merits. However, in the Court's view, in so far as there had been compliance with the 1967 Act, there were no grounds on which the applicants could argue that they had a right under English law to retain their properties. This was because, in so far as there had been compliance with the 1967 Act, any such right had been extinguished.[56] Accordingly, apart from cases where non-compliance with the

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53 See *Council of Civil Service Unions* v *Minister for Civil Service* [1985] 1 AC 374, 410-411.

54 See above n 17, P van Dijk and G J H van Hoof, 301.

55 Above n 38, *James*.

56 By contrast, Article 6(1) did apply to any dispute in which the applicants alleged non-compliance with the 1967 Act, because it could be said on arguable grounds that the applicants had a right to retain their properties in so far as there was non-compliance with the Act: above n 38, *James*, 157-158, paras 81-82; and see the discussion below, text accompanying nn 143-146.

1967 Act could be alleged, there was no right which could be said, on arguable grounds, to exist in the law of the United Kingdom.[57]

This aspect of the Court's interpretation of the concept of "civil rights and obligations" is controversial,[58] because it is inconsistent with the principle, well-esatblished in the Court's case law, that the concept of "civil rights and obligations" must be given an autonomous meaning which is independent of the domestic law of the State Party concerned.[59] The result is that the applicability of Article 6(1) in relation to the same factual situation may vary from one State to another, depending upon the classifications adopted in the respective domestic legal systems. Moreover, the Court's interpretation creates an incentive for States to change their domestic law in order to avoid the need for a "fair hearing" to be given in a certain field.[60]

The boundary line between arguable and non-arguable rights may be obscure in some circumstances. This problem arose in *Ashingdane* v *United Kingdom*.[61] There, the applicant claimed that he had an arguable right to hospital accomodation under the National Health Service Act 1977, section 3 of which imposed a duty on the Secretary of State for Social Services to

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57 The Court justified its approach on the basis that Article 6(1) did not in itself "guarantee any particular content" for civil rights and obligations in the substantive law of the States Parties to the Convention. This analysis was confirmed, in the Court's view, by the fact that "Article 6(1) does not require that there be a national court with competence to invalidate or override domestic law": above n 38, *James*, 157-158, para 81. See also above n 38, *Powell and Rayner* v *United Kingdom*, 365-366, paras 34-35.

58 Above n 38, *Ashingdane*, 548-549 (Concurring Opinion of Judge Lagergren). See further above n 38, *W v United Kingdom*, 59-60 (Joint Separate Opinion of Judges Lagergren, Pinheiro Farinha, Pettiti, MacDonald, De Meyer and Valticos); above n 38, *Lithgow*, 400-401 (Joint Separate Opinion of Judges Lagergren and MacDonald). See also above n 38, *Golder*, 535-536, 34-36; above n 38, *Öztürk*, 420-421, para 49.

59 See below, text accompanying 73-74.

60 Compare above n 38, *W* v *United Kingdom*, above n 38, *R* v *United Kingdom*, above n 38, *O* v *United Kingdom*, above n 38, *B* v *United Kingdom* and above n 38, *H* v *United Kingdom*, where the Court held that a parental right of access to his or her child could not have been extinguished altogether by a care order, especially in light of the right to respect for private and family life under Article 8 of the Convention: above n 38, *W* v *United Kingdom*, 54-56, paras 74-77.

61 Above n 38, *Ashingdane*.

provide hospital accomodation "to such an extent as he considers necessary to meet all reasonable requirements".[62] Because it was able to dispose of the case on other grounds,[63] the Court assumed without deciding that "a right [was] conferred on the individual citizen by section 3".[64] The Court hinted, however, that it seriously doubted whether such a right even arguably existed under English law. This doubt was implicit in the Court's reference to the action for breach of statutory duty in the English law of torts; the Court noted that the action was available only "if the statute created in the individual concerned an interest which was intended by Parliament to be protected by an action in tort".[65] It was debatable whether section 3 of the 1977 Act created such an interest. *Ashingdane* provides a further illustration of the principle that Article 6(1) extends only to disputes over rights and obligations "which can be said, at least on arguable grounds, to be recognised under domestic law".[66] Article 6(1) could be applicable only if a right to hospital accomodation arguably existed in English law; the only possible source of such a right was the English law of torts, which was obscure on that point.[67]

### 2 *"civil" rights and obligations*

It is a further requirement of Article 6(1) that the rights and obligations in respect of which the dispute arises must be "civil" in character.[68] What, then, is meant by the term "civil" in the context of Article 6(1)? Although the Court has refrained, to date, from giving an abstract definition of the concept of

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62 Above n 38, *Ashingdane*, 536, para 25.

63 See below nn 163-178 and accompanying text.

64 Above n 38, *Ashingdane*, 547, para 59 (footnote omitted).

65 Above n 38, *Ashingdane*, 538, para 30.

66 See, for example, above n 38, *James*, 157, para 81.

67 See also above n 38, *Moreira de Azevedo*, 737, para 67; above n 38, *Baraona*, 339, para 41.

68 See, for example, above n 38, *Benthem*, 9, para 34.

"civil rights and obligations",[69] it has tended to equate "civil rights and obligations" with "private rights and obligations", as opposed to "public rights and obligations".[70] This public-private distinction is highly problematic. It has meant that, for example, employment in the public service is regarded as a "public" right and is not accorded protection under Article 6(1),[71] whereas employment in a private business is treated as a "private" right and, therefore, is accorded such protection.[72] From the employee's perspective, such a distinction is plainly arbitrary: both types of employee have important interests at stake, such as career prospects and livelihood, which logically should enjoy equal protection. In view of the manifest arbitrariness of the public-private distinction, it comes as no surprise that the Court has increasingly tended to blur it. As will be seen, the range of rights which may be regarded as "civil" rights within the meaning of Article 6(1) is continuing to expand.

It is well-established that the concept of "civil rights and obligations" is an autonomous[73] concept which must be interpreted independently of any formal

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69 See above n 38, *Feldbrugge*, 431, para 27; above n 38, *Deumeland*, 463, para 61; and above n 38, *Benthem*, 9, para 35.

70 The Court has consistently held that the phrase "determination of his civil rights and obligations" ("*contestations sur ses droits et obligations de caractère civil*") covers "all proceedings the result of which is decisive for private rights and obligations": see above n 38, *Ringeisen (No 1)*, 490, para 94; above n 38, *König*, 193, para 90; above n 38, *Le Compte, Van Leuven and De Meyere*, 16, para 44; above n 38, *Albert and Le Compte*, 541, para 28(b); above n 38, *Feldbrugge*, 431, para 27; above n 38, *Deumeland*, 462, para 60; above n 38, *Benthem*, 9, para 34; above n 38, *Pudas*, 388, para 35; above n 38, *Baraona*, 339, para 42. The Court has not ruled out the possibility, however, that the concept of "civil rights" may extend beyond those rights which have a private nature: above n 38, *König*, 195, para 95.

71 See, for example, App No 8496/79 v *United Kingdom* (1981) D & R 168 (European Commission of Human Rights); see also the authorities listed in above n 17, van Dijk and van Hoof, 2ed, n 487 at p 303.

72 See above n 38, *Buchholz*; above n 38, *Obermeier*; and above n 38, *Cesarini*.

73 The principle of autonomy ensures that "the object and purpose of the Convention" is not compromised: above n 38, *König*, 193, para 88. See also W J Ganshof van der Meersch "Le caractère «autonome» des terms et la «marge d'appréciation» des gouvernements dans l'interprétation de la Convention eurpéene des Droits de l'Homme" in F Matscher and H Petzold eds, *Protecting Human Rights: The European Dimension. Studies in honour of G J Wiarda* (2ed, Carl Heymanns Verlag K G, Köln, 1990) 201.

classifications in national legal systems.[74] This means that "[t]he character of the legislation which governs how the matter is to be determined . . . and that of the authority which is invested with jurisdiction in the matter . . . are . . . of little consequence".[75] Moreover, it is not necessary that both parties to the proceedings be private persons; the Court has stated that, "[i]f the case concerns a dispute between an individual and a public authority, whether the latter has acted as a private person or in its sovereign capacity is . . . not conclusive".[76] Nor is a right's "civil" character altered because regulation of it is desirable in the "public interest".[77] It follows that, in ascertaining whether a right is a "civil" right within the meaning of Article 6(1), "only the character of the right . . . is relevant".[78]

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74 Otherwise, a State Party could bypass Article 6(1)'s requirements simply by altering the legal classification of the right in its domestic law; and that is a result which the principle of autonomy is designed to avoid. See above n 38, *Ringeisen (No 1)*, 490, para 94; above n 38, *König*, 192-193, para 88; above n 38, *Feldbrugge*, 431, para 27; above n 38, *Deumeland*, 462, para 60; above n 38, *Benthem*, 9, para 34; above n 38, *Pudas*, 388, para 35; above n 38, *Baraona*, 339, para 42; and above n 38, *X* v *France*, 502-503, para 30. In *König* the Court also mentioned that it was required also to "take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States": above n 38, *König*, 193, para 89. See also above n 38, *Feldbrugge*, 432, para 29; above n 38, *Deumeland*, 463, para 63.

75 Above n 38, *Ringeisen (No 1)*, 490, para 94; above n 38, *König*, 194, para 92, 195, para 94; above n 38, *Le Compte, Van Leuven and De Meyere*, 16, para 44; above n 38, *Sporrong and Lönnroth*, 56, para 80; above n 38, *Albert and Le Compte*, 541, para 28(b); above n 38, *Feldbrugge*, 431, para 27; above n 38, *Deumeland*, 462-463, para 60; above n 38, *Benthem*, 9, para 34; above n 38, *Pudas*, 388-389, paras 35-36; above n 38, *H* v *Belgium*, 348-349, paras 46-47; above n 38, *Allan Jacobsson*, 71, para 73; above n 38, *Baraona*, 340, para 43; above n 38, *X* v *France*, 502-503, para 30; above n 38, *Editions Périscope*, 613, para 40; above n 38, *Tomasi*, 57-58, para 121. Compare above n 38, *Rasmussen*, 377-378, para 32; above n 38, *Salesi*, 20, para 39.

76 Above n 38, *König*, 194, para 90. See also above n 38, *Ringeisen (No 1)*, 490, para 94; above n 38, *Le Compte, Van Leuven and De Meyere*, 16, para 44; above n 38, *Albert and Le Compte*, 541, para 28(b); above n 38, *Feldbrugge*, 431, para 27; above n 38, *Deumeland*, 462-463, para 60; above n 38, *Benthem*, 9, para 34; above n 38, *Pudas*, 388-389, paras 35-36; above n 38, above n 38, *H* v *France*, 87-88, para 47; above n 38, *Baraona*, 340, para 43; above n 38, *Giancarlo Lombardo*, 6, para 16; above n 38, *Francesco Lombardo*, 6-7, paras 14-17.

77 Above n 38, *König*, 194, para 92; above n 38, *Le Compte, Van Leuven and De Meyere*, 18, para 48; above n 38, *Albert and Le Compte*, 541, para 28(b); above n 38, *Rasmussen*, 377-378, para 32; above n 38, *H* v *Belgium*, 349, para 47; above n 38, *Allan Jacobsson*, 71, para 73; above n 38, *Mats Jacobsson*, 87, para 34; above n 38, *Tre Traktörer Aktiebolag*, 320-321, paras 42-43.

78 Above n 38, *König*, 194, para 90; above n 38, *Feldbrugge*, 431, para 27; above n 38, *Deumeland*, 462-463, para 60; and above n 38, *Benthem*, 9, para 34.

In the light of these guiding principles the Court has held "civil" rights to include certain categories of rights, the two most important of which are rights of property,[79] and the right to pursue a business, profession or other private occupation.[80] The ownership, use and enjoyment of property is clearly a right of a private and, therefore, civil nature, while the right to pursue a business, profession or other private occupation owes its "civil" character to its commercial component, as *König* illustrates. In that case, which concerned the right to run a private medical clinic, the Court attached importance to the fact that the running of a clinic was in certain respects a commercial activity, carried on through the conclusion of contracts between the clinic and its patients and with a view to profit; in the Court's view, this activity resembled "the exercise of a private right in some ways akin to the right of property".[81] The right to run a clinic was, accordingly, a civil right within the meaning of Article 6(1).[82] "Civil" rights have also been held to include parental and other family rights,[83] the right to protect one's reputation,[84] and the right to join a

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79 Above n 38, *Ringeisen (No 1)* v *Austria* (contract for sale of land); above n 38, *Winterwerp* (mental patient's right to deal with property); above n 38, *Sporrong and Lönnroth* (expropriation of and construction on property); above n 38, *Zimmerman and Steiner*; above n 38, *Sramek* (contract for sale of land); above n 38, *James* (acquisition by tenants of landlords' property); above n 38, *Lithgow* (compulsory acquisition of shares); above n 38, *Benthem* (license to operate gas installation); above n 38, *Erkner and Hofauer* (land consolidation proceedings); above n 38, *Poiss* (land consolidation proceedings); above n 38, *Ettl* (proceedings affecting land); above n 38, *Bodén* (expropriation permit); above n 38, *Gillow* (occupation of home); above n 38, *Allan Jacobsson* (construction on property); above n 38, *Mats Jacobsson* (construction on property); above n 38, *Skärby* (construction on property); above n 38, *Håkansson and Sturesson* (retention of property); above n 38, *Fredin* (proposal to develop property); above n 38, *Capuano* (easement over property); above n 38, *Baraona* (compensation for damage to property); above n 38, *Oerlemans* (cultivation of land); above n 38, *Wiesinger* (consolidation proceedings); above n 38, *de Geouffre de la Pradelle* (alteration of land).

80 Above n 38, *König*; above n 38, *Buchholz*; above n 38, *Le Compte, Van Leuven and De Meyere*; above n 38, *Albert and Le Compte* v *Belgium*; above n 38, *H*; above n 38, *Obermeier*; and above n 38, *Cesarini*.

81 Above n 38, *König*. See also above n 38, *Le Compte, Van Leuven and De Meyere*; above n 38, *Albert and Le Compte*.

82 Above n 38, *König*, 195, para 95.

83 Above n 38, *Airey*; above n 38, *Rasmussen*; above n 38, *W* v *United Kingdom*; above n 38, *R* v *United Kingdom*; above n 38, *O* v *United Kingdom*; above n 38, *B* v *United Kingdom*; above n 38, *H* v *United Kingdom*; above n 38, *Olsson*; above n 38, *Bock*; above n 38, *Eriksson*.

84 Above n 38, *Golder*; above n 38, *Silver*; above n 38, *Helmers*.

private pension fund.[85] Furthermore, the range of rights and obligations protected by the law of tort and contract are also civil rights and obligations within the meaning of Article 6(1).[86]

In recent years the Court's interpretation of the concept of "civil rights and obligations" has been evolving. The Court has indicated that it is prepared to extend the concept beyond the established categories of rights and obligations to include rights and obligations which have traditionally been regarded as "public" in character. The Court took its first steps in this direction in the *Feldbrugge*[87] and *Deumeland*[88] cases, where it accepted that social security rights were "civil" rights within the meaning of Article 6(1). *Feldbrugge* concerned a decision by the relevant authorities to deprive the applicant of a statutory sickness allowance; *Deumeland*, a claim by the applicant for a statutory widow's pension which had been sought by his mother. The Court acknowledged that the rights disclosed both public- and private-law features,[89] but concluded that private-law features predominated.[90] In so doing the Court focused upon the "personal, economic and individual" nature of the rights, a factor which, in its view, "brought [the rights] close to the civil sphere".[91] In *Feldbrugge's* case the Court noted, moreover, that the applicant

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85 Above n 38, *Giancarlo Lombardo*; above n 38, *Francesco Lombardo*.

86 Above n 38, *Pretto*; above n 38, *Axen*; above n 38, *Guincho* v *Portugal*; above n 38, *Lechner and Hess*; above n 38, *H* v *France*; above n 38, *Langborger*; above n 38, *Uniön Alimentaria Sanders S A*; above n 38, *Vernillo*; above n 38, *Martins Moreira*; above n 38, *Neves e Silva*; above n 38, *Philis*; above n 38, *Moreira de Azevedo*; above n 38, *Santilli*; above n 38, *X* v *France*; above n 38, *Brigandì case*; above n 38, *Zanghì case*; above n 38, *Vocaturo*; above n 38, *Pugliese (No 2)*; above n 38, *Tomasi*.

87 Above n 38, *Feldbrugge*.

88 Above n 38, *Deumeland*.

89 Features of public law were the character of the legislation, the compulsory nature of the insurance and the assumption by the State of responsibility for social protection: above n 38, *Feldbrugge*, 432-434, paras 31-35; above n 38, *Deumeland*, 464-465, paras 65-68. Features of private law, by contrast, were the personal and economic nature of the asserted right, the connection with the contract of employment, and affinities with insurance under the ordinary law: above n 38, *Feldbrugge*, 434-435, paras 36-39; above n 38, *Deumeland*, 465-466, paras 70-73.

90 Above n 38, *Feldbrugge*, 435, para 40; above n 38, *Deumeland*, 466, para 74.

91 Above n 38, *Feldbrugge*, 434, para 37.

had "suffered an interference with her means of subsistence";[92] and it emphasised that it was necessary to view the facts from the applicant's perspective:

> *For the individual asserting it*, [a right flowing from legislation] is often of crucial importance; this is especially so in the case of health insurance benefits where the employee who is unable to work by reason of illness *enjoys no other source of income*.[93]

Despite presenting the appearance of comparing the public- and private-law features of the rights in question, in reality the Court in *Feldbrugge* and in *Deumeland* paid only lip-service to the public-private distinction. The predominance of private-law features was not the decisive factor in the Court's decisions. Rather, the Court was responding to the jeopardy in which the applicants' livelihoods had been placed.[94] In such circumstances, adequate procedural protection was mandatory; and, in order to provide it, the Court blurred the distinction between public and private rights. The decisions were undoubtedly appropriate, it is submitted, since, from the applicant's perspective, it is the impact upon his or her livelihood which is of crucial importance, not the artificial distinction between public and private rights.[95]

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92 Above n 38, *Feldbrugge*, 434, para 37. The Court also referred to the connection between the right to a sickness benefit and the contract of employment: above n 38, *Feldbrugge*, 434, para 38; and to the affinities of the statutory insurance scheme with insurance under the ordinary law: above n 38, *Feldbrugge*, 434-435, para 39.

93 Above n 38, *Feldbrugge*, 434, para 37.

94 See C Scott "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 Osg Hall LJ 769, 861-862.

95 In concluding in both *Feldbrugge* and *Deumeland* that the rights to social-insurance benefits were "civil" rights, the Court noted as a relevant factor that neither individual was "affected in her relations with the public authorities as such, acting in the exercise of discretionary powers . . . ": above n 38, *Feldbrugge*, 434, para 37; above n 38, *Deumeland*, 465, para 71; and see also above n 38, *Salesi*, 20, para 19. This may suggest that Article 6(1) does not apply to "acts of public authorities taken in the exercise of discretionary powers": see A W Bradley "Social Security and the Right to a Fair Hearing: The Strasbourg Perspective" [1987] PL 3, 9. van Dijk criticises this aspect of the Court's reasoning as "superfluous" and as irreconcilable with its judgement in the *Benthem* case (which did involve the exercise by a public authority of discretionary powers): above n 17, van Dijk, n 64 at 143.

*Feldbrugge* and *Deumeland* have been applied most recently in *Salesi*[96] and in *Schuler-Zgraggen*,[97] where the Court held that the right to a disability allowance and the right to an invalidity pension respectively were "civil" rights within the meaning of Article 6(1). Referring in both cases to the "principle of equality of treatment", the Court saw "no convincing reason" to distinguish between these rights and the rights to social insurance benefits asserted in *Feldbrugge* and *Deumeland*.[98] These cases provide a strong impetus for the continued expansion of the categories of rights which are "civil" rights within the meaning of Article 6(1). The reference in *Salesi* and in *Schuler-Zgraggen* to the principle of equality of treatment is particularly noteworthy, because it means that other rights which are "personal, economic and individual" in nature are also likely to be regarded as "civil" rights. This would include a number of rights which traditionally have been regarded as "public" in character, such as the right to tax concessions or the right to fiscal advantages,[99] in circumstances where such rights have direct links with the economic interests of the individual concerned.

Thus in *Editions Périscope* v *France*[100] the Court hinted that the right to tax concessions may be a "civil" right within the meaning of Article 6(1). That case concerned an action by the applicant company for compensation from

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It appears, however, that the Court has abandoned this aspect of its reasoning. In the recent *Schuler-Zgraggen* case, which concerned the right to an invalidity pension, the Court justified its view that the right was "civil" in character by noting that "the applicant was not only affected in her relations with the administrative authorities as such but also suffered an interference with her means of subsistence": above n 38, *Schuler-Zgraggen*, 12, para 46. This clearly implies that it makes no difference to the character of the right that the individual is "affected in her relations with the administrative authorities as such".

96 Above n 38, *Salesi*.

97 Above n 38, *Schuler-Zgraggen*.

98 Above n 38, *Salesi*, 20, para 19; above n 38, *Schuler-Zgraggen*, 12, para 46.

99 See above n 38, *Editions Périscope*, 606, para 35 (Opinion of the Commission); see also the decisions in App No 2552/65, 26 Col 1, 2717/66, 13 Yearbook 176 (European Commission); App No 9908/82, 32 D & R 266 (European Commission); App No 8903/80, 21 D & R 266 (European Commission).

100 Above n 38, *Editions Périscope*.

the administrative authorities for damage suffered as a result of the authorities' refusal to grant it tax concessions and postal charge reductions. Admittedly, the Court was not directly required to determine whether the rights to tax concessions and to postal reductions were "civil" rights within the meaning of Article 6(1), because those rights were not in dispute; the right in dispute was the right to receive compensation for the damage suffered.[101] None the less, in concluding that the right to receive compensation was a "civil" right, the Court noted, significantly, it is suggested, that the subject matter of the applicant's action was "pecuniary" in nature and that "the action was founded on an alleged infringement of rights *which were likewise pecuniary rights*".[102] Accordingly, in the Court's view, not only was the "subject-matter" of the action - the right to compensation - "pecuniary" in nature; so too were the right to tax concessions and the right to postal reductions, whose alleged infringement had given rise to the action.[103] Given that "pecuniary" rights bear all the hallmarks of "personal, economic and individual" rights, and also have close affinities with property rights, logic suggests that the right to tax concessions and the right to postal reductions would also have been regarded as "civil" rights had the Court been required to determine their status.

The same emphasis upon the economic interests of the applicant is evident in recent cases concerning the grant and revocation of statutory licenses. In *Benthem* v *the Netherlands*,[104] the Court held that the right to a statutory license to operate a liquid petroleum gas installation was a "civil" right, since the grant of the license was a condition for the conduct of part of the applicant's business activities, the license was closely associated with his right to use his possessions and it had a proprietary character, as it could be

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101 Above n 38, *Editions Périscope*, 611-612, paras 36-37.

102 Above n 38, *Editions Périscope*, 613, para 40 (emphasis added).

103 See also above n 38, *Neves e Silva*.

104 Above n 38, *Benthem*.

assigned to third parties.[105] By contrast, the public-law features of the license were accorded less importance. The Court took a similar approach in *Pudas* v *Sweden*, which concerned the right to a public transport license,[106] and in *Tre Traktörer Aktiebolag* v *Sweden*, where the right to a license to sell alcoholic beverages was at issue.[107] In all three cases - *Benthem*, *Pudas* and *Tre Traktörer Aktiebolag* - the Court emphasised the direct link between the grant of the license and the entirety of the applicant's commercial activities,[108] a factor which clearly pointed, in the Court's view, to the "civil" character of the right.[109]

The Court's interpretation of the concept of "civil rights and obligations" is evolving, with the result that the categories of rights which fall within the ambit of Article 6(1) are continuing to expand. In particular, there are strong indications that the distinction between public and private rights will ultimately be abandoned by the Court. That would be an appropriate development, it is submitted, because the distinction is an outmoded one which ignores the fundamental importance to individuals of a wide range of social security and other rights. A rights-centred perspective requires that procedural protection be given to such rights as well as to rights which have traditionally been regarded as "private" in character. It is only a matter of time, it is submitted, before the Court takes "one more step"[110] and no longer restricts the concept of "civil rights and obligations" to "private rights and obligations".

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105 Above n 38, *Benthem*, 9, para 36.

106 Above n 38, *Pudas*, 389, paras 36-37.

107 Above n 38, *Tre Traktörer Aktiebolag*, 320-321, para 43.

108 See especially above n 38, *Benthem*, 9, para 36.

109 See also above n 38, *König*, 194-195, para 92; above n 38, *Le Compte, Van Leuven and De Meyere*, 18, para 48.

110 Above n 17, van Dijk, 141.

### 3 *Access to a court/tribunal*

In *Golder* v *United Kingdom*[111] the Court was required to resolve an issue of fundamental importance. Did Article 6(1) only guarantee a fair hearing in legal proceedings which were already pending, or did it secure in addition a right of access to the courts for every person wishing to commence an action in order to have his or her civil rights and obligations determined?[112] In a landmark judgement the Court concluded that Article 6(1) did secure a right of access to the courts;[113] and that the applicant's effective exercise of that right had been violated in this case.[114]

In *Golder* there had been a serious disturbance at a prison where the applicant was incarcerated. When a prison officer indentified him as having been involved in the disturbance, the applicant indicated that he wished to bring a civil action for libel. The Home Secretary, however, refused the applicant permission to contact a solicitor and effectively prevented him from bringing the action.[115] In the European Court of Human Rights the applicant complained that the Home Secretary's refusal to allow him to contact a solicitor amounted to a breach of his rights under Article 6(1) of the Convention. The applicant argued that Article 6(1) secured a right of access to the courts, and that the Home Secretary's refusal had precluded his exercise of that right.

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111 Above n 38, *Golder*.

112 Above n 38, *Golder*, 530-531, para 25.

113 *Golder* has been followed in a line of cases including, for example, above n 38, *Silver*; above n 38, *Skärby*; above n 38, *Oerlemans*.

114 Above n 38, *Golder*, 531, para 26.

115 Above n 38, *Golder*, 526-529, paras 10-20, 531, para 26.

The Court acknowledged that Article 6(1) did not expressly provide for a right of access to the courts,[116] but concluded that such a right was implicit in the terms of the Article. It emphasised that this interpretation was based on a careful analysis of the terms of Article 6(1).[117] In reality the Court was motivated by a desire to uphold the rule of law, a principle to which it clearly attached great importance. Noting the reference to the rule of law in the Convention's preamble,[118] the Court thought it "both natural and in conformity with the principle of good faith"[119] to bear in mind the rule of law when interpreting Article 6(1).[120] The Court considered it inconceivable that one could speak of the rule of law in relation to civil matters "without there being a possibility of having access to the courts".[121] This supported the view that Article 6(1) secured a right of access to the courts.

Moreover, the Court pointed to the serious consequences to which, in its view, a narrow interpretation of Article 6(1) might lead. If Article 6 (1) were not interpreted as securing a right of access to the courts, a State could, without breaching Article 6(1), "do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent

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116 Above n 38, *Golder*, 532, para 28.

117 Above n 38, *Golder*, 536, para 36.

118 Above n 38, *Golder*, 535, para 34. The Convention's preamble provides (in pertinent part):

> The Governments signatory hereto, being Members of the Council of Europe . . . Being resolved, as the Governments of European countries which are likeminded and hav a common heritage of political traditions, ideals, freedom and the *rule of law*, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.

Above n 2, 222-225.

119 Article 31(1) of the Vienna Convention of the Law of Treaties provides that a treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". For the text of the Vienna Convention on the Law of Treaties, see 1155 UNTS 331.

120 Above n 38, *Golder*, 535, para 34.

121 Above n 38, *Golder*, 535, para 34.

on the Government".[122] Consequences such as these would be "indissociable from a danger of arbitrary power".[123] The Court added:

> It would be inconceivable, in the opinion of the Court, that Article 6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.[124]

Moreover, the Court emphasised that the right of access to a court must be effective and not merely theoretical. Although the Home Secretary had not formally denied the applicant his right to institute proceedings before a court, he had effectively prevented him from commencing an action, and this amounted to a breach of Article 6(1). "Hindrance in fact", the Court considered, "can contravene the Convention just like a legal impediment".[125] Furthermore, it made no difference that the applicant could have commenced an action upon his release from prison, given that at the relevant time his release "was still rather remote". In the Court's view, "hindering the effective exercise of a right may amount to a breach of that right, even if the hindrance is of a temporary character".[126]

The same concern to ensure the effectiveness of the right of access to a court is reflected in *de Geouffre de la Pradelle* v *France*.[127] In that case an application for judicial review of a government decree designating the applicant's land as an area of outstanding beauty had been dismissed as out of

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122 Above n 38, *Golder*, 536, para 35.

123 Above n 38, *Golder*, 536, para 35.

124 Above n 38, *Golder*, 535-536, para 35. Although in this passage the Court referred to the right of access to a court as arising in the context of a "lawsuit", the Court's subsequent jurisprudence indicates that the right of access does not apply in those circumstances only; as will be seen, the right of access to a court applies wherever civil rights and obligations are being determined, whether in the context of a "lawsuit" or otherwise.

125 Above n 38, *Golder*, 531, para 26.

126 Above n 38, *Golder*, 531, para 26].

127 Above n 38, *de Geouffre de la Pradelle*.

time and therefore inadmissible by the *Conseil d'Etat*. Although it was clearly possible for the applicant to challenge the decree in the *Conseil d'Etat*,[128] in practice the applicant was precluded from doing so by what the Court referred to as the "extreme complexity" of the relevant French law. This complexity was likely to have made uncertain the exact nature of the decree and also the time-limit for bringing an application for judicial review,[129] which accounted for the applicant's failure to register the application in time.[130] In the Court's view, Article 6(1) entitled the applicant to "a clear, practical and effective opportunity to challenge an administrative act that was a direct interference with his right of property".[131] Due to its complexity, the system was insufficiently coherent and clear, with the result that the applicant had not had a "practical, effective right of access to the Conseil d'Etat".[132]

*Golder* and *de Geouffre de la Pradelle* reflect the Court's adherence to the principle of effectiveness.[133] This well-established principle is designed to secure the effective exercise and effective enjoyment of human rights.[134] It is central to the jurisprudence of the Court, which has stated that "the [European] Convention is intended to guarantee not rights that are theoretical or illusory but rights that are *practical and effective* . . .".[135] It

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128 Above n 38, *de Geouffre de la Pradelle*, 16, para 29.

129 Above n 38, *de Geouffre de la Pradelle*, 17, para 33].

130 It is submitted that the Court strongly implied without expressly identifying a link between the complexity of the law the applicant's failure to meet the time-limit: see above n 38, *de Geouffre de la Pradelle*, 16, para 31 taken together with 17-18, paras 32-35.

131 Above n 38, *de Geouffre de la Pradelle*, 17, para 34.

132 Above n 38, *de Geouffre de la Pradelle*, 19, para 35.

133 See generally J G Merrills *The Development of International Law by the European Court of Human Rights* (Manchester University Press, Manchester, 1988) 89-112; and A Shaw & A S Butler "The New Zealand Bill of Rights comes alive (I)" [1991] NZLJ 400, 402.

134 *Mbenge* v *Zaire*, Comm No 16/1977, GAOR, 38th Sess, Supp No 40, UN Doc A/38/40 (1983), p 134, 140, para 22.

135 *Artico* v *Italy* (1980) 60 ILR 181, 196-197; 3 EHRR 1, 13, para 33 (European Court of Human Rights) (emphasis added).

follows that the right of access to a court must be exercisable "in a *real and practical way*".[136]

An additional and important aspect of the right to a court is that Article 6(1) requires the court to have jurisdiction to determine *all* aspects of the dispute, whether they be issues of fact, law or merits.[137] This principle was established in *Le Compte, Van Leuven and De Meyere* v *Belgium*.[138] That case involved the exercise of disciplinary powers over doctors by a professional committee, with a full re-hearing on the merits before an appeal tribunal and subject to judicial review on issues of law by the Court of Cassation. The Court held that the availability of judicial review on issues of law was insufficient to satisfy Article 6(1), because Article 6(1) also required judicial review of issues of fact and of the merits of the disciplinary committee's decision, including the appropriateness of the penalties imposed upon the applicant doctors. These were issues which the Court of Cassation had no power to determine. The appeal tribunal did have such power, but it neither sat in public nor gave judgement publicly as Article 6(1) required. It followed that the issues of fact and the merits of the decision, both of which were as crucial to the outcome of the dispute as the issues of law, had not been determined by a body which satisfied Article 6(1)'s requirements.[139] The inadequacy of judicial review of legality alone was confirmed in *Sporrong and Lönnroth* v *Sweden*.[140] In that case the merits of a governmental decision to authorise the expropriation of

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136 Above n 38, *Airey*, 316, para 26 (European Court of Human Rights) (emphasis added). In respect of the effective exercise of the right of access to a court, see also above n 38, *Sporrong and Lönnroth*; above n 38, *Pudas*; above n 38, *Bodén*; and above n 38, *Mats Jacobsson*. Compare above n 38, *Gillow*, 357, para 69.

137 Compare *Kaplan* v *United Kingdom* 4 EHRR 64 (European Commission).

138 Above n 38, *Le Compte, Van Leuven and De Meyere*.

139 Above n 38, *Le Compte, Van Leuven and De Meyere*, 19, para 51(b). See also above n 38, *Feldbrugge* (full Appeals Board had no power to go into merits); above n 38, *W* v *United Kingdom*, above n 38, *R* v *United Kingdom*, above n 38, *O* v *United Kingdom*, above n 38, *B* v *United Kingdom* and above n 38, *H* v *United Kingdom* (judicial review only as to legality of authority's decision); above n 38, *Obermeier* (administrative court had power to determine questions of law only).

140 Above n 38, *Sporrong and Lönnroth*.

the applicants' property were technically reviewable by the Supreme Administrative Court, but such a review was restricted in its scope and rarely undertaken. In the Court's view, because judicial review of the merits was undertaken only in exceptional circumstances, the applicant did not have an effective and practical right of access to a court for a "full review of measures affecting a civil right".[141] This failed to satisfy the requirements of Article 6(1).[142]

At this point some clarification is required. The cases of *Le Compte, Van Leuven and De Meyere* and *Sporrong and Lönnroth* may give the impression that, under Article 6(1), the court in question must have power to determine issues of fact and merits as well as issues of law. But that is not strictly the correct position. What Article 6(1) requires is that the court have power to determine *all aspects of the dispute*. That is not the same thing, because issues of fact or merits will not necessarily be aspects of the dispute. This is illustrated by the case of *James* v *United Kingdom*.[143] In that case the applicants had been deprived of their ownership of a number of properties through the exercise by their tenants of rights of acquisition under the Leasehold Reform Act 1967.[144] The 1967 Act conferred on the tenants the right to purchase compulsorily the freehold of the properties on prescribed terms and subject to certain prescribed conditions.[145] There was no provision under the 1967 Act for the applicants to challenge the tenants' right of acquisition on the grounds of individual merits or hardship; the applicants could only allege that the terms and conditions laid down in the Act had not been satisfied. It followed that the merits of the acquisition could not be an

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141 Above n 38, *Sporrong and Lönnroth*, 58, para 86.

142 Above n 38, *Sporrong and Lönnroth*, 58, para 87. Very similar facts arose in above n 38, *Pudas*, above n 38, *Bodén*; and above n 38, *Mats Jacobsson*.

143 Above n 38, *James*.

144 Above n 38, *James*, 126, para 10.

145 Above n 38, *James*, 126, para 11.

aspect of any dispute; accordingly, Article 6(1) did not require that the courts have power to determine the merits. By contrast, whether there had been compliance with the terms and conditions of the 1967 Act was potentially disputable, and Article 6(1) required such disputes to be determined by a court. The Court held that, in so far as any dispute might arise concerning compliance with terms and conditions of the 1967 Act, the applicants had "unimpeded access to a tribunal competent to determine any such issue";[146] and this met the requirements of Article 6(1). It was not necessary that the court have power to determine the merits as well as issues of fact and law, because the merits could not be an aspect of the dispute. This illustrates that there is nothing magical about issues of fact or merits for the purposes of Article 6(1); they become important only if they are aspects of the dispute in question.

Of course, in many cases issues of fact or merits *will* be aspects of the dispute. In *Le Compte, Van Leuven and De Meyere* and in *Sporrong and Lönnroth*, for example, the merits of the respective decisions to impose disciplinary penalities and to authorise the expropriation of property were crucial to the outcome of the disputes in question. In such circumstances, judicial review merely as to the legality of the decisions would not meet the requirements of Article 6(1), because the court would not review all aspects of the dispute. By contrast, in a case such as *James*, judicial review on issues of fact and law will suffice, as these are the only issues arising. It follows that, where a case concerns the exercise of a decision-making power, Article 6(1) requires that the court have power to substitute its own decision for that of the original decision-maker.

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146 Above n 38, *James*, 158, para 81. In particular, disputes over a tenant's entitlement to acquire the freehold under the 1967 Act and over related matters were within the jurisdiction of the County Court; and the purchase price payable was subject to determination, in default of agreement, by the local Leasehold Valuation Tribunal (or, formerly, the Lands Tribunal): above n 38, *James*, 159, 134-135, 24-25.

The implications of the *Golder* judgement are clearly far-reaching. Article 6(1) secures a right of access to a court whenever a person's civil rights or obligations are being determined; that right of access must be practical and effective; and the court must have power to determine all aspects of the dispute, which may include issues of fact and merits as well as issues of law. However, it is important to note that the Court in *Golder* recognised that "the right of access to the courts is not absolute".[147] In the Court's view, there must be room for limitations by implication, given that the right of access to a court is itself implicit in Article 6(1),[148] and also because the right "by its very nature calls for regulation by the State".[149] However, the Court emphasised that limitations must never injure the substance of the right of access to the courts nor conflict with other rights enshrined in the Convention.[150] In *Golder*, the limitation placed on the applicant's right of access to the courts could not be justified, because "[i]t was not for the Home Secretary himself to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any claim that might be brought".[151]

In a series of cases since *Golder* the Court has identified some of the limitations upon the right to a court. One limitation is that the right to a court need not be observed at each stage in the determination of civil rights and obligations. This means that Article 6(1) does not preclude administrative or other bodies which are neither courts nor tribunals within the meaning of Article 6(1) from taking measures which affect civil rights and obligations,

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147 Above n 38, *Golder*, 537, para 38.

148 See also above n 38, *Campbell and Fell*, 202, para 90.

149 Above n 38, *Golder*, 537, para 38.

150 Above n 38, *Golder*, 537, para 38. The Court followed its judgement in the *Belgian Linguistic Case (No 2)* 1 EHRR 252, 281, para 5, in respect of the right to education. See also above n 38, *Winterwerp*, 414 para 75 (mental illness may render legitimate certain limitations upon the exercise of the right to a court, but cannot warrant the total absence of that right).

151 Above n 38, *Golder*, 538, para 40.

provided that these measures are subject to review by a body which does meet Article 6(1)'s requirements. This was established in *Le Compte, Van Leuven and De Meyere* v *Belgium*.[152] That case concerned the exercise by the medical profession of disciplinary powers over doctors. The disciplinary matter had been dealt with by three bodies: first, the Provincial Council of the Medical Association; secondly, the Association's Appeals Council; and, thirdly, the Court of Cassation. The European Court of Human Rights held that Article 6(1) did not require all three bodies to be a court or tribunal within the meaning of the Article. Justifying its conclusion by reference to essentially pragmatic considerations, the Court stated:

> Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, *a fortiori*, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system.[153]

This meant that it was not necessary for the Provincial Council to comply with the requirements of Article 6(1); in particular, the Council did not need to be a "tribunal" within the meaning of Article 6(1).[154] What Article 6(1) did require, however, was that the Appeals Council and the Court of Cassation be "tribunals" within the meaning of the Article, the Appeals Council because it determined issues of fact and merits and the Court of Cassation because it determined issues of law.[155]

The position is neatly summarised in *Albert and Le Compte* v *Belgium*:

> Even in instances where Article 6(1) is applicable, conferring powers [on jurisdictional organs of professional associations] *does not in itself* infringe the Convention. Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of

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152 Above n 38, *Le Compte, Van Leuven and De Meyere*.

153 Above n 38, *Le Compte, Van Leuven and De Meyere*, 19, para 51(a). Compare above n 38, *Schuler-Zgraggen*, 21, para 2 (partly dissenting opinion of Judge Walsh).

154 Above n 38, *Le Compte, Van Leuven and De Meyere*, 19, para 51(a).

155 Above n 38, *Le Compte, Van Leuven and De Meyere*, 20, para 54.

> Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1).[156]

Some may criticise Article 6(1) on the basis that it "judicialises" administrative processes to an inappropriate degree. The Court, however, has resisted any invitations to peg back the requirement that there be access to a court which has the power of determination. In *W* v *United Kingdom*,[157] a case concerning decisions by a local authority to restrict and terminate the applicant's access to his child, the United Kingdom Government argued that it was preferable to leave the discretion as to access to the local authority rather than to the courts because of, first, the large number of children in public care and, secondly, the need to take decisions urgently and without delay, through specialised social workers and as part of a continuous process.[158] The Court was "not unmindful" of the Government's arguments but considered that this was an area in which it was "essential to ensure that the rights of individual parents [were] protected"; and, moreover, that in any case "Article 6(1) does not require that all access decisions must be taken by the courts but only that they shall have power to determine any substantial disputes that may arise".[159] It follows that mere administrative expediency cannot justify a departure from the requirements of Article 6(1). Moreover, it must be borne in mind that the availability of review by a court does not inevitably lead to government by paralysis; it does not follow that the right will constantly be exercised, especially in light of the fact that Article 6(1) does not permit trivial disputes to be taken on appeal, as the Court emphasised in this passage from *W's* case.

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156 Above n 38, *Albert and Le Compte* v *Belgium*, 542, para 29 (emphasis added; footnotes omitted).

157 Above n 38, *W* v *United Kingdom*.

158 Above n 38, *W* v *United Kingdom*, 57, para 79.

159 Above n 38, *W* v *United Kingdom*, 57, para 79. See also above n 38, *Eriksson*, 205, paras 80-81, 207, paras 90-92.

It is clear, therefore, that Article 6(1) allows for the intervention of administrative and other bodies which do not meet the requirements of the Article. It must not be lost sight of, however, that the decisions of such bodies must be subject to review by a "tribunal" within the meaning of Article 6(1). The final power of decision in respect of each aspect of the dispute must be reposed in a "tribunal" which meets the requirements of Article 6(1). It will not suffice if the tribunal's decisions are subject to review by a body which does not meet Article 6(1)'s requirements. This is illustrated by *Le Compte, Van Leuven and De Meyere*. In that case, the Appeals Council was a "tribunal" within the meaning of Article 6(1) and had power to determine issues of fact, merits and law, but that in itself did not satisfy Article 6(1) because the Court of Cassation had power to overturn the Council's rulings on issues of law. Accordingly, Article 6(1) required the Court of Cassation also to be a "tribunal" within the meaning of the Article.[160] Otherwise, the final power of decision in respect of issues of law would not have resided in a body meeting the requirements of Article 6(1).

There remains the question whether Article 6(1) has any impact at all upon the procedures of administrative bodies which intervene at an earlier stage in the decision-making process. Some may argue that Article 6(1) absolves such bodies from the duty to observe any procedural requirements, provided that their decisions are subject to review by bodies which do meet the requirements of the Article and have power to determine all aspects of the dispute. The result, so the argument runs, is that Article 6(1) does not require administrative bodies to observe even a minimum standard of fair procedure. This would have serious drawbacks, because the interests of fair dealing and good administration are better served if administrative bodies observe basic

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160 Above n 38, *Le Compte, Van Leuven and De Meyere*, 20, para 54.

procedural standards, irrespective of whether their decisions are subject to review by a body which provides more extensive safeguards.

However, it is overly simplistic to say that Article 6(1) has no impact at all upon the procedures of administrative bodies which intervene at an earlier stage in the decision-making process. In some circumstances, an administrative body may need to comply with Article 6(1), even if there is provision for review of its decisions by a tribunal. Consider, for example, the case where a disciplinary committee suspends an employee from her duties on a charge of theft. Suppose that as a result of the suspension the employee suffers damage to her reputation, and consequently her career prospects and livelihood are jeopardised. Suppose also that the committee's decision is subject to review by a tribunal which meets the requirements of Article 6(1) and has jurisdiction to determine the issues of fact, law and merits arising out of the suspension. On its face, this scheme appears to comply with Article 6(1): the tribunal is able to reverse the committee's suspension order. But can it be said that the tribunal is able to reverse the whole impact of the suspension order? It is true that the tribunal does have the final word on the merits and legality of the suspension and, accordingly, is able to restore the complainant to her previous employment. Yet, even if the suspension is reversed, from the employee's perspective the damage has already been done. She has suffered an injury to her reputation, career prospects and livelihood which the tribunal cannot undo. In such circumstances, it cannot be said that the employee has had access to a tribunal meeting the requirements of Article 6(1) in respect of the determination of *all* of her rights. Her rights to a reputation and to a livelihood have been determined by the disciplinary committee, an administrative body, which does not meet the requirements of Article 6(1).

Moreover, even if the tribunal is able indirectly to determine those rights, that will not satisfy Article 6(1). The Court has indicated elsewhere that only a direct determination may suffice. In *W* v *United Kingdom*,[161] the Court held that the applicant's ability to challenge the decision to take the child into public care before the English courts did not meet the requirements of Article 6(1). In the Court's view, "whether a child should be in public care and whether his parent should have access to him are matters to which different considerations may well apply"; accordingly, it was necessary that the applicant be able to challenge the restriction and termination of his right of access directly.[162] This illustrates that review by a tribunal will not suffice if the tribunal is unable to determine directly all the rights at issue.

In *Ashingdane* v *United Kingdom*[163] the Court indicated how it would determine the validity of limitations on the right of access to a court. It held that limitations must meet a proportionality test:

> . . . the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the *very essence* of the right is impaired.[164] Furthermore, a limitation will not be compatible with Article 6(1) if it does not *pursue a legitimate aim* and if there is not a *reasonable relationship of proportionality* between the means employed and the aim sought to be achieved.[165]

In *Ashingdane*, the applicant was a patient who had been placed in a secure special hospital. Despite authorisation from the Home Secretary,[166] the Secretary of State for Social Services refused to direct the applicant's transfer to a local psychiatric hospital, due to a ban by nursing staff on the admission

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161 Above n 38, *W* v *United Kingdom*. See also above n 38, above n 38, *R* v *United Kingdom* 74, above n 38, *O* v *United Kingdom*, above n 38, *B* v *United Kingdom* and above n 38, *H* v *United Kingdom*.

162 Above n 38, *W* v *United Kingdom*, 57, para 81.

163 Above n 38, *Ashingdane*.

164 See above n 38, *Golder*, 537, para 38; above n 38, *Winterwerp*, 414, para 75. This proposition represented no real advance on what had already been established in *Golder* and other cases.

165 Above n 38, *Ashingdane*, 546-547, para 57

166 Pursuant to section 65(3)(c) of the Mental Health Act Act 1959.

of patients like the applicant. The Secretary's refusal was made pursuant to section 99 of the Mental Health Act 1959.[167]

The applicant instituted proceedings for judicial review of the refusal,[168] but these were stayed due to the operation of section 141 of the 1959 Act. Section 141 provided that no person could be liable to civil proceedings in respect of any act done under the 1959 Act "unless the act was done in bad faith or without reasonable care";[169] and the Court of Appeal found that neither of these grounds had been made out.[170] The applicant argued that section 141 of the 1959 Act did not apply, because the act at issue was not the refusal of transfer under section 99 of the 1959 Act but the failure of the Secretary of State for Social Services to comply with section 3 of the National Health Service Act 1977,[171] which imposed a duty on him to provide hospital accomodation "to such an extent as he considers necessary to meet all reasonable requirements".[172] However, the Court of Appeal considered that the act out of which liability was said to arise was the refusal of transfer under section 99 of the 1959 Act, not a failure to comply with section 3 of the 1977 Act.[173] Accordingly, section 141 of the 1959 Act applied, and the applicant's action could not proceed.

In the European Court of Human Rights the applicant complained of the decision of the Court of Appeal whereby his action was barred due to the operation of section 141 of the 1959 Act. He argued that the Court of

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167 Above n 38, *Ashingdane*, 531, para 14.

168 Above n 38, *Ashingdane*, 532, para 16.

169 Above n 38, *Ashingdane*, 532-533, para 17.

170 Above n 38, *Ashingdane*, 533-534, para 18(a).

171 Above n 38, *Ashingdane*, 533, para 18(a).

172 Above n 38, *Ashingdane*, 536, para 25.

173 Above n 38, *Ashingdane*, 533, para 18(a).

Appeal's decision amounted to a breach of his right to a court under Article 6(1) of the Convention.[174]

In the Court's view, the applicant's claim in the domestic courts was based on section 3 of the 1977 Act. Assuming without deciding that section 3 arguably conferred a right on the individual citizen, the Court accepted that section 141 of the 1959 Act limited the applicant's access to the courts in order to have that right determined.[175] The question was whether the limit on access was justifiable by reference to the proportionality test.

The Court noted that section 141 was designed to avoid the risk of those responsible for the care of mental patients being unfairly harrassed by litigation. In the Court's view, that objective was clearly legitimate in relation to hospital staff as individuals. In relation to the Local Health Authority and the Department of Health and Social Security, however, its legitimacy was less obvious and "closer scrutiny" was required.[176]

Section 141 of the 1959 Act had the effect of limiting claims based on section 3 of the 1977 Act in so far as they related to acts done under the 1959 Act. The applicant's claim based on section 3 of the 1977 Act could proceed only if bad faith or negligence were alleged. This effectively limited the applicant's right of access to the courts. However, the Court considered that this limitation was justifiable in terms of the proportionality test. It noted that section 141 of the 1959 Act "*only partially* precluded the responsible authorities from being sued"; the applicant retained the capacity to sue, provided that he alleged bad faith or negligence and obtained the leave of the

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174 Above n 38, *Ashingdane*, 545, para 53.

175 Above n 38, *Ashingdane*, 547, para 58.

176 Above n 38, *Ashingdane*, 547, para 58.

High Court. In the Court's view, this limitation "did not impair the very essence" of the applicant's right of access to a court, nor "transgress the principle of proportionality".[177] Accordingly, this limitation did not breach Article 6(1) of the Convention.

The Court referred to an additional limitation on the applicant's right of access to a court. It noted that the legal obligation imposed on the Minister by section 3 of the 1977 Act was "couched in rather general terms" and, accordingly, conferred a wide discretion. In the Court's view, "by its very nature and quite apart from section 141 of the 1959 Act" the obligation under section 3 was "not . . . amenable to full judicial control by the national courts".[178] This suggests that, even if section 141 of the 1959 Act had not limited the applicant's right of access to the court's, the wording of section 3 itself might have done so, due to the reluctance of the courts to intervene where a discretion is widely-framed. As it expressed no conclusions on this point, it is unclear whether the Court would have considered it necessary for a limitation of this nature to satisfy the proportionality test. Logic, however, suggests that it would be necessary. That raises the possibility that discretionary powers may offend against Article 6(1) of the Convention on the basis that they are too vaguely or too widely worded. Alternatively, it may be that the width of the discretion justifies a more limited type of review, which excludes consideration of issues of fact or merits. This is consistent with the Court's reference to "full" review by the courts of the obligation imposed by section 3 of the 1977 Act.

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177 Above n 38, *Ashingdane*, 547-548, para 59.

178 Above n 38, *Ashingdane*, 547, para 59.

In *Lithgow* v *United Kingdom*[179] the Court applied the proportionality test and found that the limitations in question could be justified by reference to it. In *Lithgow*, the United Kingdom Parliament had enacted the Aircraft and Shipbuilding Industries Act 1977 which nationalised the aircraft and shipbuilding industries. The applicants were among the many shareholders whose shares in companies were compulsorily acquired. The Act made provision for compensation to be payable to the shareholders. An arbitration tribunal was established which was empowered to resolve disputes concerning the compensation payable in each case by determining the "base value" of the shares. Shareholders did not have an individual right of access to the tribunal; the Act provided instead for a collective system of dispute-resolution, whereby the parties which appeared before the tribunal were the Secretary of State for Industry and a representative of the shareholders of each company. The applicants complained that the absence of an individual right of access to the arbitration tribunal as regards the determination of their right to compensation constituted a breach of Article 6(1) of the Convention.[180]

However, the Court held that there was no breach of Article 6(1) in this respect. It considered that, "[n]otwithstanding this bar on individual access, the Court does not consider that in the particular circumstances the very essence of Sir William Lithgow's right to a court was impaired".[181] In the Court's view, the interests of each shareholder were protected, albeit indirectly, in three ways. First, the shareholders' representative was appointed by and represented the interests of all the shareholders of the company concerned. Secondly, the 1977 Act provided for shareholder meetings at which the representative could be instructed. Thirdly, in addition

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179 Above n 38, *Lithgow*, (1986) 8 EHRR 329

180 Above n 38, *Lithgow*, 394, para 195.

181 Above n 38, *Lithgow*, 394, para 196.

to the shareholders' power to remove their representative, remedies were available against a representative who failed to comply with either his duties under the Act or his Common Law obligations as agent.[182] Accordingly, the limitation did not remove the applicant's right of access to a court altogether.

Moreover, in the Court's view, the limitation on the direct right of access to a court pursued a legitimate aim, namely, "to avoid, in the context of a large-scale nationalisation measure, a multiplicity of claims and proceedings brought by individual shareholders".[183] Furthermore, the Court considered that there was a reasonable relationship of proportionality between the means employed and the aim of avoiding a multiplicity of claims. In this respect, the Court noted the powers and duties of the shareholders' representative, and the Government's margin of appreciation under the Convention.[184]

*Lithgow's* case indicates that the right of access to a court may be triggered even although a determination affects the civil rights and obligations of many people in the same way. In such circumstances access to the court may justifiably be limited, as *Lithgow* demonstrates, but it must not be reduced to such an extent as to impair very essence of the right. This is illustrated by the case of *Philis* v *Greece*,[185] where the applicant engineer had been precluded from seeking direct redress through the courts for the non-payment of fees for design projects. Under Greek law, the Technical Chamber of Greece was subrogated to the rights of the payee engineer. The Chamber had a duty to institute proceedings and to pay the sum received into a special bank account for the engineer. There was no provision for the engineer to bring a parallel

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182 Above n 38, *Lithgow*, 394, para 196.

183 Above n 38, *Lithgow*, 394, para 197.

184 Above n 38, *Lithgow*, 394-395, para 197.

185 Above n 38, *Philis*.

action or to intervene before the Chamber had instituted proceedings.[186] The Court acknowedged that there were advantages in this system: the Chamber provided the services of experienced counsel and paid legal costs which a number of engineers may have been unable to meet.[187] However, the scheme's advantages did not justify the consequent limitation upon the applicant's right of access to the courts. In the Court's view, because the applicant could not institute proceedings, directly and independently, to seek the payment from his clients of fees which were owed to him, the "very essence" of his right to a court had been impaired.[188] Therein lies the material distinction between *Lithgow* and *Philis*: in *Lithgow* the applicants had indirect access to the arbitration tribunal through representatives which ultimately were under their control; whereas, in *Philis*, the applicant did not enjoy even indirect access to the courts, because he was unable to exert any control over the Technical Chamber.

The implications of *Golder* have clearly been far-reaching. Article 6(1) secures a right of access to a court whenever a person's civil rights or obligations are being determined; that right of access must be practical and effective; and the court must have power to determine all aspects of the dispute, which may include issues of fact and merits as well as issues of law. Although limitations on the right to a court are permissible, they must be justified by reference to a proportionality test, and may not remove the right of access to a court altogether.

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186 Above n 38, *Philis*, 766-767, paras 61-62, 767-768, paras 63-64.

187 Above n 38, *Philis*, 766, para 61.

188 Above n 38, *Philis*, 768, para 65.

### 4 *"tribunal"*

Where a dispute arises in respect of which Article 6(1) applies, there must be provision for a determination of the dispute by a "tribunal". What constitutes a "tribunal" within the meaning of Article 6(1)? As *Golder's* case demonstrates,[189] there can be no doubt that "courts of law of the classic kind" are tribunals within the meaning of the Article. However, this does not mean that "tribunal" is to be equated with "court". The European Court of Human Rights has emphasised that the term "tribunal" in Article 6(1) "is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country".[190] It follows that the term "tribunal" must be taken to refer to a wider range of bodies than courts alone.

In determining whether a body other than a court is a tribunal, it is necessary to focus upon the substantive function and character of the body.[191] The formal classification of the body is not decisive; indeed, a number of bodies have been held to be tribunals within the meaning of Article 6(1) despite their not being classified as such in the domestic law of the State Party concerned.[192]

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189 See also above n 38, *Le Compte, Van Leuven and De Meyere*, 20, para 55 (Court of Cassation "obviously" a tribunal).

190 Above n 38, *Campbell and Fell*, 198, para 76. See also above n 38, *Lithgow*, where an arbitration tribunal was held to be a "tribunal" within the meaning of Article 6(1) despite being set up for the purpose of adjudicating a limited number of special issues affecting a limited number of companies. See also Above n 38, *Feldbrugge*, 429, para 18 where the President of the Appeals Board, "a judge appointed for life who gave a reasoned decision referring to the conclusions of a medical expert", was held to be a "tribunal" within the meaning of Article 6(1).

191 Above n 38, *Sramek*, 362, para 36.

192 See, for example, above n 38, *Sramek*, 362, para 36 (regional real property transactions authority); *Campbell and Fell*, 198, para 76 (prison board of visitors) and *H* v *Belgium*, 350, para 50 (Council of the *Ordre des avocats)*.

The term "tribunal" in Article 6(1) denotes "bodies which exhibit . . . common fundamental features".[193] The Court has identified the most important of these features. It is necessary that the body exercise judicial functions, although that in itself will not suffice.[194] Additional elements must be present. The body must be independent of the executive and of the parties to the dispute; it must afford the guarantees of a judicial procedure; and, moreover, the length of its members' term of office must be of an adequate duration.[195] If any of these features are not present, the body will not be a tribunal within the meaning of Article 6(1).

An additional and crucial requirement, in the Court's view, is that the body must exercise a power of decision. It will not be enough for the body's function to be recommendatory only. This proposition emerges from *Benthem* v *the Netherlands*.[196] That case involved the revocation by the Crown of the applicant's statutory license to operate a liquid petroleum gas installation at his service station. The license had initially been granted by the municipal authorities but was revoked on appeal by the Crown after a hearing before the Administrative Litigation Division of the Council of State. The Crown determined the appeal on the advice of the Division;[197] although able to depart from that advice, in practice the Crown very rarely did so.[198]

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193 Above n 38, *Benthem* v *Netherlands*, 11, para 43.

194 Above n 38, *Le Compte, Van Leuven and De Meyere*, 20, para 55; above n 38, *Campbell and Fell*, 181, para 39(c). A body performs a judicial function when "determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner": above n 38, *H* v *Belgium*, 350, para 50.

195 Above n 38, *Benthem*, 11, para 43; above n 38, *De Wilde, Ooms and Versyp*, 407, 408, paras 76, 78; above n 38, *Campbell and Fell*, 198, para 76; above n 38, *X* v *United Kingdom*, 207, para 53. See above n 38, *Neumeister* v *Austria (No 1)* 1 EHRR 91, 132, para 24; above n 38, *Ringeisen (No 1)*, 490, para 95; above n 38, *Le Compte, Van Leuven and De Meyere*, 20, para 55; above n 38, *Albert and Le Compte* v *Belgium*, 543, para 31; above n 38, *Lithgow*, 396, para 201; above n 38, *H* v *Belgium*; above n 38, *Sramek*362, para 36.

196 Above n 38, *Benthem*.

197 Above n 38, *Benthem*, 5, para 21.

198 Above n 38, *Benthem*, 6, para 26.

In the Court's view, although the Administrative Litigation Division acted like a court, and although only very rarely did the competent Minister depart from its proposals to the letter, the Division was not a "tribunal" within the meaning of Article 6(1). The Court acknowledged that, in determining whether the Convention has been complied with, "one must frequently look beyond the appearances and the language used and concentrate on the realities of the situation".[199] However, it could not be overlooked that "a power of decision is inherent in the very notion of [tribunal] within the meaning of the Convention".[200] Accordingly, the Division was not a "tribunal" because it only tendered advice. Although the Division's advice was only rarely departed from, that was "only a practice of no binding force".[201]

It follows that, for the purposes of Article 6(1), a distinction must be drawn between bodies which have a power of *determination* and those which have a power of *recommendation*. Only the former can be tribunals within the meaning of the Article. Moreover, it is noteworthy that the Court attached greater weight to the theoretical possibility that the Crown might depart from the Division's recommendations than to the practical likelihood that those recommendations would be followed. This indicates that compliance in practice with Article 6(1) does not eliminate the need for a formal guarantee that its requirements will be met.

It is clear that a body cannot be regarded as a "tribunal" when it acts in an administrative capacity. This is because a "tribunal" is characterised by its *judicial* function;[202] by hypothesis, a "tribunal" does not perform an

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199 Above n 38, *Benthem*, 10, para 40.

200 Above n 38, *Benthem*, 10, para 40.

201 Above n 38, *Benthem*, 10, para 40.

202 A "tribunal" is "characterised in the substantive sense of the term by its judicial function": above n 38, *H* v *Belgium*, 350, para 50.

*administrative* function. This distinction was drawn by the Court in *Benthem*.[203] As has been seen,[204] in that case the power of decision in respect of the license lay with the Crown. The expression "the Crown", when decision-making powers were being exercised, was "commonly used to denote the King together with the Minister or Ministers".[205] Although the Crown was empowered to determine the dispute, a power of decision did not in itself render the Crown a "tribunal"; Article 6(1) required that additional elements be present, including independence, impartiality and the guarantees of judicial procedure.[206] The Court held that the Crown could not be a "tribunal" in these circumstances since, in deciding whether to revoke the license, it was acting in an administrative and not a judicial capacity.[207] Its administrative function was revealed in that "the Royal Decree by which the Crown . . . rendered its decision constituted, from the formal point of view, an administrative act"; the Crown was acting in its capacity as head of the executive, and the Royal Decree emanated from a Minister, who was responsible to Parliament for it.[208] Moreover, the Minister was the hierarchical superior of the Regional Health Inspector, who had lodged the appeal against the grant of the license, and of the Ministry's Director-General, who had submitted a technical report to the Division; this also suggested that the Crown in this context was not acting independently of the executive.[209] Accordingly, the term "tribunal" in Article 6(1) does not refer to bodies which are acting in an administrative capacity or as an arm of the executive.

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203 Above n 38, *Benthem*.

204 Above, text accompanying n 197.

205 Above n 38, *Benthem*, 5, para 23.

206 Above n 38, *Benthem*, 11, para 43.

207 Above n 38, *Benthem*, 10-11, para 41.

208 Above n 38, *Benthem*, 11, para 43.

209 Above n 38, *Benthem*, 11, para 43.

It is important to note, however, that a body is not precluded from being a "tribunal" by the mere fact that on occasions it acts in an administrative capacity. The same body can alternate between administrative and judicial functions; and, accordingly, can be a "tribunal" at one point in time and not at the next. In the view of the European Court, a "plurality of powers cannot in itself preclude an institution from being a [tribunal] in respect of some of them".[210] This proposition was applied in *Campbell and Fell* v *United Kingdom*,[211] where the Court held that a prison board of visitors was, "when carrying out its adjudicatory tasks", a "tribunal" within the meaning of Article 6(1) notwithstanding that it also performed other functions as part of the day-to-day administration of the prison.[212] The mere fact that the board of visitors acted in an administrative capacity on some occasions did not prevent it from being a "tribunal" when acting as the adjudicator of prison disputes.

This principle may be applied to a variety of bodies which perform diverse functions. It is particularly well-suited to describe the position of a government minister when performing his or her various functions. Consider, for example, the Minister of Social Welfare. On the one hand, the Minister will have ultimate responsibility for the operation of the Department of Social Welfare, including the policy pursued by the Department and the criteria which it applies in determining eligibility for benefits. In this context the Minister is acting in an administrative capacity. On the other hand, the Minister may be required by law to hear appeals from the decisions of Departmental officers in respect of, for example, a person's eligibility to receive a benefit. The mere fact that the Minister acts administratively when supervising the operation of the Department does not prevent her from being

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210 Above n 38, *H* v *Belgium*, 350, para 50.

211 Above n 38, *Campbell and Fell*.

212 Above n 38, *Campbell and Fell*, 198, para 76.

a "tribunal" when she is determining an appeal. What is required is that the Minister act judicially *when determining the appeal.* If the Minister does so, she may be regarded as a "tribunal" within the meaning of Article 6(1) when determining the appeal. The Minister must still exhibit the fundamental features of a "tribunal", of which the most important in this context is independence of the executive,[213] but there is nothing in principle to preclude the Minister from being a "tribunal".

### 5 "*independent*"

As has been seen, independence of the executive and of the parties to the dispute is a fundamental feature of a "tribunal" within the meaning of Article 6(1).[214] This feature is expressly mentioned in the first sentence of Article 6(1), which requires that the tribunal be "independent and impartial". Accordingly, there is a degree of overlap between the terms "tribunal" and "independent". However, given that independence is an express requirement of the Article, the Court has considered it worthy of separate attention.

There are some tribunals whose independence speaks for itself. These tend to be composed of members of the judiciary, who are presumed to act independently.[215] Where it does not speak for itself, a tribunal's independence will be assessed by reference to a number of factors. These are the manner of appointment of the tribunal's members; the duration of its

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213 See above, text accompnaying n 193.

214 See above, text accompanying n 193.

215 See, for example, above n 38, *Le Compte, Van Leuven and De Meyere*, 20-21, para 57 and above n 38, *Albert and Le Compte*, 543, para 31 (members of the judiciary); above n 38, *Sramek*, para 40 (Judge of Innsbruck Court of Appeal and agricultural expert); above n 38, *Feldbrugge*, 436, para 42 (President of Appeals Board); above n 38, *Ettl*, 267, para 37 (judges of Regional Court and Court of Appeal); above n 38, *Langborger*, 425, para 31 (professional judges).

member's term of office; the existence of guarantees against outside pressures; and whether the body presents an appearance of independence.[216]

The fact that a member of a tribunal is appointed by the executive or by a party to the dispute will not in itself raise a doubt as to that member's independence, provided that adequate safeguards are in place to ensure that the member will act independently and not as a representative of the executive or of that party. In *Campbell and Fell*, for example, although the members of the prison's Board of Visitors were appointed by the Home Secretary, who was himself responsible for the administration of prisons, their independence from the executive could not be called into question on that basis alone; in the Court's view, "to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not 'independent'".[217] Moreover, although the Home Office had the power to issue broad guidelines to Boards, "[the Boards were] not subject to its instructions in their adjudicatory role".[218] This provided an important guarantee that the members of the Board would not act as agents of the executive when performing their adjudicatory function. The executive could not dictate to the Board how it should determine any particular case. This guarantee was also present in *Sramek's* case, where the executive was prohibited by law from giving instructions to the government-appointed members of the Regional Real Property Transactions Authority.[219]

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216 Above n 38, *Campbell and Fell*, 198-199, para 78.

217 Above n 38, *Campbell and Fell*, 199, para 79.

218 Above n 38, *Campbell and Fell*, 199, para 79.

219 Above n 38, *Sramek*, 359, para 26, 363, para 38, 364, para 41. See also above n 38, *Lithgow*, 396, para 202; above n 38, *H* v *Belgium*, 350, para 51; and above n 38, *Ettl*, 267, para 38.

Furthermore, in order for a tribunal to be independent it is necessary that its members' term of office be of adequate duration and that the members be virtually irremovable during the term. These safeguards are designed to ensure that the executive does not influence a tribunal's decisions by threatening its members with dismissal. What constitutes an "adequate" duration of term will vary from case to case; terms of three,[220] five[221] and six[222] years have been held to be adequate. As regards irremovability, the Court has indicated that the mere existence of a power of removal does not compromise a tribunal's independence, provided that the power is only very rarely exercised in practice. In *Campbell and Fell*, for example, the members of the prison Board of Visitors held office for a term of three years or such less period as the Home Secretary might appoint.[223] Although the Home Secretary could require a member to resign, in practice "this would be done only in the most exceptional circumstances".[224] In the Court's view, this unlikely possibility did not threaten the independence of the Board:

> It is true that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6(1). However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present.[225]

This passage is difficult to reconcile with the decision in *Benthem*, where the Court insisted upon compliance with Article 6(1) both in practice and in form.[226]

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220 See above n 38, *Sramek*, 363, para 38. In above n 38, *Campbell and Fell*, 199, para 80, where the members of the prison Board of Visitors held office for a term of three years or such less period as the Home Secretary might appoint, the Court considered that the term of office was "admittedly relatively short", but for the "very understandable reason" that the members were unpaid for their service.

221 See above n 38, *Ettl*, 268, para 41.

222 See above n 38, *Le Compte, Van Leuven and De Meyere*, 20-21, para 57; above n 38, *Albert and Le Compte*, 543, para 31.

223 Above n 38, *Campbell and Fell*, 199, para 80.

224 Above n 38, *Campbell and Fell*, 199, para 80.

225 Above n 38, *Campbell and Fell*, 199, para 80 (footnotes omitted).

226 See above nn 199-201 and accompanying text.

An additional and significant requirement is that the tribunal present the *appearance* of independence. A tribunal's composition will be particularly important in this regard, because a balanced membership will help to give the impression of independence.[227] Although there is no objection in principle to the presence of civil servants on a tribunal,[228] their presence may raise a doubt as to the tribunal's independence in a particular case. In *Sramek* v *Austria* the Court held that a regional authority's independence was compromised by the inclusion of civil servants among its membership because the government was itself a party to the dispute and one of the civil servants, who occupied the key position of *rapporteur* to the authority, had the government's representative as his hierarchical superior.[229] Even though the government's representative was prohibited by law from giving and in fact did not give instructions to the *rapporteur*,[230] the Court could not overlook the impression created by the *rapporteur's* subordinate status *vis-à-vis* the government's representative:

> Where, as in the present case, a tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, *vis-à-vis* one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation seriously affects the confidence which the courts may inspire in a democratic society.[231]

It follows that it may be insufficient in some circumstances even to show that a tribunal did in fact act independently. The appearance of independence is as important as independence in fact. At the same time it should be noted that

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227 Above n 38, *Le Compte, Van Leuven and De Meyere*, 20-21, para 57; above n 38, *Albert and Le Compte*, 543, para 31; above n 38, *Sramek*, 363, para 39; *Ettl*, 266-267, para 36.

228 Above n 38, *Ringeisen (No 1)*, 490, para 95; above n 38, *Ettl*, 267-268, paras 38-40.

229 Above n 38, *Sramek*, 364, para 41.

230 Above n 38, *Sramek*, 358-359, para 26, 364, para 41.

231 Above n 38, *Sramek*, 364, para 42 (footnotes omitted). Moreover, the mere fact that one member as a lawyer may have received instructions from the government in the past did not raise a doubt as to his independence: above n 38, *Sramek*, 363, para 40. Nor was there any difficulty in that the chairman of the regional authority happened to be a mayor; although municipalities exercised their powers subject to the government's supervision, the authority's activities did not involve the exercise of any such powers, and the mayor could not be subject to supervision in matters falling outside the ambit of those powers: above n 38, *Sramek*, 363-364, para 40.

the circumstances in *Sramek* were special. The civil servant occupied the strategically-important position of *rapporteur*; had his position been less pivotal, there may have been less reason to doubt the independence of the authority as a whole.[232]

In other circumstances, however, there may still be an appearance of independence despite relatively close links between the tribunal and a party to the dispute. In *Campbell and Fell*, the Board of Visitors of the prison maintained contacts with the executive and the prison administration when acting in its supervisory role. This gave the inmates the impression that the Boad was closely associated with the executive and the prison administration. The Court, however, did not consider that these sentiments on the part of inmates were enough for there to be a lack of independence: such sentiments were "probably unavoidable in a custodial setting"; and it was significant that the Board had contact with the inmates also.[233] In the Court's view, in order to show lack of independence the inmates would have needed to be "reasonably entitled, on account of frequent contacts between a Board and the authorities, to think that the former was dependent on the latter"; and the mere fact of these contacts could not justify such an impression, especially given that they existed with the inmates themselves.[234]

Parallels may be drawn between the Board of Visitors in *Campbell and Fell* and a government minister. Consider the position of a minister who hears an appeal from a decision of his departmental officials. Although the minister may be regarded by the individual who brings the appeal as lacking in independence because of what is viewed as the close relationship between the

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232 Compare above n 38, *Ettl*, 267, paras 38-39.

233 Above n 38, *Campbell and Fell*, 200, para 81.

234 Above n 38, *Campbell and Fell*, 200, para 81.

minister and his departmental officials, such sentiments on the part of the individual will not be enough in themselves to establish a lack of independence. Applying the test formulated in *Campbell and Fell*, it would be necessary to show that the impression was reasonable and based on frequent contacts between the minister and his officials. There is, accordingly, an objective element which must be satisfied. In circumstances such as these, it may be difficult to show that the impression is reasonable, especially given that the minister is the hierarchical superior of the departmental officials. In a *Sramek*-type situation, however, where the tribunal member is subordinate to one of the parties to the dispute, such an impression is more likely to be well-founded.

### 6 "*impartial*"

Article 6(1) expressly requires the tribunal to be "impartial" as well as "independent". Although Article 6(1) appears to treat independence and impartiality as separate and distinct concepts, in some circumstances the two concepts may be difficult to dissociate. If a tribunal is not independent of the executive or of both parties to the dispute, it is likely that the tribunal's impartiality will also be called into question.[235] None the less, the Court has given separate consideration to the meaning of the term "impartial" in Article 6(1).

A tribunal's impartiality is assessed both subjectively and objectively.[236] Subjective impartiality refers to the personal impartiality of the tribunal's members, who are presumed to be impartial until there is proof to the

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235 See above n 38, *Le Compte, Van Leuven and De Meyere*, 20, para 55; above n 38, *Sramek*, 363-364, paras 38-42; Above n 38, *Ettl*, 266-267, paras 36-41; Above n 38, *Langborger* v *Sweden*, 425, para 32.

236 See above n 38, *Campbell and Fell*, 200-201, paras 84-85.

contrary.[237] Subjective impartiality, accordingly, concerns the impartiality in fact of the tribunal's members. Objective impartiality, by contrast, refers to the appearance of impartiality and to the internal organisation of the tribunal.[238] This is also known as "structural" impartiality.[239] In some cases, a tribunal's objective impartiality speaks for itself; this will usually be a court of the classic kind, or a tribunal composed of members of the judiciary.[240] In other cases, the balanced membership of the tribunal and the manner of appointment of its members may give the assurance of impartiality.[241]

In principle, the participation of tribunal members at an earlier stage of proceedings does not raise a doubt as to the tribunal's impartiality. In *Ringeisen* v *Austria (No 1)*,[242] for example, there was no difficulty in that two members of the Regional Commission had participated in an earlier decision of the Commission on the same case. In the Court's view,

> . . . it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority.[243]

In *Gillow's* case, furthermore, the fact that the Royal Court of Guernsey sat in almost the same composition in two related cases, one civil, the other criminal, was not in itself a reason "capable of giving rise to legitimate doubts

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237 Above n 38, *Le Compte, Van Leuven and De Meyere*, 21, para 58; above n 38, *Albert and Le Compte*, 543, para 32; above n 38, *Campbell and Fell*, 200, para 84; above n 38, *H* v *Belgium*, 350, para 52; above n 38, *Gillow*, 358-359, para 73.

238 See above n 38, *Albert and Le Compte*, 543, para 32; above n 38, *Campbell and Fell*, 200, para 85; above n 38, *Lithgow*, 396, para 202; and above n 38, *H* v *Belgium*, 350, para 52.

239 See above n 38, *H* v *Belgium*, 350, para 52.

240 Above n 38, *Le Compte, Van Leuven and De Meyere*, 21, para 58 (Court of Cassation); above n 38, *Feldbrugge*, 436, para 42 (President of Appeals Board).

241 See above n 38, *Albert and Le Compte*, 543-544, para 32 (members appointed by party to dispute acted in personal capacity only) and bove n 38, *Lithgow*, 396, para 202 (members appointed in consultation with parties to dispute).

242 Above n 38, *Ringeisen (No 1)*.

243 Above n 38, *Ringeisen (No 1)*, 490-491, para 97.

as to the impartiality of the Royal Court".[244] Although there was a factual connection between the two appeals, they concerned two different people and two different questions. Moreover, it was common in the Convention countries, the Court noted, that higher courts deal with similar or related cases in turn.[245]

The position is likely to be different in a case where a judge is hearing an application for leave to appeal from his or her own judgement. In such a case, there may be stronger grounds for arguing that there is a lack of objective impartiality. The connection between the original hearing and the application for leave to appeal may be so close as to give rise to legitimate doubts as to the judge's impartiality. An appearance of impartiality might, in such circumstances, be difficult to sustain.

The difficulties associated with presenting an appearance of impartiality are well-illustrated by *Langborger* v *Sweden*.[246] In that case, the applicant required the approval of the Housing and Tenancy Court for the deletion of a "negotiation clause from his lease. The Housing and Tenancy Court was composed of two professional judges and two lay assessors. The lay assessors were nominated by the Swedish Federation of Property Owners and the National Tenants' Union respectively, and then appointed by the Government. Only the lay assessors' impartiality was at issue.[247]

Although, in the Court's view, the lay assessors were in principle extremely well-qualified to participate in the adjudication of disputes between landlords

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244 Above n 38, *Gillow*, 358, para 73.

245 Above n 38, *Gillow*, 358, para 73. Compare above n 38, *Campbell and Fell*, 200, para 85.

246 Above n 38, *Langborger*.

247 This was another case in which it was difficult to dissociate impartiality from independence: above n 38, *Langborger*, 425, para 32.

and tenants, their objective impartiality was open to doubt in these particular circumstances. The lay assessors were nominated by and had close links with the landlords' and tenants' organisations, which had an interest in the continued existence of the negotiation clause, since they derived their very existence from rent negotiations. Since the applicant sought the deletion from his lease of the negotiation clause,

> . . . he could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim.[248]

It is noteworthy that the presence of two professional judges on the Housing and Tenancy Court made no difference to the result. The Court's objective impartiality could not be sustained in circumstances where its decision had direct consequences for the interests of the landlords' and tenants' associations with which two of the Court's members had close links. However, it would not be every case where circumstances such as these arose. Indeed, the European Court was careful to point out that in principle the Housing and Tenancy Court was well-qualified to adjudicate upon disputes between landlords and tenants. This illustrates that each case demands a careful study of the relevant relationships in order to assess whether doubts as to a tribunal's impartiality are justified.

## III SECTION 27(1) OF THE NEW ZEALAND BILL OF RIGHTS

This Part of the paper focuses on the meaning of section 27(1) of the New Zealand Bill of Rights, which guarantees that the principles of natural justice shall be observed by any tribunal or other public authority which has the power to make a determination in respect of a person's rights, obligations, or

248 Above n 38, *Langborger*, 426, para 35.

interests protected or recognised by law. The Part argues that section 27(1) must be interpreted consistently with Article 14(1) of the Covenant; and it explores some of the implications of this interpretation for administrative decision-making processes in New Zealand.

### *A Proper Approach to Interpretation*

Section 27(1) of the Bill of Rights is the provision which is designed to implement Article 14(1) of the Covenant in New Zealand's domestic law.[249] Section 27(1) provides:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

The meaning of section 27(1) has not yet been tested in the Courts. However, the Court of Appeal has indicated the appropriate approach to the interpretation of the Bill of Rights in general. In interpreting the Bill of Rights, it is important to consider its "nature and subject matter and special character".[250] Of relevance is the Long Title which identifies the purposes of the Bill of Rights:

> (a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

The Long Title has two implications for the interpretation of the Bill of Rights. First, paragraph (a) expresses "a positive commitment to human rights and fundamental freedoms" and reflects the "spirit [in which]

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249 *A Bill of Rights For New Zealand: A White Paper*, New Zealand. Parliament. House of Representatives. 1985. AJHR. A 6. p 109. Article 14(1) extends the same guarantee of a fair hearing to persons facing a criminal charge. Section 25(a) of the Bill of Rights implements that aspect of Article 14(1).

250 *Noort* v *Ministry of Transport; Curran* v *Police* [1990-92] 1 NZBORR 97, 151.

interpretation questions are to be resolved".[251] It requires that the Bill of Rights "be construed generously" in a manner which is "suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".[252] A rights-centred approach is necessary.[253]

Secondly, paragraph (b) of the Long Title recognises that the Bill of Rights was enacted to affirm New Zealand's commitment to the Covenant. This confirms that "[i]n approaching the Bill of Rights it must be of cardinal importance to bear in mind the antecedents".[254] The provisions of the Covenant are of central importance to the proper interpretation of the Bill of Rights. Furthermore, it is implicit in paragraph (b) that the Bill of Rights reflects a commitment to international human rights standards.[255] This means that the practice of other nations in the sphere of human rights is highly relevant. It is also significant that the Court of Appeal has said: "[w]hether a decision of the Human Rights Committee is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debatable, but at least it must be of considerable persuasive authority".[256] It follows that the practice of the Committee under Article 14(1) of the Covenant is of central importance to the proper interpretation of section 27(1) of the Bill of Rights.

Some may argue that section 27(1) of the Bill of Rights represents little if any advance on the right to natural justice at Common Law.[257] Because section 27(1) appears to have been formulated by reference to the Common Law, so

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251 Above n 250.

252 *Flickinger* v *Crown Colony of Hong Kong* [1990-92] 1 NZBORR 1, 4; above n 250, 139-140.

253 *R* v *Goodwin* (1992) 9 CRNZ 1, 45-46 per Richardson J.

254 Above n 250, 142.

255 This is reflected in the increasing extent to which the Court of Appeal is drawing upon international materials for guidance in interpreting the Bill of Rights: see for example *R* v *Goodwin (No 2)* [1993] 2 NZLR 390, 393-394.

256 Above n 255, 393.

257 See J C Hay *Section 27 of the New Zealand Bill of Rights Act 1990 The Right to Justice: Something Old, Something New* (LLM Research Paper, Victoria University of Wellington, 1991) 8-23.

the argument runs, the Common Law is determinative of section 27(1)'s meaning. The White Paper commentary on the draft Bill of Rights supports this argument:

> [Section 27(1)] largely reflects basic principles of the common law . . . . In a general sense the provision will not change the courts' normal and long-standing task, except to the extent that the principles will now have an enhanced status.[258]

However, this argument is misguided. It is clearly erroneous to interpret the Bill of Rights by reference to the Common Law. The Court of Appeal has stated emphatically that the Bill of Rights must be interpreted by reference to the provisions of the Covenant and internationally-proclaimed human rights standards.[259] This approach to interpretation is supported by paragraph (b) of the Long Title, which states that the Bill of Rights is an Act to "affirm New Zealand's commitment to the [Covenant]". To interpret section 27(1) by reference to the Common Law would clearly undermine paragraph (b) of the Long Title. Given that section 27(1) is designed to implement Article 14(1) of the Covenant in New Zealand's domestic law,[260] section 27(1) must be interpreted by reference to Article 14(1), not by reference to the Common Law.

It follows that section 27(1) of the Bill of Rights falls to be interpreted by reference to the conclusions reached in Part II of this paper. The practice of the Human Rights Committee under Article 14(1) of the Covenant, taken together with the jurisprudence of the European Court of Human Rights under Article 6(1) of the European Convention, will be of central importance

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258 Above n 249, p 110.

259 See *R* v *Butcher and Burgess* [1990-92] 1 NZBORR 59, 70 per Cooke P.

260 See above n 249.

to the proper interpretation of section 27(1).[261] As will be seen, the practice of the Committee and the jurisprudence of the European Court have far-reaching implications for the meaning of section 27(1). Far from merely codifying the Common Law right to natural justice, section 27(1) of the Bill of Rights, by affirming New Zealand's commitment to Article 14(1) of the Covenant, affords much more extensive procedural protections to those affected by administrative processes than does the Common Law.

### *B Impact of Article 14(1) of the Covenant on the Meaning of Section 27(1)*

As will be seen, the right to natural justice under section 27(1) differs from the right to natural justice at Common Law in two important respects. First, the right applies in a wider range of situations than it does at Common Law; and, secondly, the content of the right is more extensive than it is at Common law. Both of these differences are due to the impact of Article 14(1) of the Covenant upon the meaning of section 27(1) of the Bill of Rights.

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261 Moreover, the New Zealand courts can also be expected to refer to the jurisprudence of the Canadian Supreme Court under s 7 of the Canadian Charter of Rights and Freedoms when interpreting s 27(1) of the Bill of Rights. Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Significantly, the Canadian Supreme Court has held that s 7 has substantive as well as procedural dimensions: *Reference re Section 94(2) of Motor Vehicle Act (British Columbia)* [1985] 2 SCR 486; *Morgentaler, Smoling and Scott* v *The Queen* [1986] 1 SCR 30. See also *Singh* v *Minister of Employment and Immigration* [1985] 1 SCR 177. Section 7 has recently been considered by the Supreme Court in the following cases: *R* v *Desousa* [1992] 2 SCR 944; *R* v *Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606; *Schater* v *Canada* [1992] 2 SCR 679; *R* v *Rube* [1992] 3 SCR 159; *Idziak* v *Canada* [1992] 3 SCR 631; *R* v *Morales* [1992] 3 SCR 711; *R* v *Pearson* [1992] 3 SCR 665; *R* v *Généreux* [1992] 1 SCR 259; *Chiarelli* v *Canada (Minister of Employment and Immigration)* [1992] 1 SCR 711; *R* v *Van Haarlem* [1992] 1 SCR 982. See generally E Colvin "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 Can Bar Rev 560; R E Hawkins "Interpretivism and Sections 7 & 15 of the Canadian Charter of Rights and Freedoms" (1990) 22 Ott L Rev 275; D J Mullan "The Impact of the *Charter* on Administrative Procedure: The Meaning of Fundamental Justice" in *Public Interest v Private Rights: Striking the Balance in Administrative Law* (Pitbaldo Lectures, Manitoba, 1990) 29.

*1 When does section 27(1) apply?*

Section 27(1) requires that the "principles of natural justice" be observed by "any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law". In what circumstances does section 27(1) require the principles of natural justice to be observed? The key words in the section, it is submitted, are "determination in respect of that person's rights, obligations, or interests protected or recognised by law". There must be a "determination"; and it must be in respect of a person's "rights, obligations, or interests protected or recognised by law". How does Article 14(1) of the Covenant assist us to determine the meaning of these words?

It will be recalled that Article 14(1) of the Covenant applies whenever a dispute arises in respect of a person's "rights and obligations in a suit at law".[262] This is implicit in the word "determination", since logic suggests that a dispute must have arisen in respect of which the determination is required. Section 27(1) of the Bill of Rights also refers to a "determination". Section 27(1) must be interpreted consistently with Article 14(1). It follows that section 27(1) also presupposes that a dispute has arisen in respect of which the determination is required.

Moreover, it will be recalled that, under Article 14(1), the dispute must concern "rights and obligations"; and those rights and obligations must be rights and obligations "in a suit at law". If either of these conditions are not met, Article 14(1) will not apply. Under section 27(1) of the Bill of Rights, by contrast, the dispute must be "in respect of [a] person's rights, obligations, or

262 See above, text accompanying nn 39-40.

interests protected or recognised by law". Can these words in section 27(1) be interpreted consistently with "rights and obligations in a suit at law"?

It is apparent that the formulation in section 27(1) differs from that in Article 14(1). None the less, the formulation in Article 14(1), it is suggested, remains highly relevant to the interpretation of the formulation in section 27(1). Section 27(1) is designed to implement Article 14(1) in New Zealand's domestic law. It follows that the formulation in section 27(1) must, if at all possible, be given an interpretation which ensures that section 27(1) applies in as wide a range of situations as does Article 14(1).

In what range of situations does Article 14(1) apply? It will be recalled that Article 14(1) extends only to disputes over rights and obligations "which can be said, at least on arguable grounds, to be recognised under domestic law".[263] Furthermore, the dispute may concern either an interference with an existing right, the scope of an existing right, the mode of exercise of an existing right, or whether a right actually exists.[264] It follows, significantly, that Article 14(1) may apply to the exercise of discretions. The analysis under Article 14(1) is as follows. Where a person claims that a discretion should be exercised in her favour, a dispute arises as to whether the claimant has a right to have the discretion exercised in her favour. This is a dispute as to whether a right actually exists. Provided that it can be said, on arguable grounds, that the claimant has a right to have the discretion exercised in her favour, Article 14(1) may apply,[265] and the various requirements of Article 14(1) will need to be observed in the determination of the dispute. It will be a rare case where a person is unable to mount an arguable claim that she is entitled to have the

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263 See above, text accompanying nn 41.

264 See above, text accompanying nn 42.

265 Provided also that the right, the existence of which is in dispute, is a right "in a suit at law": see above nn 39-40.

discretion exercised in her favour, since the European cases show that even an apparently unfettered discretion may be the source of an arguable right.[266]

What impact does this have upon the interpretation of section 27(1)? It means that the formulation contained in section 27(1) ("in respect of [a] person's rights, obligations, or interests protected or recognised by law") must, if at all possible, be interpreted so as to ensure that section 27(1) also applies whenever a person claims on arguable grounds that she has a right to have a discretion exercised in her favour. Can the formulation in section 27(1) be so interpreted? It is submitted that it can be. The word "interests", it is suggested, is able to accomodate the situation where a person claims on arguable grounds that she has a right to have a discretion exercised in her favour. The words "rights and obligations", moreover, may be treated as referring to disputes in respect of existing rights and obligations. The correct interpretation, it is submitted, is as follows:

(a) Where a dispute arises in respect of either an interference with an existing right, the scope of an existing right, or the mode of exercise of an existing right, that may be regarded as a dispute in respect of a person's "rights . . . protected or recognised by law" within the meaning of section 27(1).

(b) Where a dispute arises as to whether a right actually exists, and it can be said on arguable grounds that the right exists, that may be regarded as a dispute in respect of a person's "interests protected or recognised by law" within the meaning of section 27(1).

It is important to note that "interests protected or recognised by law" in section 27(1) cannot be equated with "legitimate expectations". For a

266 See above, text accompanying nn 52.

legitimate expectation to be generated, it is usually necessary for a decision-maker to have given an undertaking or engaged in some past practice which leads the claimant to believe that the discretion will be exercised in his or her favour. These elements of undertaking and past practice are not prerequisites for the application of Article 14(1) of the Covenant and, accordingly, cannot be prerequisites for the application of section 27(1) of the Bill of Rights. All that is required is that there be arguable grounds on which it can be said that the claimant is entitled to have the discretion exercised in his or her favour; there is no additional requirement of an undertaking or past practice on the part of the decision-maker.

It follows that the right to natural justice under section 27(1) of the Bill of Rights must apply in a wider range of situations than it does at Common Law. Although, in determining whether the right to natural justice applies, the courts no longer require that a dispute relate to an existing right,[267] it will usually be necessary for the claimant to establish, at the very least, that he has a legitimate expectation which deserves the protection of natural justice.[268] Under section 27(1) of the Bill of Rights, a claimant is not required to establish a legitimate expectation. It is only necessary that he be able to show, on arguable grounds, that he is entitled to have the discretion exercised in his favour.

It will be recalled that, under Article 14(1) of the Covenant, the rights and obligations to which the dispute relates must be rights and obligations "in a suit at law".[269] The corresponding word in Article 6(1) of the European Convention is "civil". As has been seen, the European Court of Human Rights

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267 See *Daganayasi* v *Minister of Immigration* [1980] 2 NZLR 130, 143; *Kioa* v *West* (1985) 159 CLR 550, 616-617.

268 See *South Australia* v *O'Shea* (1987) 163 CLR 378, 386.

269 See above, text accompanying nn 39-40.

has equated "civil" rights with "private" rights, thereby introducing a problematic distinction public-private distinction, although the Court has increasingly tended to blur the distinction.[270] There are indications, moreover, that the Human Rights Committee does not intend to adopt the public-private distinction in its interpretation of the words "in a suit at law" under Article 14(1) of the Covenant.[271]

Should the New Zealand courts adopt a public-private distinction in interpreting the words "rights, obligations, or interests protected or recognised by law" in section 27(1) of the Bill of Rights? It is submitted that they should not do so. The wording of section 27(1) does not suggest that any such distinction was intended to be adopted. Moreover, it would be erroneous to import this distinction on the basis that Article 14(1) of the Covenant is qualified by it. The provisions of the Covenant cannot be used to justify a restrictive interpretation of the provisions of the Bill of Rights. This is made plain by the Covenant itself, Article 5(2) of which provides:

> There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Accordingly, any restriction upon the rights contained in the Bill of Rights "on the pretext that the . . . Covenant . . . recognizes them to a lesser extent" is impermissible. The wording of section 27(1) cannot be read down by reference to any public-private distinction as may exist in Article 14(1) of the Covenant.

It is also noteworthy that section 27(1) applies to disputes "in respect of [a] person's" rights, obligations or interests. The words "in respect of [a] person's"

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270 See above, text accompanying nn 87-110.

271 See above, text accompanying nn 39-40.

raises the question whether section 27(1) can apply in situations where a decision affects the rights, obligations or interests of many rather than only a few people or, for that matter, just one person. At Common Law the courts have always distinguished between "an exercise of a power on a large scale and one relating solely to the treatment of an individual, the former being more difficult for the [courts] to control".[272] It is submitted, however, that section 27(1) of the Bill of Rights requires the courts to abandon this approach. The European Court of Human Rights has refused to accept that Article 6(1) of the European Convention cannot apply in situations where a great many people are affected by the exercise of a power. In *Allan Jacobsson* v *Sweden*[273] the Court held that Article 6(1) applied to a dispute between the authorities and the applicant in respect of prolonged building prohibitions, despite the fact that the prohibitions affected a great number of property owners. In the Court's view, there could be "no doubt that the prohibitions severely restricted" the applicant's right and that "the outcome of the proceedings whereby he challenged their lawfulness was directly decisive for his exercise thereof".[274] Section 27(1) of the Bill of Rights falls to be interpreted in the light of this jurisprudence. Accordingly, in determining whether a dispute is "in respect of [a] person's" rights, obligations or interests within the meaning of section 27(1), it is necessary to focus on whether the decisions complained of have serious and direct consequences for the rights, obligations or intertests of the person concerned. The fact that many others have been similarly affected may have consequences for the *content* of the right to natural justice, but it cannot preclude its *application*.[275]

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272 Above n 267, *Daganayasi*. See also *Ridge* v *Baldwin* [1964] AC 40, 72; above n 267, *Kioa*, 620.

273 Above n 38, *Allan Jacobsson*.

274 Above n 38, *Allan Jacobsson*, 70, para 70.

275 The White Paper Commentary on the Draft Bill of Rights expressly supports the view that s 27(1) does not apply where the decision affects the many rather than the few:

> It is not envisaged that the provision will normally apply where the determination is a general one affecting persons as a class or indirectly - for example a change in local body rates. The phrase "in respect of" is designed to achieve this.

It emerges that the right to natural justice under section 27(1) of the Bill of Rights applies in a much wider range of situations than it does at Common Law. Its application is not restricted to situations where the dispute in question concerns existing rights or even legitimate expectations. Nor is the application of natural justice limited to those cases where only one person as opposed to many people are affected by the impugned decisions. Section 27(1) applies whenever there is a dispute in respect of rights which can be said, at least on arguable grounds, to exist in law.

### 2 *What does section 27(1) guarantee?*

Section 27(1) guarantees that the "principles of natural justice" must be observed by "any tribunal or other public authority which has the power to make a determination" in respect of a person's rights, obligations or interests. What impact does Article 14(1) of the Covenant have upon the meaning of this guarantee? Article 14(1) guarantees the right to have a dispute determined by a "tribunal" which is independent and impartial and which meets the various requirements of the Article. Section 27(1) is designed to implement Article 14(1) of the Covenant in New Zealand's domestic law and, accordingly, must be interpreted consistently with that Article. In particular the words "principles of natural justice" must be interpreted by reference to Article 14(1). It is submitted that the words "principles of natural justice" can sustain an interpretation which accomodates the requirements of Article 14(1).

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However, Fogarty takes the view that s 27(1) has the potential for wider application:

> . . . given the ability to read the section in the plural and the indeterminate character of the phrase "interests protected or recognised by law", there is scope to apply the section to policy-formation processes eg what about the principles of natural justice being applied to a review of the merits of keeping open a long-term residential institution for disabled people?

J Fogarty "David and Goliath: the State of the Play of Judicial Review in the '90s" [1991] NZLJ 338, 340.

It will be recalled that, under Article 14(1) of the Covenant, the body which has the power to determine a dispute relating to rights and obligations in a suit at law must act as an independent and impartial tribunal when determining the dispute.[276] It matters not that the body performs non-judicial functions at other times, provided that, when performing its judicial function, the body acts independently and impartially and exhibits the other features which are common and fundamental to "tribunals" in the substantive sense of the term.[277] This requirement of Article 14(1) of the Covenant must have an impact upon the meaning of the concept of the "principles of natural justice" in section 27(1) of the Bill of Rights. The concept of the "principles of natural justice" must be interpreted consistently with the requirements of Article 14(1). The concept is inherently flexible, and can accomodate all the aspects of fair procedure which Article 14(1) guarantees. It follows that, in order to observe the "principles of natural justice" within the meaning of section 27(1), a "tribunal or other public authority" must, when determining a dispute, act as an "independent and impartial tribunal" within the meaning of Article 14(1) of the Covenant.

It will be recalled that the concepts of a "tribunal", of "independence" and of "impartiality" in Article 14(1) are each have fundamental features. The concept of a "tribunal" in the substantive sense of the term denotes bodies which are independent of the executive and of the parties to the dispute, whose members' term of office is of adequate duration, and whose proceedings afford the necessary guarantees.[278] Given that section 27(1) of the Bill of Rights must be interpreted consistently with Article 14(1) of the

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276 See above, text accompanying nn 189-248.

277 See above, text accompanying nn 210-212.

278 See below, text accompanying nn 189-213.

Covenant, these features must be regarded as a part of the "principles of natural justice" which decision-makers are required by section 27(1) to observe. The requirement which has the most far-reaching implications for administrative decision-making is the requirement to act independently of the executive. Many decisions are taken in the performance of an administrative function as part of the executive. Section 27(1) requires, however, that the person or body in which the decision-making power has been reposed must act judicially and independently of the executive when making a determination in respect of a person's rights, obligations or interests. As *Campbell and Fell's* case indicates,[279] the fact that a person or body performs two functions - one administrative, one judicial - does not cause difficulty, provided that the two functions are kept separate. It is necessary, however, that an appearance of independence be maintained;[280] even if there is independence in fact, the nature of the links between the decision-maker and the executive may generate such doubt as to invalidate the decision.

Moreover, the test for impartiality under Article 14(1) of the Covenant must be incorporated into the "principles of natural justice" under section 27(1) of the Bill of Rights. What is important to note is that the tests for impartiality under Article 14(1) and, hence, section 27(1) are markedly different from the "real likelihood of bias" and "reasonable suspicion of bias" tests to which the Common Law has always adhered.[281] As has been seen, impartiality under Article 14(1) is assessed both subjectively and objectively. Although a lack of subjective impartiality is always difficult to prove, because the personal impartiality of the members of a tribunal is presumed, the test for a lack of objective impartiality, which focuses on the appearance of impartiality and the

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279 See above, text accompanying nn 210-212.

280 See above, text accompnaying nn 227-234.

281 See *Anderton* v *Auckland City Council* [1978] 1 NZLR 657. See further G D S Taylor *Judicial Review : A New Zealand Perspective* (Butterworths, Wellington, 1991) 288-292, paras 13.48-13.51.

internal organisation of the tribunal, is easier to satisfy.[282] It is by reference to these tests that the impartiality of decision-makers must be assessed.

In a recent case concerning alleged pre-determination by a judge, the Court of Appeal applied the Common Law tests for bias. *Matua Finance Ltd* v *Equiticorp Industries Group Ltd*[283] involved an application for the production of documents claimed to be privileged on the basis of the fraud exception to a claim of legal professional privilege. There was the possibility that the judge, in determining whether the exception applied, might decide to exercise the power to inspect documents under Rule 311(1) of the High Court Rules. Counsel for the defendants contended that the application should be referred to another judge. The question of fraud was the or a main issue in the litigation; if the judge were to decide to inspect the documents and then to rule that they should be disclosed to the plaintiffs, so the argument ran, the impression could be created that he had predetermined the fraud issue. The Court of Appeal did "not accept that any reasonable, fair-minded and informed observer would consider that, by making the kind of *prima facie* ruling now a possibility, the Judge would display any predetermination or appearance of bias".[284] The Court refrred also to the "real suspicion of bias" and "real danger or likelihood of bias" tests for lack of impartaility.[285] Although it may not have changed the result in the case, the Court of Appeal in *Matua*, it is submitted, should have invoked section 27(1) of Bill of Rights in dealing with the predetermination issue. In view of section 27(1), it is no longer appropriate to apply the Common Law tests for bias; it is necessary to apply the tests for subjective and objective impartiality as formulated by the European Court of Human Rights.

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282 See below, text accompanying n 238.

283 Unreported, 28 July 1993, Court of Appeal CA 165/93.

284 Above n 283, 7.

285 Above n 283, 7.

It follows that, under section 27(1) of the Bill of Rights, the content of the right to natural justice is more extensive than it is at Common law. This is because section 27(1) must be interpreted consistently with Article 14(1) of the Covenant, which it is designed to implement in New Zealand's domestic law. Article 14(1) requires that the body which has the power to determine the dispute must act as an independent and impartial tribunal. The result is a set of procedural safeguards which far exceeds the protections afforded by the Common Law.

## IV CONCLUSION

Article 14(1) of the International Covenant on Civil and Political Rights provides that, "[i]n the determination of his rights and obligations in a suit at law, everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". This means that, wherever a dispute arises in respect of rights and obligations which can be said, at least on arguable grounds, to exist under domestic law, there must be a possibility of submitting the dispute for determination to a tribunal which meets the various requirements of Article 14(1). This interpretation of Article 14(1) is strongly supported by the jurisprudence of the European Court of Human Rights under Article 6(1) of the European Convention.

It has been argued in this paper that this has direct consequences for the interpretaion of section 27(1) of the New Zealand Bill of Rights. Section 27(1) is designed to implement Article 14(1) of the Covenant in New Zealand's domestic law. Section 27(1) must be interpreted consistently with Article 14(1). It follows that section 27(1) will apply in the same range of situations, and provide the same procedural guarantees, as does Article 14(1) of the Covenant.

This has far-reaching implications. It means that the right to natural justice under section 27(1) of the Billl of Rights provides far greater protection to those affected by administrative processes than does the Common Law. Far from being a codification of the Common Law, section 27(1) is a new charter of administrative justice.

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