

Article 6-1 of the ECHR and the law applicable to the prison system

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While judicialisation¹ signals the abandonment of the Administrative State and the quest for a new form of democracy², questioning the role of the provisions of article 6 guaranteeing the right to a fair trial³, when litigating cases arising in detention, is indicative of the degree of integration of the prison system into the common space, beyond the assertion of the principle of retention on the part of prisoners of their fundamental rights, except for freedom of movement.

In this context, this European standard is a particularly reliable indicator for three reasons. First of all, it is a priori immune to the historical inertia that affects the legal frameworks of the prison

¹ A movement that is described as comprising three phenomena: the tendency to make the judge an indispensable arbiter of matters that up to that moment had been autonomous (parliamentary work, foreign policy, etc), the increased volume of litigation, which tends to turn justice into a «consumer good», and the penetration of jurisdictional control into the governmental and international realm, see A. Garapon (dir.), *La prudence et l'autorité : l'office du juge au XXI^e siècle*, IHEJ Paris 2013

² Ibid.

³ In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

system⁴. This standard functions largely according to its own specific legal categories, which are distinguished from the provisions of national law. As a matter of fact, in order to avoid that a State hides behind its own definition of domestic law so that it can escape compliance with its obligations under the Convention, and in order to overcome the diversity of national legal systems, the Court has made use of “autonomous concepts”, i.e. “*concepts that the judge decouples from the national legal context, with a view to infuse them with a "European" meaning that is valid for all signatory States*”⁵. At a later stage article 6 has largely proved its inclination to lead to major legal innovations. It has led to deep changes in all legal fields, therefore it can undoubtedly be described as the most powerful harmonization tool⁶. At last, European citizens have been very successful in using it, as the findings on such violations represented 24.14% of the overall judgements delivered by the Court in 2015⁷.

Taking into account the wording of article 6(1), the issue was first raised of including prisons into the scope of application of the article. As a matter of fact, the Court asserted this issue at a very early stage, « *article 6 par. 1 (art. 6-1) applies only to the determination of "civil rights and obligations or of any criminal charge". As a consequence, certain "cases" are not comprised within either of these categories and thus fall outside the Article's scope* »⁸. From this point of view, the Commission on Human Rights⁹ determined that the cases relating to the prison system fall within the scope of public law, and are therefore not subject to the criminal and civil limbs of article 6(1). This is the case, “*with regards to a situation in which the prisoner is subordinated vis-à-vis the prison administration and taking into consideration the fact that all the privileges granted to inmates have a general interest objective, in the framework of the State's obligations to ensure a smooth enforcement of criminal sentences*”¹⁰.

However, this approach has been tested by the use by the Court of autonomous concepts in its interpretation of the scope of article 6. The Court has rapidly proceeded to a casuistic deconstruction of the domains initially excluded from article 6-1¹¹, taking into account that the civil concept is not reducible to mere private law disputes, so that private law litigation could not be completely kept away from the right to a fair trial. The civil scope of article 6 has progressively expanded. Taking into consideration that this procedural provision realized the legal protection of other rights and freedoms, the Court equally asserted the autonomy of “criminal matters” as of 1976, through its judgement *Engel v. The Netherlands* (§ 98).

⁴ Gilles Chantraine and Dan Kaminski, « La politique des droits en prison », *Champ pénal/Penal field* [online], Séminaire Innovations Pénales, published online on September 27, 2007, consulted on January 20, 2015. URL : <http://champpenal.revues.org/2581> ; DOI : 10.4000/champpenal.2581

⁵ L. Maulino, « Convention européenne des droits de l'homme, obligations procédurales et pluralisme » in *Pluralisme et juges européens des droits de l'homme*, M. Levinet (dir.), Bruylant 2010

⁶ See an overview of the impact of judgements, in the document *Survey, forty years of activity 1959-1998*, http://echr.coe.int/Documents/Survey_19591998_BIL.pdf.

⁷ Facts and figures 2015.

⁸ *Le Compte, Van Leuven and De Meyere v. Belgique*, § 41. The complete references to the judgements are available at the end of the document.

⁹ The European Commission of Human Rights, the instance in charge of pre-screening applications, was abolished when Protocol No. 11 to the Convention entered into force in 1998. Since then, all decisions are issued by the European Court of Human Rights (ECHR). From then on, quoted decisions are judgements or decisions of the ECHR, unless otherwise specified.

¹⁰ *X. v. Germany* (dec.), which concerns procedures related to the working conditions in prison as well as the prohibition barring the applicant from sending money outside the prison.

¹¹ *Van Drooghenbroeck v. Belgium*.

Because the doctrine of implicit limitations¹² had been discarded by the Court¹³, the prison system could not remain immune to the evolution of this provision in the civil and criminal realm. Through its judgement *Golder v. The United Kingdom*, which concerned the refusal by the administration to authorize a prisoner to consult a lawyer with a view to file a defamation suit against a warder who had accused him of being implicated in a case of violence, the Court recognized the applicability of article 6(1) to an “*incident which was connected with prison life*” (§ 40). Some years later, the Court solemnly asserted in its judgement *Campbell and Fell v. The United Kingdom* that “*justice cannot stop at the prison gate and there is, in appropriate cases, no warrant for depriving inmates of the safeguards of Article 6*”.

Yet the emergence of article 6 flies in the face of the prison’s principles: the principle of equality of arms, which strictly places the parties on the same level, negates the constitutive disparity of relations in prison; the principles of a fair hearing and of a public debate runs contrary to the secrecy that characterizes the exercise of power behind the prison walls; the need to be tried within a reasonable time does not take into account the administration’s habit of being in complete control of time, etc.. Moreover, once the applicability of article 6 has been asserted, the question of the actual conditions of its enforcement inevitably arises.

Thus, the analysis of the implementation of article 6 in the litigation of prisoners’ rights implies that a determination should first be made as to what are the “appropriate cases” that require its implementation. In other words, the analysis focuses on the scope of this provision in the prison system. Subsequently, it will consider the uses that have been made in the case-law of the safeguards dedicated to litigation concerning prisoners.

1. The scope of protection: Article 6(1) “cannot stop at the prison gate”

1.1. The criminal aspect: an intervention confined to disciplinary measures

1.1.1 Asserting the principle of the applicability of ordinary law

i. Early recognition of a procedural protection with regards to disciplinary matters

Consistently, the Convention bodies deem Article 6 not applicable to procedures concerning issues related to the enforcement of sentences¹⁴. In other words, if this provision applies throughout the procedure in light of the determination of “*criminal charges*”¹⁵, its scope does

¹² In the mid-1960s, the Commission adopted the theory according to which the subordination characterizing the relation between prisoners and the administration automatically warranted restrictions on certain rights otherwise recognized by the Convention.

¹³ *De Wilde, Ooms and Versyp v. Belgium*.

¹⁴ No. 20872/92, Commission decision of 22 February 1995, Decisions and reports (DR) 80, p. 66. Delivered on the basis of Article 7, the Grand Chamber judgement *Rio del Prada v. Spain* blurs the line between “sentence” and “execution of the sentence”. The judgement *Antonio Messina v. Italy* after all goes in the same direction, as it accepts to control from the angle of Article 5 § 1(a) the failure to grant a sentence reduction.

¹⁵ The “charges” mark the initial point of the instance according to article 6 § 1 (criminal). The principle of “charges” has an autonomous character compared to national law, as it is analyzed from a material perspective and

not extend beyond the sentencing phase¹⁶. Therefore the application of this provision does not come into question when considering an application for amnesty¹⁷, or measures aimed at social integration, such as conditional release,¹⁸ or for instance temporary absences with a view to find employment externally¹⁹. The same applies to procedures related to a high-security regime strictly linked to the qualification of criminal offences by the judicial authorities²⁰.

However, the question arose at an early stage as to whether “*charges*” being possibly brought during the enforcement of the sentence are subject to the fair trial safeguards, even as they are considered by disciplinary instances, and not by criminal courts. In its judgement *Engel and others v. The Netherlands* concerning detention measures imposed on military personnel, the Court has indeed felt obliged to ensure that “*the disciplinary does not improperly encroach upon the criminal*” (§81), so that the scope of the safeguards under article 6 is not invalidated by national law qualifications. In order to draw a line between them, the Court has determined three sets of criteria, specifying that it is “*limiting itself to the sphere of military service*”: 1) the national law qualification; 2) the nature of the violation; 3) the severity of the sentence imposed on the concerned person (§§ 82-83).

The European Commission of Human Rights, in the case *Kiss v. The United Kingdom*, came quickly out in favour of an application of the criteria of the judgement *Engel and others v. The Netherlands* to disciplinary disputes in the prison system, which was supported by the Court a few years later. In its judgement *Campbell and Fell v. The United Kingdom*, the Court concurs with the government “*that in the prison context there are practical reasons and reasons of policy for establishing a special disciplinary regime, for example security considerations and the interests of public order, the need to deal with misconduct by inmates as expeditiously as possible, the availability of tailor-made sanctions which may not be at the disposal of the ordinary courts and the desire of the prison authorities to retain ultimate responsibility for discipline within their establishments.*” (§ 69). Thus, relying on the general principle of the applicability of article 6 to litigation in the prison system asserted in the judgement *Golder v. The United Kingdom* and on the rule of law requirement, the Court holds that the criteria defined in the judgement *Engel and others v. The Netherlands* apply, *mutatis mutandis*, in prison matters, and any further judgements concerning disciplinary measures imposed on prisoners will be embedded in this framework.

ii. Criteria for distinction between “pure discipline” and “criminal matters”

In line with the case-law, the first “*Engel criterion*” concerning the determination whether the issue is of a disciplinary or criminal character used in national law is indicative and serves only as starting point of the analysis.

not from a formal one. Therefore, it is defined as follows: the official notification, which is issued by the competent authorities, of an alleged criminal offence, or an act that has serious repercussions on the situation of the suspect.

¹⁶ See the cases *T. & V. v. The United Kingdom* [GC]; *Dementyev v. Russia*, §§ 24-25

¹⁷ *Asociación de Aviadores v. Spain*; *Montcornet de Caumont v. France* (dec.).

¹⁸ *Aldrian v. Austria*.

¹⁹ *Boulois v. Luxembourg* [GC].

²⁰ *Enea v. Italy* [GC].

The second criterion is more decisive²¹, as it concerns the nature of the violation – several considerations can come into question. The scope of the legal norm in question should be examined, depending on whether it concerns exclusively a specific group or whether it concerns anybody by its own nature. In the judgement *Campbell and Fell v. The United Kingdom*, the Court gives the following explanation: “*misconduct by a prisoner may take different forms; certain acts are clearly no more than a question of internal discipline, whereas others cannot be seen in the same light. Firstly, some matters may be more serious than others (...). Secondly, the illegality of some acts may not turn on the fact that they were committed in prison; certain conduct which constitutes an offence under the Rules may also amount to an offence under the criminal law. Thus, doing gross personal violence to a prison officer may correspond to the crime of "assault occasioning actual bodily harm" and, although mutiny and incitement to mutiny are not as such offences under the general criminal law, the underlying facts may found a criminal charge of conspiracy*” (§ 71). Therefore, the circumstance should be considered that the alleged disciplinary facts may amount to an offence which, “*even theoretically*”, may lead to coercive methods in the field of ordinary criminal law²².

Other parameters will be taken into consideration on the basis of this second criterion, such as the circumstance that the action initiating the proceedings finds its foundation in the statutory powers of enforcement that lie with a public authority²³, the function of the legal, punitive or deterrent principle²⁴, or making the sentence conditional upon a finding of guilt²⁵.

The last “*Engel* criterion” concerns the nature and the degree of severity of the penalty, i.e. the maximum legally prescribed penalty. The case-law holds that a custodial sentence likely to be imposed as a punitive measure falls in general under criminal law: “*In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so*”²⁶.

Moreover, the Court has set the principle according to which it should be presumed that a custodial sentence finds its foundation in “criminal matters”. This presumption can be rebutted “*entirely exceptionally, and only if those deprivations of liberty could not be considered "appreciably detrimental" given their nature, duration or manner of execution*”²⁷. Although the principle implicitly refers to the imposed penalty, i.e. the “main stake” of the proceedings, the

²¹ *Jussila v. Finland* [GC], § 38.

²² *Ezeh and Connors v. The United Kingdom*, § 104.

²³ *Benham v. The United Kingdom* [GC], § 56.

²⁴ In the case *Balsyte –Lideikiene v. Lithuania* concerning an administrative offence related to the distribution of racist writings, the Court “attaches particular significance to Article 20 of the Code on Administrative Law Offences, which stipulates that the aim of administrative punishment is to punish offenders and to deter them from reoffending. The Court recalls that a punitive character is the customary distinguishing feature of a criminal penalty” (§ 58).

²⁵ *Benham v. The United Kingdom* [GC], § 56.

²⁶ *Engel and others v. The Netherlands*, § 82.

²⁷ *Ezeh and Connors v. The United Kingdom* [GC], § 126.

Court does not lose out of sight the actual penalty, in some cases it even relies on it entirely²⁸, which is difficult to justify, since such a line of argument makes yet again the applicable procedural safeguards throughout the proceedings entirely conditional on an event which represents its completion point. Furthermore, by the yardstick of the criterion of the nature and the severity of the penalty, the decision to send prisoners to disciplinary blocks does not seem to be sufficient²⁹.

As for the articulation of the *Engel* criteria, the Court deems in general that the second and third criteria are of an alternative character and not necessarily a cumulative one: in order for Article 6 to be applicable, it can suffice that the offence in question is considered, by nature, as being “criminal” as per the Convention, or that the offence renders the person liable to a sanction that by its own nature and its degree of severity, is considered to be relevant to “criminal matters”³⁰. In the cases *Black v. The United Kingdom* and *Young v. The United Kingdom*, the Court recognizes that although the offence allegedly committed by the two applicants, i.e. of not complying with a legal order, has, *both in national law as well as by nature*, a disciplinary character, it was presented in this instance with criminal charges pursuant to Article 6 § 1 due to the nature and the severity of the loss of remission incurred and actually imposed³¹. A cumulative attitude can nevertheless be adopted when a separate analysis of each criterion does not allow to reach a clear conclusion³².

At a later juncture, the Court has followed the line of reducing the importance of the third criterion of the *Engel* case compared to the second criterion. Through the judgement of the Grand Chamber *Jussila v. Finland* [GC], which concerns a tax adjustment procedure, the Court has equally stated that “*no established or authoritative basis has therefore emerged in the case-law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6*” (§ 35). In this particular case, albeit noting the “*minor nature of the penalty*” (§ 38), the Court declares Article 6 applicable to the tax procedure, taking into account exclusively the “*nature of the offence*” criterion that according to the Court is “*the most important*” (§ 38).

iii. Ultimately decisive criterion: the extension of time in detention to be actually served

In prison matters, the third “*Engel*” criterion related to the severity and the nature of the penalty seems to be overriding, and also decisive, even after the reframing carried out by the judgement *Jussila v. Finland* [GC], promoting the criterion of the nature of the offence. It is loss of remission, regardless of its form, that should be taken into consideration in prison. An additional deprivation of freedom represents therefore the trigger of the “*criminalization*” of the disciplinary measure in the prison system.

The judgement *Campbell and Fell v. United Kingdom*, which is both the starting point for the case-law in this matter and defines its general framework, makes the qualification entirely

²⁸ See e.g. *Payet v. France* ; *Plathey v. France* ; *Cocaign v. France*.

²⁹ *Payet v. France*; *Plathey v. France* ; *Štitić v. Croatia*.

³⁰ *Ezeh and Connors v. The United Kingdom* [GC], § 126

³¹ 42 days, and 3 and 5 days respectively, pronounced.

³² *Ibid.*

relying on the loss of remission to which the applicant has been exposed to as a consequence of the disciplinary measures (§ 72). Stressing that a custodial measure that is likely to be imposed as a punitive measure belongs in general to the realm of "criminal matters", the Court observes that the fact that national law deems the measures to be rather privileges than rights is not really important. What is important are the practical consequences for the person concerned, and to know whether a remission can raise in the person concerned real hopes of being released at an earlier date than the one determined in the conviction. Likewise, the consideration that even after the decision concerning the disciplinary measure the legal basis of the detention remains the judgement issued by the court that convicted the concerned person, and nothing has been added from a legal point of view, is not decisive. The assimilation to a penalty is appropriate when, "*by causing detention to continue for substantially longer than would otherwise have been the case, the sanction came close to, even if it did not technically constitute, deprivation of liberty and the object and purpose of the Convention require that the imposition of a measure of such gravity should be accompanied by the guarantees of Article 6.*" Although it was firmly opposed by the respondent government, the same argument would prevail in the Grand Chamber judgement in the case *Ezeh and Connors v. The United Kingdom*, as the Court deemed it to be its duty to "*look beyond the appearances and the language used and concentrate on the realities of the situation*" (§ 123).

Once the question of the nature to be ascribed has been solved, according to Article 6 § 1, in case of a deprivation of liberty (loss of remission), the question has arisen of the definition of the concept of "*substantial injury*", otherwise known as the severity required to requalify the measure. As far as it is concerned, the European Commission of Human Rights, if it adheres to the criteria developed by the Court, it will place the trigger threshold of Article 6 § 1, i.e. the number of additional days of detention, on a high level, introducing on top of it an additional consideration, which concerns the proportionality of the "penalty", incurred and actually imposed, related to the offence in question. Therefore, in the case *P. v. France*, the Commission of Human Rights asserts that "*it cannot be considered that a potential loss of 18 days in terms of loss of remission is a penalty of such a nature and severity degree that they may render the punished violation relevant in criminal matters*".

On the other hand, the Court would not be as circumspect. In the already mentioned judgement of the Grand Chamber *Ezeh and Connors v. The United Kingdom*, the Court rules that occurrences of deprivation of liberty which were liable to be (losses of remission incurred) (42 days), and which were actually imposed on the applicants (40 and 7 days respectively) could not be regarded as "*sufficiently unimportant or inconsequential as to displace the presumed criminal nature of the charges against them*" (§§ 127-129). Even more significantly, in the case *Young v. The United Kingdom*, since the issue concerned a fact qualified as being of a purely disciplinary nature (disobeying the order of a warder), the Court maintained the applicability of Article 6 § 1 in light of the nature and the severity of the inflicted detention penalty, i.e. 42 days, and of the penalty actually imposed, three days.

However, in the absence of an extension of the penalty actually imposed, the disciplinary procedure is still out of the reach of the criminal limb of Article 6 § 1. The same issue was considered in three cases involving France, *Payet*, *Plathey* and *Cogaign*, in which the applicants

had all been inflicted the maximum duration of confinement to the disciplinary block (45 days at the time), but they did not justify any actual refusal to reduce the sentence³³. Therefore, the three prisoners were prosecuted for offences of a mixed nature (disciplinary and criminal) and severely punishable under the criminal code³⁴. The Court has reached a conclusion which is identical in the case *Štitić v. Croatia*, taking however into account, besides the absence of an extension of the duration of the detention to be inflicted, the fact that the penalty involving seven days of disciplinary block was, in the specific case, suspended (§ 56).

1.1.2 An evolutionary interpretation of the judgement?

The special application of the interpretation method known as the method of “autonomous concepts” to the concept of “*criminal matters*” has been described by M. Delmas-Marty as a “*fuzzy logic*”, as opposed to a rational logic, be it formal or binary. As a matter of fact, it is “*a line of argument that does not tend toward a classification in the formal sense (not criminal or criminal, or symbolically 0 or 1), but it seems to be in the interval between the categories not criminal and criminal (or symbolically the interval between 0 and 1). Therefore, the interpretation task lies in placing national practices somewhere inside of this interval*”³⁵. In its early stages, prison litigation was one of the privileged venues for such a flexible approach. The judgement *Campbell and Fell v. The United Kingdom*, and to a lesser extent, the judgement *Ezeh and Connors v. The United Kingdom*, represented the “*leading cases*” in disciplinary matters. This voluntary approach appears to be even more peculiar, as it materializes at a time of the building up of the European case-law when little consideration was devoted to the rights of prisoners³⁶; on the other hand, it clashed with firmly rooted national legal traditions, and consequently the Court could not find its evolutionary interpretation on the convergence of national laws.

The Court does so by taking into consideration “*an object and a goal that are conceived as objectives to be achieved, and thus are likely to progress and expand*”³⁷. The Court had already clearly stated, in the case *Delcourt v. Belgium*, that “*In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision*” (§ 25). The importance of Article 6 in the system of the Convention - the “*rule of law*” cannot be conceived without access to justice and without procedural

³³ In the second case the applicant had sent the document certifying the loss of 40 days of reduced sentence too late. The President of the Section decided not to attach it to the file pursuant to Article 38 § 1 of the Regulation (mail of the Registry dated 11 June 2011)

³⁴ In both these cases, the Court found the respondent State to be in breach under Article 13, in conjunction with Article 3 of the Convention.

³⁵ M. Delmas-Marty (dir.), “La ‘matière pénale’ au sens de la Convention EDH, flou du droit pénal”, *Revue de science criminelle et de droit pénal comparé*, 1987, pp. 819-854, spec. pp. 826-827, quoted in B. Belda, prec.

³⁶ Although it had been stated at a very early stage that “*even if an applicant is being detained as a result of a sentence that has been inflicted on him/her due to crimes perpetrated against the most basic human rights, this circumstance however does not deprive him/her of the guarantee of the rights and freedoms defined in the Convention*” (*Koch v. Germany*).

³⁷ F. Ost, “Originalité des méthodes d’interprétation de la Cour EDH”, in M. Delmas-Marty (dir.), *Raisonnement la raison d’Etat*, P.U.F., 1989, pp. 405-463, spec. p. 424. F. Ost points out in this regard that the Convention is in the eyes of the European Court of Human Rights a starting point for achieving a goal, rather than the fruit of the past efforts of the Member States of the Council of Europe.

safeguards for defendants – has convinced the European judge to apply the criteria of the *Engel* case law to prison litigation through the judgement *Campbell and Fell v. The United Kingdom*. As shown by Béatrice Belda³⁸, the judge combines teleological interpretation and autonomous interpretation, with a view to “*overcome the constraints that are inherent to the functional context of the interpretation (context that is characterized by the deprivation of the freedom to come and go), and precisely, with the aim to overcome the appearances or «pretence» of correctional disciplinary proceedings*”. Hence, “*as the correctional environment is subject in general to an alternative legal regime, which is justified by the specific nature of correctional authorities’ mission, the interpretative technique of the “autonomous concepts” allows not only to counteract such specificities, as well as, more broadly, national peculiarities, but also, at a later stage, to expand the applicability of the conventional safeguards to a larger number of defendants*”. The autonomous and material approach that was developed in such a way has made it possible to simultaneously take into account national specificities and “*complex structures that are not used to being subjected to the law*”. It has since then proved to be a particularly appropriate technique for introducing a logic of a common body of law in prisons.

As previously mentioned, once the applicability of the *Engel* criteria to correctional disciplinary matters has been established, the attention of litigation has shifted to delineating the full scope of the “unsubstantial injury” clause relative to the presumption in favour of the criminalization of the sanction which entails, one way or another, an additional deprivation of freedom. The evolution has consisted in placing inconsistent (imposed) penalties within the scope of Article 6. The Court seems to have locked itself into a binary approach, relying on the category of measures (custodial measures as well as other measures), which obviously has the enormous advantage of clarity and predictability that are typical of measures that are expected from national authorities, but which, in this case, undermine the consistency of the case-law, and above all creates very large blind spots in the protection of fundamental rights.

After a closer look at the case-law, with regards to prison matters, even though it is described as being predominant in the Grand Chamber judgement *Jussila v. Finland* [GC], the second *Engel* criterion is after all taken into consideration only in order to reinforce the in-country analysis of the third criterion. The punitive function of the correctional disciplinary action fails to attract the attention of the Court, while it is subject to “legality” requirements with regards to the charges and the scale of penalties³⁹, to judgement rituals, etc., which have been copied from those of criminal law enforcement. Moreover, the usage of the third criterion is determined by the prison context. Thus, the punitive character of a penalty in a disciplinary block, which is a radical form of committal order, is not relevant in this respect. Likewise, the test required for such a measure is not examined concretely by the Court in this case⁴⁰, while in other contexts it has found a breach⁴¹. And yet we know that, according to one of the directives stemming from the Court, the Convention must “*be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions*”⁴².

³⁸ B. Belda, *Les droits de l'Homme des personnes privées de liberté*, Contribution à l'étude du pouvoir normatif de la Cour européenne des droits de l'homme (thesis), Bruylant, 2010

³⁹ See *Campbell and Fell*, § 71.

⁴⁰ See nevertheless the case *Štitić v. Croatia*

⁴¹ See for instance *Renolde v. France*, § 106-109; *Keenan v. The United Kingdom*.

⁴² *Stec and others v. The United Kingdom* (dec.) [GC], § 48.

The restrictive approach adopted in the criminal sphere is however partially compensated by the fact that the civil limb of Article 6 § 1 is taking over, as it is experiencing an interpretative dynamic which is clearly favourable to the rights of prisoners.

1.2 The civil aspect: an extensive scope of application

1.2.1 Comprehensive criteria

The evolution in the field of civil litigation within the realm of public law has inevitably raised the question of Article 6 § 1 coming into play with regards to the exercise of its official powers by the public authority vis-à-vis prisoners.

From this point of view, referring to the principle of the judgement *Golder v. The United Kingdom*, the Court has stated that the analytical framework that has been developed in this matter by its case-law is applicable under general law conditions. Three parameters are taken into consideration by the Court in order to tackle the issue of the applicability of Article 6 § 1 in its civil limb⁴³: the parameter of the existence of a “*challenge to a right*”, the parameter of the existence, of which it can be said in a defensible way that it is recognized in the domestic order, and finally the parameter of the “*civil character*” of this right. These different aspects are laid down as distinct and cumulative conditions, but the case-law portrays them rather as links of a chain that is closely interlinked with the qualification pursuant to Article 6 § 1, as certain characteristics can be taken into account under any line of argument, depending on the case. Moreover, the three parameters exposed below are a response to an educational concern, as they do not represent a formal description of the different stages of the Court’s approach.

i. A real and serious challenge

As for the first aspect, Article 6 § 1 shall only apply if the “challenge”, which can concern both the very existence of a right as well as its scope or the procedures of its exercise, is “real and serious”, in the sense that the outcome of the proceedings must be directly decisive for the right in question, “*mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play*”. In other words, a peripheral matter of the litigation cannot be taken artificially into account when characterizing such right. In the Grand Chamber case *Enea v. Italy* [GC] the Court specifies that it is necessary to take into consideration the restrictions of the individual’s rights of a civil character, “*on account of the nature of the restrictions (for instance, a prohibition on receiving more than a certain number of visits from family members each month or the ongoing monitoring of correspondence and telephone calls) and of their possible repercussions (for instance, difficulty in maintaining family ties or relationships with non-family members, exclusion from outdoor exercise)*” (§ 106).

⁴³ The Court is not always consistent in the way it deconstructs the conditions for the applicability of Article 6 § 1, and ties them together (see *Enea v. Italy* [GC]).

Moreover, if a claim brought before a court is to be presumed real and serious⁴⁴, this would change if there are clear indications proving that the claim is frivolous or devoid of any foundation. In a civil claim against the prison administration concerning the mere presence in the prison of HIV-infected prisoners, the Court ruled that the injury required by the domestic order to grant a financial compensation was impossible to characterize based on the charge invoked by the applicant⁴⁵. The same solution has been established with regards to the claim of injury arising from the absence of film screenings in the prison⁴⁶.

ii. A “right” enshrined in the domestic order

The second aspect implies that the right in question in the challenge be recognized in the national legal order. As a matter of fact, “*the Court should not create, by way of interpretation of Article 6 § 1, substantive law that has no legal basis in the concerned State*”. In order to assess the legal status of the applicant’s claims in national law, the Court takes as its point of departure the provisions of the relevant national law and the interpretation given to them by national courts⁴⁷. From this point of view, the Court states that it needs very serious reasons to go against the highest national courts by ruling, unlike them, that the person concerned could claim in a defensible way that he/she held a right recognized by domestic law⁴⁸. However, the autonomy of the analytical framework pursuant to Article 6 § 1 equally applies here, and the Court has to examine the legal density of the interests claimed by the applicant. In making this appraisal, “*one must look beyond the appearances and the language used and concentrate on the realities of the situation*”⁴⁹.

For an understanding, pursuant to Article 6-1, of the “right”, the discretionary character of the powers of the authorities in the exercise of their prerogatives can be taken into consideration, and can even play a decisive role. However, the mere presence of a discretionary element in the wording of a legal provision does not per se exclude the existence of a right⁵⁰. In the Grand Chamber case *Enea v. Italy* [GC], the respondent Government pointed out that the choice of institution in which a prisoner served his/her sentence fell exclusively within the scope of the administrative authorities’ discretionary powers and was based on “*considerations falling wholly within the sphere of public law*”. These included order and security and the need to prevent possible acts of violence or escape attempts by prisoners. The Italian Government explained that “*in the presence of such extensive powers the subjective situation of the prisoner and his or her aspirations and claims were the subject of purely residual protection which could not have the same ranking in the legal system as the protection afforded to “rights”.*” (§ 90).

⁴⁴ *Bentham v. The Netherlands*, § 32 and *Rolf Gustafson v. Sweden*. In the case *Shishkov v. Russia*, the behaviour of the applicant, deemed “erratic”, as he had filed multiple claims regarding his conditions of detention to different instances and on different bases, the Court deems that the actions carried out by the person concerned cannot be considered as vexatious or abusive (§ 113).

⁴⁵ *Skorobogatykh v. Russia* (dec.).

⁴⁶ *Artyomov v. Russia*.

⁴⁷ *Masson and Van Zon v. The Netherlands*, § 49.

⁴⁸ *Ibid.*

⁴⁹ *Van Droogenbroeck v. Belgium*, § 38, § 121.

⁵⁰ *Camps v. France* (dec.), and *Ellès and others v. Switzerland*, § 16.

The Grand Chamber objects that “*any restriction affecting these individual civil rights must be open to challenge in judicial proceedings, on account of the nature of the restrictions (...).By this means it is possible to achieve the fair balance which must be struck between the constraints facing the State in the prison context on the one hand and the protection of prisoners’ rights on the other*” (§ 106). In other words, the balance between the requirements of order and security and the protection of prisoners’ interests is a matter for the courts, as the former cannot constitute in principle an obstacle to judicial review.

The sequence following the analysis of the legal status of the “right” in question leads the Court to research, according to the criterion outlined in the Grand Chamber judgement *Vilho Eskelinen and others v. Finland* [GC]⁵¹, whether the national courts, in similar circumstances, accept to examine an applicant’s claim⁵². It is the so-called criterion of the “benevolent judicialization”⁵³.

As for the different parameters, and taking into account, if need be, the requirements flowing from international law, the Court assesses whether the right has a legal basis in national law. Hence, it is the consideration of the absence of such a “right” to a prison leave in the legal order of Luxembourg that has led the Court to rule that the provisions of Article 6 § 1 shall not apply to the requests for temporary permission to leave the correctional institution filed by the applicant in the Grand Chamber case *Boulois v. Luxembourg* [GC]. More precisely, in this case the Court finds its argument on the circumstance that by determining the regime of permissions to leave the Luxembourg legislator had the clear “*intention to create a privilege in respect of which no remedy was provided*” (§ 98). Furthermore, the Court observes that the applicant had not been in a position to produce decisions, be they judicial or administrative, relative to appeals lodged against decisions refusing a prisoner’s requests for prison leave (§ 100). Lastly, the Court considers that no right in this matter is enshrined in conventional law, and that there is no convergence of national laws in this matter. The Court therefore draws the conclusion that this case is distinct from the one of the judgement *Enea v. Italy* [GC].

In this last case, the Grand Chamber initially takes into account the position of Italy’s Constitutional Court, which has censured certain provisions of the law on the prison system, because they did not envisage any judicial remedy against a decision that may influence the rights of a prisoner (§ 100 and § 39). Subsequently, the Court bases its line of argument on the fact that “*most of the restrictions to which the applicant was allegedly subjected relate to a set of prisoners’ rights which the Council of Europe has recognised by means of the European Prison Rules, adopted by the Committee of Ministers in 1987 and elaborated on in a Recommendation of 11 January 2006 (Rec(2006)2). Although this Recommendation is not legally binding on the member States, the great majority of them recognise that prisoners enjoy most of the rights to which it refers and provide for avenues of appeal against measures restricting those rights.*” (§ 101).

iii. Civil character of the right

⁵¹ *Vilho Eskelinen and others v. Finland* [GC], § 41, which concerns civil service disputes.

⁵² See the judgement *Ganci v. Italy*, which notably contains the recognition by the Constitutional Court of rights to the benefit of prisoners.

⁵³ See *Oršuš and others v. Croatia*, § 105; “where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights within the meaning of Article 6 § 1”.

Independently of the legal qualification used in national law, the Court takes into account, as has been already said, the substantive content of the “right” and the effects attached to it by the concerned State’s domestic law, with a view to determine whether it is of a “civil character”. In this perspective, the proceedings that in national law flow from “public law”, because they bring into play the powers of public authorities, flow in principle from the civil limb of Article 6 § 1, as their outcome is decisive for rights and obligations of a private character.

Challenges that have accrual ramifications clearly fall within the scope of this category. The same is true of compensation claims filed by prisoners concerning acts of violence perpetrated by state officials⁵⁴, forcible feeding during a hunger strike⁵⁵, poor material conditions of detention⁵⁶ or inadequate health care⁵⁷. It also applies to restrictions imposed on a prisoner’s right to receive money from outside⁵⁸.

Similarly, the Court has no difficulty in ruling that the restrictions on family rights fall within the scope of the rights of a private character, whether the question is a limitation of access to the visiting room⁵⁹ or security measures surrounding visits by relatives, such as the use of a separation system⁶⁰.

Besides this hard core of the rights of a private character, the Court’s conception of what falls within the scope of the “*sphere of personal rights*”, and is as such of a “civil nature”, is comprehensive and comprises potentially a wide variety of situations occurring in prison. The Court has for instance taken into consideration, besides the restrictions on the exercise of the right of access, the limitations of access to the prison yard, resulting from the implementation of a high security regime⁶¹. In the case *Musumeci v. Italy*, the Court makes a reference, without further explanation, to the limitations imposed on the prisoner’s “*personal freedom*” that are associated with a reinforced surveillance system (E.I.V.), echoing the foundation of the relevant case-law of Italy’s Constitutional Court. In the case *Enea v. Italy* [GC], which concerns the same measure, the Grand Chamber focuses its assessment on the most typical impacts on family links and heritage issues (§ 103). Without elaborating on the aspects of the restrictions imposed on the rights of the person concerned, in the case *Razvyazkin v. Russia*, the Court refers to the solutions of the judgements *Ganci*, *Musumeci*, *Enea v. Italy* and *Gülmez v. Turkey*, in order to state that the confinement of a prisoner to the disciplinary block falls within the scope of the civil limb of Article 6 § 1 (§ 133).

In this context, a crucial question remains pending, i.e. the implementation of fair trial safeguards to sentence management proceedings. The aim of this litigation is to lead the Court to apply to prison litigation the stance it takes in the domain of forced psychiatric hospitalizations,

⁵⁴ *Aksoy v. Turkey*, § 92; *Tomasi v. France*, § 121-122.

⁵⁵ *Ciorap v. Moldova*.

⁵⁶ *Beresnev v. Russia*.

⁵⁷ *Vasiliev v. Russia*.

⁵⁸ *Enea v. Italy* [GC]

⁵⁹ *Gülmez v. Turkey*; *Enea v. Italy* [GC].

⁶⁰ *Stegarescu and Bahrin v. Portugal*, § 35-39.

⁶¹ *Ibid.*

where it ascribes a civil character to the right to freedom⁶² and consequently rules that the civil limb of Article 6 § 1 shall apply, as proceedings related to the legality of deprivation of freedom are concerned.

In the case *Bogusław Krawczak v. Poland*, the 4th section of the Court has indicated that it was not necessary for it to rule on the applicability of the requirements of Article 6 § 1 to the proceedings of conditional release (early release of convicted persons), as the safeguards of the proceedings applied in this case were deemed to be satisfactory (§ 99). Without referring to the issue of the applicability *rationae materiae* of grievance, the 4th section, in the case *Rokosz v. Poland*, although rejecting as inadmissible the plea in law alleging breach of Article 6 § 1 concerning a procedure for suspension of the sentence for medical reasons, did so for substantive considerations. The Court has observed that, unlike in criminal law, civil law did not require in principle the support of legal aid, which led to the rejection of the claim as manifestly ill-founded.

The solution used by the 2nd section of the Court in the judgement *Vasilescu v. Belgium* is certainly clearer; this judgement states that “it deems that it is settled case-law that Article 6 is not applicable to the examination of the requests for interim release or to issues related to the enforcement modalities of a sentence involving deprivation of liberty” (§ 121). But this judgement does not seem to strive to close the debate, as the foundation of the 2nd section, derived from the position of the Grand Chamber in the judgement *Boulois v. Luxembourg* [GC]: far from establishing an exclusion principle for the prison system from the scope of Article 6, the solution of this last case is to be ascribed to considerations based on Luxembourg’s national law (see below). Moreover, the judgement *Boulois* observes the case-law developments that have determined the matter, so that it is difficult to see a downward shift in the interpretation dynamic favourable to prisoners. The fact remains that, as things stand, the case-law is far from formulating a coherent stance.

1.2.2. Distortions in the protection granted by the “civil” branch

It is quite remarkable that prison litigation is not among the domains excluded in principle from Article 6 § 1⁶³. Because they represent particularly sensitive measures from the point of view of fundamental rights, the European case-law has allowed accessing the Court whenever the States were attempting to justify, in the name of security constraints and of the preservation of internal order, keeping a space that is completely subject to the discretion of the administration. Article 6 § 1 has compounded Article 13⁶⁴, strengthening the obligations imposed on the States (see below). However, the case-law is characterized by a certain incoherence, since the issue of

⁶² *Aerts v. Belgium* ; *Vermeersch v. France* (dec.); and *Laidin v. France* (No. 2), § 73-76.

⁶³ Litigation concerning the entry and the residence of foreigners, taxation and voting, see *Vilho Eskelinin v. Finland*, § 61.

⁶⁴ See *Ganci v. Italy*. In this respect it should be noted on the one hand that the Court is in charge of the legal qualification of the facts of the case (*Gatt v. Malta*, § 19; *Jusic v. Switzerland*, § 99) and that on the other hand, in the framework outlined by the decision about the admissibility of the request, the Court can address any question of fact or of law that may arise during the proceedings before the Court itself (*Guerra and others v. Italy*, § 44, *Chahal v. The United Kingdom*, § 86 and *Ahmed v. Austria*, § 43).

needing to understand which rights are held by the prisoner seriously affects the coherence of the protection granted by the civil limb of Article 6 § 1.

Two aspects of the case-law draw in particular one's attention, as they display the reticence of the Court to draw the due conclusions from the analytical framework it has elaborated: the non-applicability of Article 6 to measures to relax the conditions of sentences and the varying emphasis it has put on *soft law* norms and on comparative law in its line of argument on the applicability.

First and foremost, the Court's line of argument as far as the sentence management procedures are concerned is hard to grasp, in particular with regards to the importance it grants the prison population, notably when compared to other aspects of the prisoner's life that benefit from the protection of Article 6. As explained before, the Court's approach in this matter is at best cautious. The 4th section has failed to take a stance. The 2nd section on its part has ruled that conditional release was outside of the scope of Article 6. In order to reach this solution it referred to the Court's traditional position⁶⁵, which was reconsidered by the judgement *Enea v. Italy* [GC], and above all superseded by the establishment of the so-called criterion of the "benevolent judicialisation" (see above).

In fact, the converse solution is appropriate from different angles, as the States have at least widened the jurisdiction of the domain of sentence enforcement. The right to freedom, which is at the center of these kinds of litigation, has been qualified as a right of a civil character for a long time. Thus, in this case the Court rules consistently, as it is considering measures related to the confinement of the mentally ill⁶⁶. Similarly, when the Court considers personal autonomy pursuant to Article 6 § 1, this could justify invoking the fair trial safeguard in this matter, since it seems to be strongly involved in the procedure of early release. The Court has for instance ruled that a procedure whose outcome is important for the applicant because, as it could potentially remove his/her legal capacity, it has an impact on his/her personal autonomy in almost all life aspects and could lead to potential restrictions on his/her freedom, it concerned rights of a civil character⁶⁷. In the Chamber judgement *Boulois v. Luxembourg* [GC] (reversed by the Grand Chamber on another basis⁶⁸), the Court has deemed that the procedures for temporary permission to leave the correctional institution had indirect but certain impacts on the private life of the person concerned, more precisely on his/her "private social life", as their goal was "*making new arrangements for his professional and social life on his release from prison*" (followed by courses aimed at obtaining diplomas, several administrative formalities), "*for securing gainful employment, in particular with a view to paying compensation to the victim and settling his debts*". The Court deems that "*in view of the significance of his interest in resettling in society*", "*the applicant's social rehabilitation was crucial to the protection of his right to lead a private life and develop his social identity*" (§ 64). All these considerations have not been challenged by

⁶⁵ The judgement *Vasilescu v. Belgium* makes reference to the judgement *Boulois v. Luxembourg* [GC] (*Neumeisteri v. Austria*, §§ 22 and 23 ; *Lorsé and others v. The Netherlands* (dec.) ; and *Montcornet de Caumont v. France* (dec.)).

⁶⁶ *Aerts v. Belgium*; *Laidin v. France* (No.°2).

⁶⁷ *Shukurov v. Russia*, § 71.

⁶⁸ The opposition by the national legislator to all forms of appeal.

the Grand Chamber judgement in this case; however, they have not been taken into account in subsequent decisions.

The objection could be made that the Court rules that Article 6 § 1 is not applicable in its civil limb to decisions concerning pre-trial custody, even when they directly bring into play individual freedom. However, the Court has reached a coherent position with regards to the protection granted in this matter by Article 5 § 4, considered to be the *lex specialis* with regards to Article 6 § 1⁶⁹. Now, in a post-sentence context, the provisions of Article 5 § 4 are only applicable, given the state of the case-law, in very limited if not residual situations⁷⁰, so that the non-consideration of Article 6 leads to a lack of conventional protection, even though the right to freedom is of primary importance in the Convention⁷¹. If not for the systemic argument, the sidelining – for the time being – of Article 6 § 1 would seem purely axiomatic and hardly justifiable. Ultimately, it seems as though the Court feared to turn Article 6 § 1 into a lever to be used on the criminal policies and practices concerning early release.

The most recent case-law seems to sound the death knell of this conservative position, as the latter seemed to be untenable with regards to the case-law on access to conditional release for convicts sentenced to life. As stressed by Judge Pinto de Albuquerque in his partly concurring opinion where he explains the implications of the Grand Chamber judgement *Murray v. The Netherlands* of the 26 April 2016, “*decisions to keep prisoners in or recall them to prison must be taken with all procedural guarantees of fairness, such as the guarantee of a reasoned decision. The implicit conclusion to be drawn from this strong statement of principle by the Court is that the parole mechanism should also include an oral hearing of the prisoners and adequate access to their files (...)*”. As the Portuguese judge shows, the substantial obligation concerning resocialization this requirement relates to, applies to “*all prisoners, including those serving life sentences*”.

Hence, the fairness of the release proceedings constitutes one of the elements taken into account in order to examine, from the angle of Article 3, the compressibility of life sentences. This issue is inscribed in a set of requirements which for States are an obligation under international law which are marked by an intangible character. Such a legal intensity cannot reconcile itself with a binary logic, where procedural rights are guaranteed most firmly for certain prisoners – those sentenced to life – and totally ignored when it comes to the others, including those who are in a similar situation to the former, as they are serving very long sentences. Moreover, as noted by Mr. Pinto de Albuquerque, the requirements linked to resocialization, from which the procedural obligations flow, apply necessarily not only to prisoners serving life sentences, but at the very least prisoners sentenced to long sentences, i.e. over five years according to the recommendations of the Council of Europe. The measures to relax the conditions of sentences exist in an already very dense legal environment, which inevitably influences the analysis of their legal in the domestic order.

⁶⁹ *Reinprecht v. Austria*, § 51-55.

⁷⁰ See the report on long sentences. In most cases the Court rules that the control of the legality of detention is incorporated into the conviction.

⁷¹ See for instance *Medvedev v. France* [GC], § 76.

Secondly, the emphasis put in the Court’s reasoning⁷² on *soft law* norms and on the argument based on comparative law does not amount to a rigorous method. In the Grand Chamber judgement *Enea v. Italy* [GC] both these considerations are combined to justify the evolutionary interpretation that has been given (§ 101). In order to reject this time a development of case-law, the Grand Chamber, in the case *Boulois v. Luxembourg* [GC], takes refuge behind divergent national practices on the “*the status of prison leave and the arrangements for granting it*”, although the Court does not usually make an observation of a consensus or of convergent national laws of Member States conditional upon such accurate scrutiny⁷³. First and foremost, the judgements subsequent to the *Boulois* judgement fail to integrate the evolution that has characterized the case-law with regards to the consideration of the aim of rehabilitation, in particular through the judgement *Vinter and others v. The United Kingdom* [GC]⁷⁴. In this judgement the Court refers to considerations based on comparative law and on the Council of Europe *soft law*, which are much more general than those analyzed in the judgement *Boulois v. Luxembourg* [GC]. The use that is made of extraconventional references in the understanding of the “right” seems therefore to be discretionary in prison-related case-law.

2. Safeguarding the right to a fair trial in prison: some very specific safeguards

2.1 The safeguards granted under article 6 in European case-law

2.1.1 Subject and distribution of the safeguards granted under article 6

Article 6 appears *prima facie* as an article that offers multiple resources to the applicant prisoner, adapted in particular to the situation, as it is in its nature to thwart the administration’s tendency to regulate in a discretionary manner all aspects of daily life. The “court” of Article 6 must meet a series of conditions, namely independence, in particular vis-a-vis the government, impartiality, duration of the mandate of its members, safeguards guaranteed by the proceedings, of which several feature in the text of Article 6 § 1. As a matter of fact, the Court has considerably enriched this text, by giving a definition of these elements, but equally by inferring from them “implicit” safeguards, in the form of a bunk bed construction, some of which have originated several rights or principles, defined and delineated by the case-law, which are established in the field of internal procedures⁷⁵. These issues are beyond the scope of this paper, as it would be very difficult to come close to the clarity and the synthesis of the reports devoted to this matter by the Research Division of the Court⁷⁶. The author will simply give a very quick overview of the fair trial requirements, so as to put into perspective its implementation in the context of prison litigation.

⁷² The issue of the criterion relative to the protection of the right in the domestic order.

⁷³ As for its role in the Court’s case-law, see H. Surrel, *Pluralisme et recours au consensus dans la jurisprudence de la Cour européenne des droits de l’homme*, RTDH.

⁷⁴ See Nicolas Hervieu, “Les peines perpétuelles au prisme européen de la dignité et de la réinsertion sociale des détenus” [PDF] in *Lettre “Actualités Droits-Libertés”*, CREDOF, 18 July 2013; see also the judgement *James, Wells and Lee v. The United Kingdom*

⁷⁵ J. Meunier, *La notion de procès équitable devant la Cour européenne des droits de l’homme*, 2003.

⁷⁶ *Guide on Article 6, Right to a fair trial, civil limb*, and *Guide on Article 6, Right to a fair trial, criminal limb*, Council of Europe/European Court of Human Rights, 2013 and 2014 respectively.

Article 6 is structured in two paragraphs. The first enumerates the safeguards enjoyed by all individuals in the framework of civil or criminal proceedings, while the second establishes the special safeguards enjoyed by all persons facing criminal prosecution. However, it is important to note that the safeguards of Article 6 § 2 and, at least certain safeguards of Article 6 § 3⁷⁷ apply *mutatis mutandis* for those disciplinary procedures which regulate the first paragraph in the same manner as in the case of a person accused of a criminal offence.

As the article in question is Article 6 § 1, the Court has quickly specified, with regards to a prison-related case, that “*the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1)*”, which “*secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only*”⁷⁸. From this perspective, the Court maintains that in civil matters Article 6 § 1 can sometimes compel the State to provide legal assistance, whenever such assistance is indispensable to gain effective access to a judge, be it because the law mandates legal representation, be it because of the complexity of the proceedings or of the case (in criminal matters, free legal aid is explicitly required pursuant to Article 6 § 3 (c), “when the interests of justice so require”).

The term “fair” has brought forth several principles, a sort of “*procedural safeguards "implicit" in Article 6*”. First and foremost, the matter at stake is the principle of equal arms, which envisages that “*all parties to a proceeding [civil or criminal have] a reasonable opportunity of presenting its case to the court under conditions that do not put it, in a significant way, at disadvantage with respect to the opposing party*”. The Court may be required to examine very concretely the respective situations of the parties⁷⁹.

The adversarial principle, which requires that the judge makes sure that all the elements of the litigation are a topic for debate between the parties, also follows from the above. The Court states that it is “one of the main safeguards in legal proceedings”. Lastly, it emphasizes the fairness of the principle of the legality of evidence: the issues related to evidence (burden of proof, probative force, admissibility...) fall in principle within the scope of the States’ discretion, but the Court deems that it “*must nevertheless enquire whether the evidence related to proceedings against the applicants had been gathered in such a manner so as to guarantee a fair trial*”⁸⁰. The Court requires that the decisions issued by the “court” be based on “*trustworthy*” evidence, which on the one hand implies that the concerned person has the opportunity “*of challenging the authenticity of the evidence and of opposing its use*” and on the other hand that

⁷⁷ Article 6-3-a, Article 6-3-b, Article 6-3-d : see *Albert and Le Compte v. Belgium*.

⁷⁸ *Golder v. The United Kingdom*, § 36.

⁷⁹ The Court has therefore ruled that that it did not guarantee to the parties the same means to state their cases regarding the proceedings in which “on the one hand, the tribunals of fact allowed the Revenue to confine the reasons given for its decision to exercise the right of pre-emption to stating “the sale price declared in the contract of sale [is] too low” - reasons that were too summary and general to enable Mrs Hentrich to mount a reasoned challenge to that assessment; and on the other hand, the tribunals of fact declined to allow the applicant to establish that the price agreed between the parties corresponded to the real market value of the property” (*Hentrich v. France*, § 56).

⁸⁰ Concerning the adversarial principle see *Cottin v. Belgium*, §30 and *Schenk v. Switzerland*, § 46.

“the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy”⁸¹. This necessarily also implies that the court must ensure that the evidence held by one of the parties be produced to the parties in order for them to be submitted for discussion⁸². However, the Court refuses to act as a fourth instance⁸³, which makes the articulation of a complaint concerning the evidence sensitive.

The right to appear and be heard in person should be mentioned as well. Although it concerns in particular the criminal process, this right also applies in civil matters, whenever the character or the behaviour of one of the parties strongly contributes to shaping the opinion of the court (see below). Lastly, the duty to provide reasons for judicial decisions should also be mentioned⁸⁴.

Furthermore, other fundamental procedural safeguards are explicitly mentioned. The public nature of proceedings, whether they are the hearing or the delivery of the decision by the judge, is described by the Court as a tool protecting defendants from a “secret justice that escapes the public’s control”, and also represents “one of the ways of contributing to preserving the trust in courts”. Article 6 requires moreover that the trial be conducted within a reasonable time, a character which is assessed depending on the complexity of the case, the behaviour of the applicant and the attitude of public authorities. Then, the “court” must be independent: its independence is assessed with regards to the executive power as well as to the parties concerned⁸⁵. The court must also be impartial. The subjective – or personal – impartiality corresponds to what the judge can think privately and is taken for granted. The objective – or functional – impartiality points to the need to identify the objective indicators which give reason to believe that the judge is prejudiced about the litigation that he/she is called to examine. This impartiality is assessed on a case-by-case basis, but in a virtually constant manner through the prism of “be seen to be done”.

Subsequently, Article 6, in paragraphs 2 and 3, elaborates on the safeguards enjoyed by “everyone charged with a criminal offence”. The presumption of innocence (Article 6 § 2), implies that the burden of proof is on the prosecution. The right to be informed, as soon as possible, about the nature and the reason of the criminal charge, is guaranteed by Article 6 § 3 (a). The right to have adequate time and facilities for the preparation of one’s defence (Article 6 § 3 (b)) implies a right of access to the file, through counsel or directly by the defendant, if he/she has decided to conduct the defence in person. The right to defend oneself, either in person or through a lawyer of his/her choice, is the subject of Article 6 § 3 (c), as well as the right to

⁸¹ *Lisica v. Croatia*, § 49.

⁸² *Laska and Lika v. Albania*, §§ 70-71.

⁸³ The Court is not competent to recognize errors of fact or of law allegedly committed by a domestic court, unless and since these errors could interfere with the rights and freedom protected by the Convention. The Court cannot assess the elements of fact or of law that have led a national court do adopt one decision over another, otherwise it would turn itself into a court of third or fourth instance and would thus disregard the limits of its mission (see the guide on admissibility on the Court’s website).

⁸⁴ In this respect, the Court stresses that “Article 6 § 1 obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument — nor is the European Court called upon to examine whether arguments are adequately met”.

⁸⁵ “in order to establish whether a body can be considered as “independent”, the method of appointment and the duration of the mandate of its members, the existence of a protection against external pressures in particular should be taken into account, and whether there is appearance of independence”.

witnesses (Article 6 § 3 (d)) and the right to summon, question or have questioned witnesses for both the defence and the prosecution. The right to an interpreter is envisaged by Article 6 § 3 (e). Lastly, the Court deems that the right against self-incrimination is at the very heart of the concept of fair trial established by Article 6.

2.1.2 Scope of the requirements under Article 6(1) in civil or criminal matters

Along with the autonomous concepts of “criminal charge” and of “challenge of a civil character”, the “moment” in the proceedings as of which the safeguards of Article 6 are applied is decoupled from the national legal categories. In fact, since an instance should be considered as being relative to “rights and obligations of a civil character” or to a “criminal charge”, the person concerned has the right to have examined his/her case or the charge by “a court” that meets the conditions of Article 6 § 1⁸⁶. However, pursuant to Article 6 § 1, a court must not necessarily be a court of a classical kind, integrated into the common judicial structures. What is important in order to ensure compliance with Article 6 § 1, is the implementation of both the material and procedural safeguards. Thus, a “court” is characterized in the substantive sense by its judicial role, i.e. by examining, on the basis of legal standards and according to an organized procedure, all questions under its jurisdiction. Moreover, equally from this point of view, the sphere of fair trial is not constrained by strict limits defined a priori by the States. A body that does not qualify in national law as a court may be subject to the requirements of Article 6.

The effect of this expansive logic is nevertheless mitigated by the global approach of the analysis based on Article 6, which certainly contributes to the fact that the judgements convicting the defendants in these prison-related matters are after all very rare. The examination from the perspective of this provision actually implies an assessment of the procedure in its entirety. A defect resulting in a lack of fairness may under certain conditions be corrected during a later stage of the instance before the authority or the court concerned, or alternatively by a higher court. This can be achieved only if the challenged decision is submitted to the attention of an independent judicial body, which has full jurisdiction and meets the requirements of Article 6 § 1. The characteristics of a judicial body with unlimited jurisdiction comprise among other things the power to amend all points, in both fact and law, of the decision handed down by the lower court. Notably, the court must have jurisdiction to discuss all questions in both fact and law relevant in the litigation it is called to examine. The important matter is the extent of the effected control, which is examined in light of the circumstances of the case⁸⁷.

In particular, although it is not incompatible with the Convention to delegate to administrative authorities the task to prosecute and punish, the person concerned must be able to refer any decision taken against him/her to a court that offers the safeguards of Article 6. The Convention therefore does not rule out that in administrative proceedings a “penalty” be initially imposed by an administrative authority. It entails however that the decision of an authority that does not meet

⁸⁶ *Le Compte, Van Leuven and De Meyere v. Belgium*, § 50.

⁸⁷ See the case-law quoted in *Guide on Article 6, Right to a fair trial, civil limb*, Council of Europe/European Court of Human Rights, 2013, notably §§ 177-185.

the conditions of Article 6 § 1 is subject to the subsequent control by a judicial body with unlimited jurisdiction⁸⁸.

Moreover, one should keep in mind that certain rights under Article 6 may be subjected to limitations, as for instance the right of access to a court, the public character, the communication of evidence, etc. Such limitations will be in conformity with the Convention if they are legitimate, proportionate to the pursued objective and if they “do not question the substance of the guaranteed right”. In this context, considerations related to the enforcement of public order or logistical difficulties faced by the prison administration may be taken into account by the Court (see below).

Lastly, in cases that are luckily rare, the case-law holds that the opportunity given to the prisoner to challenge the different implications of a detention regime exempts the State from the duty of providing a judicial remedy that allows to question the use of a detention regime as such. In the case *Enea v. Italy* [GC] (§§ 118-120), the Grand Chamber considered that the impossibility to challenge the decision to be confined in a high security sector of the E.I.V. prison did not constitute a breach of Article 6 § 1 of the Convention, provided that all limitations to a right of a “civil character” ensuing from such a confinement can be the subject of judicial review. However, such a solution seems to be marginal, as the Court considers in general that the applicant prisoners should not be forced to take multiple procedural steps so as to pursue their claims⁸⁹.

2.2 Concrete implementation of protection in the prison system

2.2.1 Civil litigation

i. Access to a court

The right of access to a court has as such been established by the Court in the renowned case *Golder v. The United Kingdom* [GC], which concerns the rejection by the prison director of a prisoner’s claim to the right to consult a lawyer, with the aim to bring defamation proceedings against a warder who had accused him of assaulting him⁹⁰. Although the measure as such did not entail the impossibility to refer the case to a court, access to a lawyer is deemed to be an essential

⁸⁸ See for instance the judgement *A. Menarini Diagnostics S.R.L. v. Italy*, §§ 57-61 and the references it contains.

⁸⁹ See for instance *Shishkov v. Russia*, § 135.

⁹⁰ The Court states that “Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term.” (§ 28). Thus, the Court had to research, by way of interpretation, the elements or aspects of this right. The Court refers to the principle of the rule of law as described in the Preamble of the Convention, as in civil matters “one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.” The Court has noted in the case *Golder v. The United Kingdom* [GC] that Article 6-1 should be read in the light of the “principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally “recognised” fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice” (§ 35). The Court takes the view that the right of access to the courts is not absolute. “As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication” (§ 38).

prerequisite for the proposed action, especially because of his detention. In this respect, the Court stresses that “*hindrance in fact can contravene the Convention just like a legal impediment*” (§ 26). Similarly, the opportunity that the applicant would have had of bringing proceedings against his detention is deemed by the Court to be insufficient, as it may be “*hindering the effective exercise of a right may amount to a breach of that right, even if the hindrance is of a temporary character*” (ibid.).

Moreover, this founding judgement takes account of the importance ascribed to the effectiveness of the right of access to a court. This requirement led the Court to constantly demand that the person concerned “*enjoy a clear and concrete opportunity to challenge any act that constitutes a breach of his/her rights*”. In a very exemplary manner, the Court ruled that such an opportunity had not been granted to the applicants in the case *Stegarescu and Bahrein v. Portugal*, which concerned the isolation of prisoners accused of preparing an armed prison break. The Court takes account of the fact that the applicants had never had access to the text of the administrative decisions that ordered their confinement to a security cell and that they had only been informed of the fact that such a decision had been made in light of the existence of indicators that pointed to the fact that a prison break plan was in the making. In the eyes of the European judges, such a procedure did not enable the persons concerned to challenge effectively the measure at issue. This requirement seems to be particularly relevant, and could then be the starting point for developing a consistent case-law, in disputes concerning security measures, where the prison administration is ready to invoke public order in order to refuse to give an explanation to the persons concerned about the decisions that have been made against them.

The concern about ensuring a referral to the courts which is really viable is present in the cases in which the Court ruled that excessive procedural constraints, such as the one requiring a list of all persons concerned by the procedure, are a breach of the right of access to a court⁹¹, as is the exceedingly short timeline of the procedure⁹².

The right of access to a court is attained in its substance even if the court does not judge the merits of the appeal on the grounds that the latter has lost its purpose as a result of the lapse of time. Among several Italian cases, the judgement *Enea v. Italy* [GC] concerns the proceedings brought by a prisoner subjected to a special detention regime. The court, which had ten days to rule, rejected one of the applicant’s claims more than four months after it learned about the reason the time limits for the contested decision had expired. Thus, the absence of any decision on the merits has voided the control exerted by the court of any substance. The Court takes into account that the time limits imposed on the latter had been set at ten days as a result, on the one hand, of the severity of the effects of the special regime on the rights of the prisoner, and on the other hand as a result of the limited validity of the contested decision. In the case *Musumeci v. Italy*, which is different in the sense that the courts had simply issued a decision belatedly, the Court further takes into account the fact that the administration was not bound by any judgement overturning a part or the entirety of the imposed restrictions, and can therefore issue,

⁹¹ *Shishkov v. Russia*.

⁹² Ibid.

immediately after the expiration of the validity of one of these measures, a new decision reintroducing the restrictions that were lifted by the court⁹³.

Unsurprisingly, the question of accessibility to the court comes up regularly in its financial dimension in prison litigation. This is the case because, to begin with, it concerns the legal costs that are foreseen, where necessary, by national law. The case-law considers in general that the capacity of the applicant to pay for the legal costs, and the stage of the proceedings when these costs are due are elements to be taken into account in order to learn whether access to a court has been hampered. The purely financial restrictions, totally decoupled from the prospects of success of the appeal, must be the subject of a particularly rigorous scrutiny.

In the case *Cirop v. Moldova* the applicant was denied access to a court, as the Supreme Court had refused to examine his claim concerning forcible feeding that he had been subjected to, on the grounds that he had not paid for the costs of the proceedings. According to the Court, the person concerned should have been exempted from the payment, regardless of his capacity to pay, taking into account not only the derogations provided for in national law, but also the severity of his allegations (torture).

As far as free legal aid is concerned, the case-law considers that, unlike what is common in criminal matters, Article 6 § 1 does not imply that the State must provide for free legal aid in all litigation related to a “right of a civil character”. The situation could however differ when this assistance is indispensable in order to gain effective access to a court, on the basis of the particular circumstances of the case, and in particular on the basis of the importance of the issue for the applicant, of the complexity of the right or of the applicable procedure, and of the capacity of the defendant to present effectively his case in person. In prison-related matters, the Court seems quite reluctant to take a stance. In several cases, it took into account the absence of legal aid, but only with the purpose of reinforcing its line of argument, and not on the grounds of the right of access to a court, but on the grounds of the failure to appear before the judicial body⁹⁴. The use of this approach vis-à-vis the same State is emblematic of a real reticence on the part of the Court to take a stance on the issue of free legal aid. The case *Rokosz v. Poland*, which concerned an application for suspension of sentence on medical grounds – a situation constituting a breach of Article 3 – takes account of the extreme strictness of the Court’s scrutiny on this basis. The Court actually takes into account the fact that “*even though the proceedings have great importance for the Applicant, they are not characterized by a complexity such that the assistance of a lawyer is indispensable so that the Applicant is guaranteed an effective examination of his/her appeal. The Court notes moreover that the entirety of the arguments presented by the Applicant in his/her appeal has been examined by the Appellate Court.*”

After all, European case-law indicates a very weak will as far as the requirement of effective access to a court in prison litigation is concerned. The concrete obstacles faced by prisoners, resulting from their situation of complete dependence on the prison’s administration, from their socio-economic situation and from the inaccessibility of the measures providing access to the law outside of the prison system, are taken into account in a very incidental manner by the Court

⁹³ Previously, the Court had entered the field of Article 13, reaching the same conclusion on the basis of the same considerations: See *Messima v. Italy* (No. 02).

⁹⁴ *Larin v. Russia; Vasilyev v. Russia; Beresnev v. Russia.*

with regards to Article 6. In other contexts, this economic reality seems more striking in the Court’s analysis of the effectiveness of the action taken by the complaint mechanism⁹⁵.

ii. Personal appearance and public hearing

Taking into account the tendency by States to try to flout the logistical constraints deriving from the transfers of prisoners to the courthouse, the failure to appear before the court and the absence of a public hearing constitute key areas where a breach of Article 6 § 1 is found. These violations, which can go hand in hand, are in general examined taking into consideration other characteristics of the proceedings, with the aim to assess its fairness in its entirety, on the basis of the requirements of equal arms and of the adversarial principle. As the Court sums it up in the judgement *Larin v. Russia*, Article 6 does not guarantee the right to personal presence before a civil court, but rather a more general right to present effectively one’s case, provided the principle of equal arms vis-à-vis the opposing party is respected. The State retains the right to choose the means to be used for the purpose of guaranteeing such rights. As for the hearing requirement⁹⁶, it does not apply systematically in cases in which written exchanges can be more appropriate, depending on the circumstances, for instance when no issues of fact or of law are available which could not be adequately solved on the basis of the file and of the written observations of the parties. Personal presence, oral or written form of the proceedings, legal representation etc., are also issues that must be analyzed in the broader context of the “fair trial” safeguard: it should be verified whether the applicant – party to civil proceedings – has been given a reasonable opportunity to comment on the observations or on evidence produced by the other party, and to present his/her case under conditions that do not put him/her at a disadvantage vis-à-vis the opposing party.

In general, the Court will issue a conviction judgement when the national courts have failed to conduct a hearing and/or to allow the prisoner to appear in person, as the debate before the court implies a discussion of the facts or an assessment of the personality of the person concerned. The key element lies therefore in the subject of the discussion before the court. The intervention of a counsel is not sufficient, as the applicant should be seen as a witness in his/her own case⁹⁷. In other words, the statement of the facts that he/she is required to deliver constitutes a decisive aspect of the proceedings.

In the case *Gülmez v. Turkey*, the Court found a systemic breach of Article 6 § 1 as a result of national law, according to which a prisoner’s appeal against a disciplinary measure was to be examined on the basis of the file, without public hearing. In the specific case, the Court had ruled that the applicant’s defence had only been taken into account before the disciplinary commission imposed the measures in question, and the applicant had not benefited from legal assistance in order to defend himself before the national courts examining his appeals against the disciplinary

⁹⁵ *Aden Ahmat v. Malta*.

⁹⁶ The Court reminds that conducting public hearings constitutes a fundamental principle under Article 6 § 1. This public character protects defendants against a secretive justice that escapes the control of the public. It is equally one of the means through which trust in the courts can be preserved. By making the administration of justice transparent, the public character contributes to the achievement of the objective of Article 6 § 1, i.e. guaranteeing a fair trial, which is one of the fundamental principles of all democratic societies, in the meaning of the Convention.

⁹⁷ *Skorobogatykh v. Russia* ; *Kovalev v. Russia*, § 37 ; and *Sokur v. Russia* § 35.

measures. On the grounds of Article 46 of the Convention, the Court invites the respondent State to bring its national law in line with the requirements of Article 6, taking account of the European Prison Rules.

Conversely, in a case in which the issue to be assessed by the national courts was to determine whether the prison administration was entitled, on the basis of domestic law, to regulate the language used in phone conversations, the Court deemed that there was no issue of credibility requiring a debate on the evidence or a cross-examination of the witnesses. Furthermore, the disputed issue could be examined on the basis of the writings of the parties⁹⁸.

In the examination of the safeguards implemented to the prisoner's benefit, the Court takes account of the prison context and enquires whether the courts were undertaking specific measures in order to ensure an effective participation on the part of the persons concerned, what could be done through a cost-benefit analysis of the decisions made by the national court. In a case concerning the appeal against a disciplinary measure⁹⁹, the Court deemed that the courts had envisaged alternative solutions so as to ensure the personal appearance of the person concerned, as they conducted a hearing in the prison institution. The Court recognized that this circumstance constitutes in fact an obstacle to the access by the public and the media to the courtroom. However, for practical reasons, it could not be expected that these debates held in a prison institution are attended by the same audience as during a hearing held in a courthouse. The inconvenient of such a court hearing in terms of publicity is compensated by the benefit that the person concerned obtains from it in terms of personal participation. As far as litigation on the quality of the health care provided in prison is concerned¹⁰⁰, the Court criticizes the national courts that, faced with the difficulty of ensuring that the prisoner is present, have failed to arrange a videolink or a hearing in the place of detention. Moreover, after having rejected the prisoner's request to appear in person, the national courts have not thought about a way to ensure an effective participation of the person concerned in the proceedings by asking him whether he had a friend or a relative who was willing to represent him, or whether he had the possibility to contact them and mandate them to act in his name. Since the applicant's testimony would have constituted an indispensable element of the defence, the Court found a breach of Article 6.

2.2.2 Criminal litigation

The criminal cases analyzed by the Court where the prisoner's internal legal status is the issue at stake are in very short supply. They concern the United Kingdom and have led to findings of a breach based on two grounds: on the one hand, the lack of independence and objective impartiality, which has an impact on the disciplinary proceedings, as a result of the accumulation of investigative, prosecution and judgement functions in the hands of the administration; on the other hand the lack of legal assistance.

In the case *Whitfield and others v. The United Kingdom*, which concerns disciplinary proceedings, the Court jointly examines the claims relative to the objective impartiality and the

⁹⁸ *Nusret Kaya and others v. Turkey*.

⁹⁹ *Razvyazkin v. Russia*, §§ 142-143.

¹⁰⁰ *Vasilyev v. Russia*.

structural independence of the body that has ruled on the applicant's case (the prison's director and the controller¹⁰¹). The Court observes that officials of the Ministry of the Interior, be it the prison's warden, the director or the controller, have prepared and brought the charges against the applicants, conducted the investigations and the proceedings, and have ruled on the prisoner's guilt and then imposed penalties. Thus, there was no structural independence between the prosecution and judgement function (§ 45), in violation of Article 6 § 1. The Court reaches the same solution in the judgements *Black v. The United Kingdom* and *Young v. The United Kingdom* of 16 January 2007. In the case *Black*, the Court discards – without giving a response – the argument of the government¹⁰², which asserted in particular that the disciplinary decision may be challenged before the Ombudsman, and may be subject to a judicial review process before the High Court. The applicant explained that the judicial review, which he had applied for in the specific case, did not amount to an appeal, which was only possible at the level of the central administration, i.e. under conditions that do not meet the requirements of Article 6 § 1.

In the case *Ezeh and Connors v. The United Kingdom* [GC], the Grand Chamber holds that the refusal by the prison's director to authorize the applicants to be represented by a counsel is a breach of Article 6 § 3 (c). Therefore, there is no need to examine the claim in the alternative, according to which the interests of justice required that the applicants be granted free legal aid for the needs envisaged by the proceedings before the director.

As far as a dispute that is, strictly speaking, not subject to the prisoner's domestic legal status is concerned, it can be noted that in the case *Riepan v. Austria*, which concerns criminal proceedings held within a prison, the Court has reached the conclusion that there is a breach of Article 6 § 1. The applicant was serving a prison sentence and, during his detention, criminal proceedings were brought against him for posing a serious threat to a warden. He was sentenced by the regional court which had conducted the proceedings in the prison. During the appeal proceedings, he asserted that the hearing had not been public, as it had taken place in the "enclosed part" of the prison to which visitors have access only by obtaining a special authorization, and had been held in a room that was too small to host a possible audience. Following a public hearing, this time, on the premises of the Appellate Court, the latter discarded the appeal maintaining that all persons concerned had been authorized to attend the proceedings.

The European Court of Human Rights reminds that the simple fact that the proceedings were taking place on the premises of the prison should not necessarily lead one to conclude that there was no public hearing. Likewise, the fact that the potential audience had to go through certain identity and possibly security controls does not per se deprive the proceedings of their public character. However, such a situation constitutes a serious obstacle to the public character of the debates. In such cases, the State has the obligation to adopt compensatory measures with the aim to make sure that the public and the media are duly informed of the trial venue and they can have effective access thereto. In the specific case, the Court has considered that the regional court had failed to adopt adequate measures to obviate the inconvenient from the point of view of publicity represented by the fact that the trial was held in the enclosed part of the prison.

¹⁰¹ An agent charged with supervising the prisons managed by a private company.

¹⁰² See the decision on the admissibility of 27 September 2005.

The Court considers moreover that the control exerted by the Appellate Court did not have the scope required to obviate the defects affecting the previous proceedings. This court certainly had the power to re-examine the case both in fact and in law, and to change the sentence imposed. The fact remains that, other than the applicant's hearing, the court had not found any evidence and abstained in particular from questioning the witnesses anew. In this respect, the Court did not deem it important that the applicant was not invited to this hearing. First and foremost, in light of the relevant procedural norms, the Appellate Court would have not granted such a motion if it had considered that the manner in which the court of first instance had found the evidence was incomplete or faulty. Secondly, the courts are to monitor observance of the right of the accused person to view the evidence produced in a public hearing.

Conclusion

The prison-related case-law of Article 6 is characterized by a double paradox. First, the Court has established very quickly the principle of the applicability of procedural safeguards to prisoners, in a time when the right of prisoners was not being taken sufficiently into account by the supervisory bodies of the Convention. However, and in spite of the discounting of the invocation of Article 6 in Strasbourg in general litigation, the number of judgements questioning the prison system on these grounds.

In criminal matters, the Court has limited itself to a handful of judgements handed down against the United Kingdom, confined to the disciplinary litigation of the refusal of losses of remission. Not only has the interpretation of the Convention not evolved so as to take account from this angle the penalty of the "prison within the prison", but the Court has abstained from applying the British precedents in the disputes that posed problems that were very similar. Having proclaimed that the prison is subjected to a principle of ordinary law with regards to fair trial safeguards, the Court has subsequently departed from the general guidelines of its case-law to adopt a binary approach which only enshrines situations where the issue at stake was evidently an extension of the effective detention period imposed on the applicants.

In this context, the civil component seemed to be, in the early 2000s, a potential vector for the establishment of the procedural rights for the detained population. Through an incremental approach, the Court has recognized the applicability of this text to several categories of measures, in particular those taken on the basis of the high security regime, which are deemed to question the prisoners' personal rights, then in the disciplinary domain, and eventually in compensation litigation, with regards to the services of the prison or prisoners' interests outside the prison. The progress made, little by little, has been negligible. In this respect, the Court's failure to guarantee the fair trial safeguards in the domain of measures to relax the conditions of sentences represents an actual default in the conventional protection of prisoners' rights. Similarly, the usage of a right in prison is oftentimes hampered by the fear that this may have repercussions on the early release procedures. The solemn establishment of a principled approach in prison-related matters, which makes categories of measures fall within the scope of Article 6, with regards to the personal rights that it questions, instead of the adopted case-based approach, seems to be the only way to ensure greater consistency in the case-law.

The second paradox is that the nature of the protection which is guaranteed under Article 6 concerns after all a very limited number of claims, as the fair trial principles seem *prima facie* to be formidable tools for the safeguard of fundamental rights in the enclosed world of prisons. The case-law focuses essentially on the right of access to a court from the point of view of the lack of appeal in matters of security measures, and the shortcomings in the field of the right to appear in person and/or to a public hearing in disciplinary or compensation litigation. Criminal litigation has focused sporadically on the impartiality and independence of the disciplinary body and on the right to legal assistance. From the point of view of the interpretations of the safeguards of Article 6, the logistical and security-related constraints linked to the detention context are taken into account in order to mitigate the procedural obligations, but the Court is trying to control concretely that the measures in question do not as a consequence affect the substance of the guaranteed right. Rather than an alteration of the fair trial principles, the issue is one of adjustments to the details of their implications for the prison environment, which in any case are apparently not able to discredit the protection granted by Article 6.

From a forward-looking point of view, the due process requirements (adversarial principle, equal arms, loyalty when producing evidence) are apparently full of potential for the detained applicants, and may reinforce considerably the conventional protection, in light of what prevails nowadays on the basis of Article 13 or of the procedural component of the normative provisions of the Convention. The lack of procedural resources in prisons certainly contributes to the complaints repeating themselves and to a lower level of sophistication of the claims. It can also be assumed that the weak consideration, on the basis of Article 6, of the issue of financial obstacles which arise in prison when seeking access to a court makes the entirety of the “fair trial in prison” principle weaker. The evolution of the case-law in these matters is certainly one of the most important issues at the moment in the realm of prison litigation. The issue of access to a justice of quality definitely constitutes one of the keys to achieving success in a case-law policy that aims to make the effectiveness of national procedural remedies an important lever to eradicate the dysfunctional aspects of the national prison systems.

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