INTRODUCTION

The respect for and protection of human rights is a cornerstone of the rule of law (*Rechtsstaat*). Accordingly, it is one of the primary goals of the Rule of Law Program South East Europe - Konrad-Adenauer-Stiftung to promote the safeguarding of basic rights and liberties. One way to ensure the effective implementation of those safeguards is an administrative legal framework which provides remedies to redress violations of human rights by state authorities.

Such a framework has only recently been established in some of the countries of Southeast Europe. Under the respective communist or socialist regimes of those countries, administrative law (both in its substantive and procedural legal dimensions) did not exist *de facto* as an instrument to enforce the rights of citizens *vis-à-vis* the state. To date, many transitional countries in Southeast Europe still lack adequate laws and practices to effectively help control the public administration through an independent judicial review of administrative acts.

The Rule of Law Program South East Europe (*RLP SEE*) supports efforts in the region to overcome such shortcomings. One example is the project "*Fair Trial in Administrative Court Proceedings*" which the RLP SEE conducted throughout 2008 in cooperation with the organization "Bulgarian Lawyers for Human Rights". The objective of this project is to familiarize Bulgarian jurists (in particular administrative law judges) with the standards of the European Court of Human Rights regarding access to administrative courts and the extent of control of administrative adjudication.

Part of the project involved an international conference held in Sofia (Bulgaria) on 26 May 2008 at which *Professor Pieter van Dijk*, President of the Administrative Jurisdiction Division in the Council of State of the Netherlands and Member of the European Commission for Democracy through Law (*Venice-Commission*), delivered the lecture at hand. In his lecture, *Professor van Dijk* analyzed how Bulgarian Administrative Law measures against human rights standards under the European Convention on Human Rights (*ECHR)*. He outlined the specific scope of Articles 6, 13, and 41 ECHR and identified issues related to the application of these provisions regarding the guarantee of the right of access to administrative courts and the right to effective remedies under domestic jurisdiction.

The publication at hand is the second volume of "*Rechtsstaat* in Lectures", an in-house publication series which gathers outstanding lectures delivered in

seminars, conferences or training courses organized by the RLP SEE. The series aims at responding to the need for expert analysis on rule of law topics which are most relevant to the countries in South East Europe.
Professor van Dijk's article is a valuable contribution to the understanding of certain procedural rights and the applicability of the ECHR for domestic jurisprudence in those countries. It is our hope that it will help spur the debates about the harmonization of domestic administrative legal frameworks and the respective practices with European standards. Securing basic rights and liberties is not only the responsibility of jurists; it is also the task of national, political, legislative, and academic authorities, as well as of civil society at large. I therefore hope that the publication will be consulted by a broad spectrum of readers.

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THE APPLICABILITY IN ADMINISTRATIVE PROCEDURES OF THE RIGHT OF ACCESS TO COURT UNDER ARTICLE 6 AND THE RIGHT TO AN EFFECTIVE REMEDY UNDER ARTICLE 13 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
THE CASE OF BULGARIA

Pieter van Dijk[1]

1. INTRODUCTION: THE SCOPE OF "CIVIL RIGHTS AND OBLIGATIONS"

The first sentence of Article 6, paragraph 1 of the European Convention on Human Rights (heretofore "*Convention"*) reads as follows: *"In the determination of his civil rights and obligations or of any criminal charge against him, everybody is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".*

As far as the civil limb of Article 6 of the Convention is concerned, the European Court of Human Rights (heretofore "*Court"* or "*Strasbourg Court")* has held that the words "civil rights and obligations" have an autonomous meaning; the substantive contents and legal effects of the legal provision concerned is determinant, not its classification within the domestic legal system.[2] Consequently, viewed through the parameters of Article 6, administrative procedures may also concern "the determination of civil rights and obligations". It is also important to point out that Article 6 is only applicable if a right or obligation is at stake that "can be said, at least on arguable grounds, to be recognised under domestic law"[3]. Indeed, the Court has no power to "create"

1 *Professor Pieter van Dijk is President of the Administrative Jurisdiction Division of the Council of State of the Netherlands and Member of the European Commission for Democracy through Law (Venice-Commission). He is a former member of the European Court of Human Rights*. The article – which reflects his personal opinions - is based on an introductory lecture presented by Professor van Dijk in Sofia (Bulgaria) on 26 May 2008 as part of the Conference "Fair Trial in Administrative Court Proceedings". The event was organized by the Rule of Law Program South East Europe of the Konrad-Adenauer-Stiftung in cooperation with the Bulgarian Lawyers for Human Rights. Part of the article will also be used for a contribution to a Dutch publication shortly.

2 *ECtHR, König v. Germany,* judgment of 28 June 1978, §§ 88-89.

3 *ECtHR, James and Others v. United Kingdom,* judgment of 21 February 1986, § 81.

rights and obligations that have no basis within the domestic legal system, and it has to show prudent restriction in interpreting domestic law in that respect, but the words "on arguable grounds" provide the Court with some freedom of assessment. Of course, the mere fact that a certain claim is not actionable under domestic law does not exclude the applicability of Article 6 because Article 6 precisely *implies a right* of access to court.[4] Moreover, the applicability of Article 6 does not require that the pertinent right or obligation is the subject matter of the proceedings concerned, as long as the outcome of the proceedings has an impact on the enjoyment of such rights or the scope of the obligation.[5] Finally, the Court's case law has to be taken into consideration which indicates that the right of access to court implied in Article 6 is not an *absolute* right. Procedural requirements such as time limits, the payment of a certain amount of court fees, the assistance of a lawyer, and the like may restrict that right.[6]

Although the Court is prepared to leave the national authorities a certain margin of discretion in this field as well, it has held that such limitations

a) must not impair upon the essence of the right of access to court;[7]
b) must be sufficiently clear or contain safeguards against misunderstanding in order not to make the right of access illusory;[8] and
c) must, like any limitation, serve a legitimate aim and show a reasonable relationship of proportionality between the limitation and the aim sought to be achieved[9]

- the time limit must not be unreasonably short;[10]
- the court fees not excessive;[11] and
- the requirement of legal assistance not prohibitive[12].

4 ECtHR, *Al-Adsani v. United Kingdom*, judgment of 21 November 2001, § 47.

5 ECtHR, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, § 73.

6 ECtHR, *Ashingdane v. United Kingdom,* judgment of 28 May 1985, § 59.

7 *Idem,* § 57.

8 ECtHR, *Lagrange v. France,* judgment of 10 October 2000, §§ 40-42.

9 *Loc. cit.* (note 2).

10 ECtHR, *Tricard v. France,* judgment of 10 July 2001, §§ 30-34.

11 ECtHR, *Kreuz v. Poland,* judgment of 19 June 2001, §§ 62-63.

12 ECtHR, *Airey v. Ireland,* judgment of 9 October 1979, §§ 22-28.

2. EXCLUSIONS AND LIMITATIONS OF THE RIGHT OF ACCESS TO COURT UNDER BULGARIAN LAW

The second paragraph of Article 120 of the Bulgarian Constitution reads as follows: "*Citizens and legal entities shall be free to challenge any administrative act which affects them, except those listed expressly by the laws"*. The last part of this provision would seem to grant to the legislature an unlimited power to exclude administrative acts from judicial review. It does not contain any restrictions the legislature must take into account, nor does it establish any criteria for determining which exclusions may be made. However, the Bulgarian Lawyers for Human Rights (*BLHR*) reported[13] that the Constitutional Court of Bulgaria has ruled that judicial review shall not be excluded in cases where this seemingly unlimited legislative power would affect any constitutionally guaranteed right or freedom, or any other constitutionally protected interest. The report also contains references to case law of the other high courts of Bulgaria holding that any exclusion or limitation has to be reviewed for its conformity with Article 6. In conclusion, Bulgarian case law holds that the power of the legislature is not an unlimited one and that any legislative exclusions or restrictions of judicial review of administrative decisions or acts established by virtue of Article 120, paragraph 2 of the Bulgarian Constitution must conform to the right of access to court under Article 6 of the Convention. I say "exclusions *and limitations*" because granting access to court without that court having full jurisdiction to examine the merits of the case is also in violation of Article 6.

The Highest Administrative Court must refer a matter to the Constitutional Court when faced with the issue of conformity of an exclusion or limitation with Article 6, because the interpretation and application of Article 120 of the Constitution is involved. If the party concerned is not satisfied with the ultimate decision at the national level, he or she may introduce an application with the Court in Strasbourg which will make the final determination.
If well-established case law of the Constitutional Court exists which holds that a certain exception or limitation does not violate Article 6, the person concerned may directly approach the Court in Strasbourg since Article 35, paragraph 1 of the Convention does not require one to petition the Constitutional Court if that remedy is not effective. Moreover, it may be assumed that, once the Strasbourg Court has decided the issue, there is no longer the obligation for the Highest Administrative Court to refer the issue to the Constitutional Court, since there is no need for an answer anymore.

13 The report is entitled "Preliminary Opinion of Bulgarian Lawyers for Human Rights on the Compliance of Bulgarian Law and Practice with the Requirements of ECHR for Fair Trial in Civil and Administrative proceedings /Article 6 – civil aspects/" and was written in 2004.

Consequently, the criterion utilized to decide whether a particular exclusion or limitation is in accordance with Article 6 includes the following:

a) does the exclusion or limitation concern a "civil right or obligation" in the sense of Article 6 in the autonomous meaning given to these words in the Court's case law;
b) would the judicial review, if granted and executed, lead to a "determination" of such a civil right or obligation in the sense given to that notion in the Court's case law;
c) does the provision for allowing judicial review give the court sufficient leeway for examining the merits of the case;
d) does the exclusion make the right of access to court illusory, or are there alternatives in the form of judicial proceedings that are effective; and
e) is the exclusion or limitation formulated in a sufficiently clear way, does it serve a legitimate aim, and is there a reasonable relationship between that aim and the scope of the limitation (proportionality).

3. IS IT WITHIN THE POWER OF THE BULGARIAN COURTS TO IGNORE AN EXCLUSION OR LIMITATION?

Who has the responsibility to solve the problem in the event an exclusion or limitation of judicial review is found to be in violation of Article 6 of the Convention?

Article 6 contains a general obligation for the Contracting States. The manner in which the State fulfils its obligation is, in principle, for the State to decide, provided that the result is in conformity with the obligation concerned. In that respect, it has to be taken into account that the Convention is directed to the Contracting States, not to any particular organ within that State, also not directly to the courts. Article 1 of the Convention obliges the Contracting States to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention and its Protocols. In addition, Articles 33 and 34 provide that the Strasbourg Court deals with complaints concerning violations of the Convention and its Protocols by a Contracting Party, while Article 46 stipulates that the Contracting Parties undertake to abide by the final judgment of the Court in any case in which they are parties.

The fourth paragraph of Article 5 of the Bulgarian Constitution reads as follows: "*International treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation.*" It is unclear whether the provision contains an obligation for the legislature only to keep domestic legislation in conformity with Bulgaria's international legal obligation, or whether it also empowers the domestic courts to give priority to international law over conflicting domestic law. From the BLHR report, it appears that the case law has adopted the latter view. According to the report, the Supreme Administrative Court of Bulgaria has adopted the opinion that Article 6 of the Convention requires the domestic courts to ignore any restriction of competence that is not in conformity with the requirement of access to court.

What does this imply for the relationship between the judiciary, on the one hand, and the legislature and executive, on the other hand? Does Article 6 of the Convention provide a legal ground for judicial review, including cases where domestic law excludes or restricts such review? This depends upon the manner in which the jurisdiction of the judiciary is regulated under domestic law, including constitutional law. According to the *communis opinion* of constitutional lawyers, provisions of international law like Article 6 of the Convention cannot directly create jurisdiction for a domestic court; the latter derives its jurisdiction from domestic law.

However, if domestic law clearly delineates which court would have jurisdiction, if that jurisdiction had not been excluded in that particular case by law, then in order to comply with the State's international legal obligations, the court concerned may decide to set aside the legal provision excluding its jurisdiction due to its incompatibility with Article 6 of the Conventions.
Relying on the subsidiary principle and Article 35's admissibility requirement of exhaustion of local remedies, the Court in Strasbourg seems to start from the presumption that ultimately it is the domestic court's responsibility to reach a final decision in a certain case in order to secure that the obligations under the Convention are respected.

This creates a continuous dilemma for the judiciary, especially after the Strasbourg Court has indicated that a domestic legal provision or legal practice is not in conformity with the Convention and the legislature has not yet reacted. In most cases, however, there is a way out of that dilemma for the domestic courts by interpreting their domestic law, both procedural and substantive provisions, in a way that brings them in conformity with the Convention. In many cases, this so-called "treaty-conform interpretation", a very common practice among domestic courts regarding the interpretation and application of the law of the European Union, may provide a solution. However, in interpreting

domestic law provisions in harmony with the Convention, the courts must pay special attention to the autonomous meaning of certain notions in the Convention which also figure in domestic law. These notions include “civil rights and obligations”, “reasonable time” and “just satisfaction”.

4. DOES THE CONSTITUTIONAL COURT HAVE A SPECIAL POSITION IN THIS RESPECT?

If the Constitutional Court of Bulgaria has decided that the exclusion or limitation of judicial review in a specific instance is not in violation of Article 6 of the Convention, it may be assumed that the other Bulgarian courts are inclined to follow that position. Article 149 of the Bulgarian Constitution does not explicitly confer on the Constitutional Court the power to rule on the conformity of laws with international instruments entered into force. However, it may be assumed that this power is included in the constitutional review by virtue of Article 5, paragraph 4 of the Constitution.

Articles 119 and 120 of the Bulgarian Constitution do not seem to articulate a system of binding precedents, as this is to be found in the common law countries. In paragraph 1, Article 119 provides “*Justice shall be administered by the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeal, regional courts, courts-martial and district courts*”, while the first paragraph of Article 120 states: “*The courts shall supervise the legality of the acts and actions of the administrative bodies*”. On the other hand, Articles 124 and 125 of the Constitution are less clear in this respect. Article 124 provides as follows: “*The Supreme Court of Cassation shall exercise supreme judicial oversight as to the precise and equal application of the law by all courts*”, while the first paragraph of Article 125 reads: “*The Supreme Administrative Court shall exercise supreme judicial oversight as to the precise and equal application of the law in administrative justice*”. These provisions might give the wrong impression that the Supreme Court of Cassation also has jurisdiction to review the judgments of the Supreme Administrative Court, because they refer to “all courts”, while it follows from Article 125 that these courts include the civil and criminal courts only. Moreover, both Article 124 and Article 125 could give the wrong impression that these Supreme Courts may also review the decisions of lower courts on their own motion, *i.e.* outside the framework of an appeal in a particular case. This would, of course, create enormous legal uncertainty and infringe upon the principle of *res judicata*. Therefore, it may be assumed that there is no *stare decisi* in the Bulgarian system of administration of justice. However, if a lower court knows beforehand that its decision will be quashed upon appeal by the higher court because it is not in conformity with the case law of that higher court, procedural economy and legal certainty will, in general, require that the lower court follows the case law of the higher court.

On the contrary, if the Strasbourg Court has held the case law of the Bulgarian Constitutional Court to be in violation of Article 6 of the Convention, there is no longer any reason for the other Bulgarian courts to follow that case law. By virtue of Article 46 of the Convention, Bulgaria has to abide by the Court’s judgment under the supervision of the Committee of Ministers of the Council of Europe. This includes the obligation to take measures of a general nature to prevent violations in the future. Moreover, under Article 13 of the Convention, persons in Bulgaria are entitled to an effective remedy against (threats of) violations of Article 6. If and as long as Strasbourg case law providing guidance on the issue is lacking, it is up to the domestic courts to secure the rights and freedoms laid down in Article 6 to the extent that the legal foundation of their jurisdiction allows them to do so.

The Bulgarian Constitutional Court would seem to have a special position within the Bulgarian system in this respect. Paragraph 1 of Article 149 of the Bulgarian Constitution states that the Constitutional Court shall provide “binding interpretations of the Constitution”, and shall rule on “challenges to the constitutionality of the laws” and on “the compatibility between the Constitution and the international instruments concluded by the Republic of Bulgaria prior to their ratification”. Article 149 does not explicitly confer power on the Constitutional Court to rule on the conformity of laws with international instruments entered into force, but it may be assumed that this power is included in the constitutional review by virtue of Article 5, paragraph 4, of the Constitution.

On the basis of the Constitutional Court’s position and competences, it is submitted here that its interpretation of the Constitution and, *via* the Constitution, of Article 6 of the Convention, and its ruling on the compatibility of a statute with Article 6, are binding on the other domestic courts since its decision has become part and parcel of domestic law. Support for this assumption may be found in Article 150, second paragraph, of the Bulgarian Constitution which contains an obligation for the Supreme Court of Cassation and the Supreme Administrative Court, if a constitutional matter arises in a case, to suspend the proceedings and refer the matter to the Constitutional Court.

Here, again, as a consequence of Article 46 of the Convention, the situation may change after the Strasbourg Court has given judgment and holds the statute concerned to be *not* in conformity with Article 6.

It is becoming more and more general practice in the member States of the Council of Europe that the domestic courts consider the judgments of the Strasbourg Court, not only in cases against the State concerned but the case law in general, as forming part of the Convention and therefore may have legal implications for all the Contracting States. As a consequence, domestic courts should give direct application to these judgments even if that means that they have to set aside domestic law as long as the legislature has not brought the law in conformity with the Strasbourg case law.

5. ACCESS TO COURT MEANS ACCESS TO A COURT WITH FULL JURISDICTION

The guarantee of access to court, implied in Article 6 of the Convention, covers all the factual and legal issues related to the dispute concerning a civil right or civil obligation as a basis for the determination by the court.[14] However, the character and contents of the dispute concerned may have an impact on the scope of judicial review as well as the procedure followed in preparing the decision submitted for judicial review.[15] Consequently, the requirement of full jurisdiction does not exclude the fact that, in an administrative procedure, the administrative authority has certain discretion to evaluate the facts or balance the different interests involved. However, when domestic law permits certain discretion, or limitations of a certain basic right, the courts must review the use of the discretion, or the application of a limitation, for its conformity with the law. This includes the law's conformity with any obligation imposed by the Convention itself, or implied in the Strasbourg case law. If the appealed administrative decision amounts to an administrative sanction with a punitive character, the judicial review procedure rises to a quasi-criminal law character, and the court must have full jurisdiction to review and quash the decision of the administration both on questions of fact and law.[16]

The reasoning of the Bulgarian Constitutional Court in its judgment No. 11 of 1 July 2003, as referred to in the above-mentioned BLHR report, does not seem

14 ECtHR, *Le Compte, Van Leuven and De Meyere v. Belgium,* judgment of 23 June 1981, § 51.

15 ECtHR, *Potocka and Others v. Poland,* judgment of 4 October 2001, § 53.

16 ECtHR, *Schmautzer v. Austria,* judgment of 23 October 1995, § 36.

to be correct in that respect. The fact that, in view of the interests involved, a speedy and efficient decision by a specialized body is required, does not justify the exclusion or limitation of judicial review. Not only does Article 6 of the Convention not allow for such an exception or limitation; it already takes into account the fact that important interests in legal certainty may be involved. This is precisely the reason that Article 6 requires a judicial decision within a reasonable time. In addition, in most cases the interested party may request a provisional injunction if his or her interests so require. The argument that the matter requires a decision by a specialized body is not valid either, because the court is not required to substitute its evaluation of the facts for that of the body concerned; it is its task to review the decision for its legality.

6. THE PROBLEM OF ACCESS TO COURT IN THE CASE OF A TACIT REFUSAL

An example of a tacit refusal is when a request is made to an administrative authority and the latter has not made a decision within the legal time limit or within a reasonable time if there is no fixed time limit.

The BLHR report noted the difficulty in determining when the time limit begins for appealing the tacit refusal. Normally, the appeal may be brought the moment the time limit prescribed by law for making the decision has passed. If there is no such time limit, there is also no fixed time limit for objection or appeal. However, the objection or appeal may be declared inadmissible because it has been filed prematurely or unreasonably late.

Secondly, the BLHR report[17] raised the issue as to whether the requesting party has an effective possibility to appeal the tacit refusal, even if he or she does not know the precise facts or circumstances. The problem may be that under Bulgarian administrative law the tacit refusal is considered to be a decision on the merits (*lex silencio positivo*) which upon appeal may be upheld or annulled. That could create a situation in which the applicant would not be able to present the necessary arguments against the refusal. It is submitted that it would be preferable not to consider the tacit refusal as a decision on the merits. The only issue at stake in appeal would then be whether the particular administrative body was duty bound to make a decision. If the court determines that this is indeed the case, the administrative body must make a decision, which in turn will be subject to appeal.

17 BLHR Report mentioned in note 13.

7. THE REQUIREMENT OF A DETERMINATION WITHIN A REASONABLE TIME

The judgment of the Strasbourg Court in *Kiurkchian v. Bulgaria*[18] did not concern the right of access to court. In that case, the applicants complained that proceedings against the municipality and their neighbours had lasted unreasonably long. This allowed their neighbours to finish the construction of a building preventing access of sunlight to the applicant's house.

This brings us to the right to a hearing within a reasonable time laid down in Article 6 of the Convention. By requiring that cases be heard within a "reasonable time", the Convention underlines the importance of administering justice without undue delays as that might jeopardise its effectiveness and credibility.[19] And, indeed, excessive delays in the administration of justice constitute an important danger, in particular, for the respect of the rule of law.[20]

The reasonableness of the delay must reflect the necessary balance between *expeditious* proceedings and *fair* proceedings.[21] A careful balance must be struck between procedural safeguards, which necessarily entail a certain length of time that cannot be reduced, and a concern for prompt justice.[22]

Moreover, the requirement of celerity must never impinge on the need to preserve the independence of the judiciary to organise its own procedures without undue internal and external control.

For these reasons, the assessment of the reasonableness of the duration of any set of proceedings should never be mechanical. It necessarily depends on the specific circumstances of the case and must reflect the concern of ensuring the right balance amongst all the different guarantees set out by Article 6 of the Convention.[23]

18 ECtHR, *Kiurkchian v. Bulgaria*, judgment of 24 June 2005.

19 ECtHR, *Katte Klitsche de la Grange v. Italy*, judgment of 27 October 1994, § 61.

20 Committee of Ministers of the Council of Europe, Res DH(97)336, Length of civil proceedings in Italy: supplementary measures of a general character, 27 May 1997.

21 ECtHR, *Nideröst-Huber v. Switzerland,* judgment of 18 February 1997, § 30*; mutatis mutandis*, *Acquaviva v.France*, judgment of 21 November 1995, § 66.

22 CEPEJ(2004)19rev2, A new objective for Judicial Systems: the processing of each case within an optimum and foreseeable timeframe, available at www.coe.int/cepej, p. 7.

23 See F. Tulkens, «Le droit d'être jugé dans un délai raisonnable: les maux et le remèdes», Venice Commission, CDL(2006)34,p. 4.

Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their judicial systems to ensure that their courts can meet the requirements of this provision.[24] Accordingly, the Court does not accept backlogs or administrative difficulties as justification for procedural delays.[25] Exceptional political or social situations in the country concerned, however, may be taken into consideration for a transitory period.[26]

The obligation to organise its judicial system in a manner that complies with the requirements of Article 6 § 1 of the Convention also applies to a Constitutional Court. However, "when so applied it cannot be construed in the same way as for an ordinary court. Its role as guardian of the Constitution makes it particularly necessary for a Constitutional Court sometimes to take into account other considerations than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms. Furthermore, while Article 6 requires that judicial proceedings be expeditious, it also lays emphasis on the more general principle of the proper administration of justice".[27]

8. EFFECTIVE REMEDY UNDER ARTICLE 13 OF THE CONVENTION IN CASE OF UNREASONABLY LENGTHY PROCEDURES

Article 1 of the Convention requires the Contracting States to "secure" the rights and freedoms under the Convention. The European Court exerts its supervisory role subject to the principle of subsidiarity,[28] *i.e.* only after domestic remedies have been exhausted or, when domestic remedies are unavailable or ineffective. The right to an effective remedy established in Article 13 of the Convention stems directly from this principle.

Article 13 reads as follows: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*".

24 ECtHR, *Bottazzi v. Italy*, judgment of 28 July 1999, § 22.

25 ECtHR, *Kolb and Others v. Austria*, judgment of 17 April 2003, § 54.

26 ECtHR, *Milasi v. Italy*, judgment of 25 June 1987, §§ 17-20; ECtHR [GC], *Maltzan and Others v. Germany*, decision of 2 March 2005.

27 ECtHR, *Gast and Popp v. Germany,* judgment of 25 February 2000, § 75.

28 ECtHR, *Z. and Others v. United Kingdom*, judgment of 10 May 2001, § 103.

8a. The Relationship between Article 6 § 1 and Article 13 of the Convention

On the ground that the requirements of Article 6 §1 are stricter than those of Article 13, until fairly recently the Convention organs determined it unnecessary to decide whether Article 13 had also been breached in case a violation of Article 6 § 1 was found.; the requirements of Article 13 being entirely "absorbed" by those of Article 6.[29]

The change in reasoning regarding the right to an effective remedy in cases of an excessive length of proceedings came in 2000, in *Kudla v. Poland*.[30] In this judgment, the Court considered "in the light of the continuing accumulation of applications before it concerning the alleged violation of the right to a hearing within reasonable time" that "the time has come to review its case-law" according to which, in case of a violation of that right (Article 6 § 1), there would be no separate examination of an alleged breach of the right to an effective remedy (Article 13). The Court also underlined the subsidiary character of the machinery of complaint to the Court, recalling that by virtue of Article 1 of the Convention, "the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities."[31]

8b. The Notion of "Effective Remedy"

In *Scordino v. Italy*, the Grand Chamber of the Court elaborated on the notion of "effective remedy" in relation to violations of the reasonable-time requirement so as to provide to the Contracting States "guidelines on affording the most effective domestic remedies possible".[32] It took as a starting point that "the best solution in absolute terms is indisputably, as in many spheres, prevention. (…) Such a remedy offers an undeniable advantage over a remedy affording only compensation, since it also prevents a finding of successive violations in the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy".[33] Preventive measures may be of a structural character or relate to the case concerned.

Regarding preventive measures of a structural character implemented in order to speed up domestic judicial procedures, Judge Malinverni, concurring in *Schutte v. France*[34], mentions the following ones: (1) increase in the number of judges and clerks, or even the number of courts: (2) measures in the sphere of the judicial organisation, such as introducing a general system of single judges at first instance; and (3) more frequent recourse to methods of alternative dispute settlement.

Preventive measures in respect of the individual case concerned will be possible only if the proceedings at national level are still pending. Measures may include a vigilant surveillance by the competent authorities, including the courts, of the progress of procedures, and possibilities for the parties concerned to draw the attention of these authorities to the required speed. The latter may have the character of an internal request directed to the administrative authority or court concerned asking to speed up proceedings, or a request to a higher authority or (the President of) a higher court to order accelerating measures or remove the case from the dilatory court. The decision may include fixing a time limit for the decision to be taken. If the reasonable time has passed in a particular phase of still pending proceedings acceleratory measures may restrict the length of the procedure as a whole, and consequently the results of the delay for the party concerned. Consequently, acceleratory measures may still be effective because the proceedings may be considered to have ended within a reasonable time. In addition, a speedy processing of a subsequent phase of the procedure may compensate for a previous phase. However, *preventive* relief in the individual case is no longer possible once the total procedure has ended and is found to have lasted unreasonably long.[35] The only individual redress possible is reparation. Reparation may take several forms: restitution, compensation and satisfaction. In principle, and to the extent still possible, the injured party may choose which reparation to seek.

29 See ECtHR, *Airey v. Ireland*, judgment of 9 October 1979, § 35. Another obstacle to the applicability of Article 13 to the issue of the excessive length of proceedings, put forward by the former European Commission on Human Rights, was its non application in cases where the alleged violation took place in the context of *judicial* proceedings; *Bartolomeo Pizzetti v. Italy*, Report of 10 December 1991.

30 ECtHR, *Kudla v. Poland*, judgment of 26 October 2000. The Court's change of position must have (also) been inspired by concerns of judicial economy, as a "radical effort" to find an antidote to its ever-increasing backlog. See JF Flauss, «Le droit à un recours effectif au secours de la règle du délai raisonnable: un revirement de jurisprudence Historique», *Revue trimestrielle des Droits de l'Homme*, 2002, pp. 179-201. See also L. Burgorgue-Larsen, «De l'art de changer de cap», in : *Libertés, justice, tolérance: mélanges en hommage au Doyen Gérard Cohen-Jonathan* (Vol. 1), Bruxelles, Bruylant, 2004, pp. 343-347; J. Andriansimbazovina, «Délai raisonnable du procès, recours effectif ou déni de justice?», *Revue française de droit administratif*, 2003(I), pp. 85-98.

31 *Idem*, § 152.

32 ECtHR [GC], judgment of 29 March 2006, § 182.

33 *Idem*, § 183.

34 Joined by judges Rozakis and Jebens; ECtHR , judgment of 26 July 2007.

35 ECtHR [GC], *Scordino v. Italy*, judgment of 29 March 2006, § 185.

Restitution means placing the victim of the violation in the situation in which he or she would have found him or herself had the violation not occurred. In the case of unreasonably long procedures, restitution in that sense is difficult if not impossible to achieve, since it would result in new procedures and, consequently, even longer delays in the final determination.

Compensatory measures may be of a financial character and consist of compensation for material and/or immaterial damages. They may also have an affirmative character in the sense that the national authority or court may decide to discontinue the prosecution,[36] acquit the accused,[37] mitigate the penal or administrative sanction, as the case may be,[38] exempt the victim from paying legal costs,[39] suspend the sentence awaiting a retrial, or not impose an additional penalty like loss of certain civil or political rights.[40] In administrative procedures, reparation may also take the form that, merely due to the lapse of time, a decision is taken or assumed to have been taken *ex lege* in favour of the applicant. The compensatory measure may also consist in the higher court imposing a disciplinary sanction on the dilatory judge, or may follow from an action for breach of constitutional or convention rights, or an action for tort.[41]

Satisfaction indicates an immaterial, symbolic reparation.[42] It comes into play when full reparation is not possible or is deemed not necessary; it may consist in acknowledgement of the wrong done, expression of regret, or formal apology.

The Court has stressed several times with respect to the relationship between Articles 6 and 13 of the Convention that a remedy available at domestic level is "effective" within the meaning of Article 13 if it prevents the allegedly impending violation or its continuation, or provides adequate redress for any violation that has already occurred. Regarding violations of the reasonable-time requirement of Article 6, Article 13 thereby allows for an alternative: a remedy is "effective" if it can be used either to prevent an unreasonable delay or expedite the

36 ECtHR, *Eckle v. Germany*, judgment of 15 July 1982, §§ 66-67.

37 European Commission of Human Rights, *Bym v. Denmark*, Report of 16 February 1993, § 21.

38 ECtHR, *Ohlen v. Denmark*, judgment of 24 February 2005, § 27.

39 *Idem*, § 28.

40 ECtHR, *Morby v. Luxembourg*, decision of 13 November 2003.

41 For the different remedies in the member States, see Venice Commission, *Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings; Replies to the Questionnaire*, CDL(2006), 15 February 2007.

42 See ECtHR, *Aussiello v. Italy*, judgment of 21 May 1996, § 25.

decision of the administrative authority or concerned court in order to prevent its continuation,, or if it provides for adequate compensation for delays that have already occurred.[43]

Although the Court has indicated that acceleratory measures to prevent (further) unreasonable delay are to be preferred over mere financial compensation,[44] and that a combination of the two kinds of remedies may appear as the best solution,[45] it leaves the Contracting States discretion as to the manner in which they provide relief within Article 13, also in connection with Article 6. As recently as in 2007, in *Schutte v. France,* the Court summarized its case law by stating that Contracting States have a choice regarding the nature of the remedy in case of an (impending) transgression of the reasonable time because they may choose either a preventive or a compensatory remedy.[46]

If the domestic court or other authority decides that the victim is entitled to financial reparation for material and/or immaterial damage, the amount depends, first of all, on the kind of damage the victim has calculated. In the case of immaterial damage, however, the national court or authority has in principle discretion to fix the amount. In order to be effective, the reparation as a remedy has to be reasonable and appropriate. If the victim is of the opinion that the amount granted does not meet that requirement, he or she may address an application to the Court for violation of Article 6 in combination with Article 13. The Court will then apply its own criteria of "effectiveness".[47] Therefore, it would seem to make sense that in establishing the amount the domestic authorities will be guided by the Court's criteria when deciding on "just satisfaction" under Article 41 of the Convention.

As was observed by Judge *Malinverni* in his concurring opinion,[48] the Court thus creates the wrong impression that preventive and compensatory remedies are equivalent. In his opinion, States should not have the discretion to choose or to

43 See, e.g., ECtHR, *Kudla v. Poland*, judgment of 26 October 2000, §§ 158-159; recently, ECtHR, *Schutte v. Austria*, judgment of 26 July 2007, § 35.

44 ECtHR [GC], *Scordino and Others v. Italy,* judgment of 29 March 2006, § 183.

45 *Idem*, § 186.

46 ECtHR 26 July 2007, *Schutte v. Austria*, § 36. Thus also previously ECtHR 26 October 2000, *Kudla v. Poland*, § 158; 11 September 2002, *Misfud v. France*, § 17; 8 July 2004, *Djangozov v. Bulgaria*, § 47.

47 See ECtHR (GC) 29 March 2006, *Scordino v. Italy (No. 1),* §§ 269-271.

48 Joined by judges *Rozakis* and *Jebens*.

opt for one or the other of these two solutions; if still feasible, priority should be given to preventive measures.

Indeed, judge *Malinverni's* view would seem to be in line with developments in the Strasbourg practice under Article 46. In cases in which the Court has found that the reasonable-time requirement has not been met, the Committee of Ministers, in supervising the implementation of the judgment, pays attention not only to the timely payment of any damages that the Court may have ordered, but also to individual measures that may accelerate the proceedings if they are still pending and general measures to prevent future breaches of the reasonable-time requirement with respect to the applicant and in other cases.[49] The Committee of Ministers has adopted the view that the Contracting States must review existing remedies for their effectiveness and introduce new remedies if required in order to fulfil a general obligation to solve the problems underlying the discovered violations.[50]

The Venice Commission, too, has expressed the view that, in general, in case of a breach of one of the rights laid down in the Convention, concrete reparation (*restitutio in integrum*) is preferable to the award of pecuniary compensation.[51] After all, preventive measures, both in order to keep track of individual cases and accelerating procedures where necessary, and preventive measures of a general nature, are more "effective" in ensuring respect for the obligation concerned. Although the duty to pay damages may also have a certain preventive effect for future cases, experiences with notorious transgressors of the reasonable-time requirement like Italy and Poland learn that this "remedy" is not very effective in that respect.

As things stand at the moment, however, the Court does not have the power to order the State that it has found to be in breach of the Convention to take certain measures, except to pay damages. It may, however, make recommendations to the concerned State to that effect. And, indeed, the Court has started to recommend certain measures of a preventive nature.[52] And, a

49 See Venice Commission, *Report on the Effectiveness of National Remedies in respect of Excessive Length of proceedings*, CDL-AD(2006)036rev, 3 April 2007, §§ 49-52. See also Interim Resolutions DH(99)436 and DH(99)437 of the Committee of Ministers with respect to Italy and Recommendation (2004)6 of the Committee of Ministers of 12 May 2004.

50 Recommendation (2004)6 of 12 May 2004.

51 See Venice Commission, *Opinion on the Implementation of Judgments of the European Court of Human Rights,* CDL-AD(2002)034, § 64, and the Report mentioned in note 49, § 169.

52 See, *e.g.*, ECtHR, *Dogan and Others v. Turkey,* judgment of 29 June 2004.

subsequent complaint concerning the same country may give the Court the opportunity to pronounce on the effectiveness of the measure(s) taken.[53] In later cases, the Court may address as to whether measures taken or planned are "reassuring improvements",[54] it may also "indicate (…) general measures at national level that could be called for in the execution of (…) a judgment", and may call upon the State concerned to speed up the adoption of such measures.[55]

9. JUST SATISFACTION UNDER ARTICLE 41 OF THE CONVENTION

Under international law, a State that is responsible for a wrongful act is obliged to make full reparation.[56] "Reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[57]

Article 1 of the Convention starts from the presumption that "the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities".[58] Article 13 of the Convention reflects this primary responsibility but, at the same time, offers an additional guarantee that this responsibility is complied with. According to the *travaux préparatoires*, Article 13 intends that an alleged victim of a violation of the Convention first tries to obtain relief at national level. Only if in his or her opinion no, or not sufficient relief has been obtained, recourse may be made to the Court.[59] Accordingly, Article 41 provides that if the Court decides a State is responsible for a violation of the Convention or has failed to provide full restitution of the wrong or reparation of damages, the Court's subsidiary character of supervision connotes that the Court may afford just satisfaction to the injured party. However, "[i]f the nature of the breach allows for *restitutio in integrum*, only the respondent State can effect it, the Court having neither the power nor the practical possibility of doing so itself".[60]

53 See, *e.g.,* ECtHR, *Içyer v. Turkey, judgment of* 9 February 2006.

54 ECtHR, *Lukenda v. Slovenia*, judgment of 6 October 2005, § 98.

55 ECtHR (GC), *Sürmeli v. Germany*, judgment of 8 June 2006, § 139.

56 Permanent Court of International Justice, *Chórzow Factory (Jurisdiction)*, judgment of 26 July 1927, *Series A*, no. 9, p. 21.

57 *Permanent Court of International Justice, Chorzów Factory (Merits)*, judgment of 15 September 1928, *Series A*, no. 17, p. 47.

58 ECtHR, *Kudla v. Poland*, judgment of 26 October 2000, § 152.

59 Collected Editions of the *travaux préparatoires*, vol. II, pp. 485 and 490, and vol. III, p. 651.

60 ECtHR, *Papamichalopoulos and Others v. Greece*, judgment of 31 October 1995, § 34.

Article 41 of the Convention provides the Court with the power to afford just satisfaction only in cases where the internal law of the State concerned "allows only partial reparation to be made". At first glance, one would assume that the concept of "partial reparation" relates to a remedy in the sense of *restitution in integrum* and not to financial reparation, since there is no reason for the Court to expressly award damages if these may be obtained, or should be awarded, under domestic law and, therefore, are covered by the obligation to abide by the judgment of the Court. This was the joint opinion of judges *Holmback*, *Ross* and *Wold* in the "*Vagrancy*" cases.[61] However, the Court decided as follows: "The mere fact that the applicants could have brought and could still bring their claims for damages before a Belgian Court does not therefore require the Court to dismiss their claims as being ill-founded any more than it raises an obstacle to their admissibility".[62] This means, on the one hand, that damages may constitute an "effective remedy" in the sense of Article 13 if other remedies are not possible or can not or no longer be obtained, and, on the other hand, that, if such a remedy has not been awarded or has not been sought, the alleged victim of the violation may directly address the Court.

If, in its judgment, the Court affords just satisfaction to the injured party in accordance with Article 41 of the Convention, the State must make prompt payment of the awarded amount. However, in *Scozzari and Giunta v. Italy,* the Court held that the duty to abide with the Court's judgments under Article 46 does not only mean that the State has to pay the sums awarded by way of just satisfaction. Subject to supervision by the Committee of Ministers, the State must choose general and/or, if appropriate, individual measures to be adopted in their domestic legal order to place an end to the violation found by the Court and to redress so far as possible the effects. If restitution is not possible, than compensation may be claimed covering "any financially assessable damage including loss of profits as is established".[63] The Court may also award financial compensation for immaterial damages; and, indeed, the Court takes the view that as a rule, excessively long delays create immaterial damage[64] as they will create "anxiety, inconvenience and uncertainty".[65] Mere immaterial satisfaction comes into play when the Court holds that acknowledgement of the wrong done constitutes sufficient compensation.

61 ECtHR, *De Wilde, Ooms and Versyp v. Belgium (Art. 50)*, judgment of 10 March 1972.

62 *Idem*, § 20.

63 ECtHR, *Scozzari en Giunta t. Italië*, 13 July 2000, § 250.

64 ECtHR, *Ernestina Zullo v. Italy*, judgment of 29 March 2006, § 97.

65 ECtHR, *Riccardi Pizzati v. Italy*, judgment of 10 November 2004, § 25.

10. "EFFECTIVE REMEDY" AT NATIONAL LEVEL IN ADMINISTRATIVE PROCEDURES

As stated before, Article 6, and consequently Article 13, of the Convention equally applies to administrative procedures to the extent that they lead to a determination of civil rights and obligations or a criminal charge in the sense of Article 6.[66] However, these procedures have certain characteristics that may make providing an effective remedy problematic in some respects.

As far as preventive measures, both of a structural and of an individual character, are concerned, there is no specific problem. Measures in the area of the number of judges and the judicial organisation, and possibilities to request the competent administrative authority or court for accelerating measures in pending procedures, *inter alia* by taking certain procedural steps or, on the contrary, skipping certain steps and moving to the merits, are imaginable here as well. Rather, the problems relate to reparation and compensation once the procedure has ended.

The least problematic compensatory remedy is that of financial compensation. In administrative procedures as well, the court may confine itself to immaterial satisfaction whereby the unreasonable character of the delay is recognized, but any other reparation is not deemed necessary. However, the Court's case-in-law indicates that as a rule it starts from the presumption that unreasonable delays in procedures cause at least immaterial damages. In addition and depending on the situation, even if the applicant cannot claim that he or she has suffered concrete damages, a claim of "loss of opportunities" may be justified.[67]A request for financial compensation of material and/or immaterial damages suffered due to the unreasonable length of administrative procedures may usually be addressed to the administrative court in combination with the complaint that the administrative procedure as a whole has not been in conformity with Article 6 of the Convention. However, in some legal systems, the request must be addressed to the civil court in the form of a tort action for illegal governmental action, while in some systems it is up to the person concerned to choose either way.

In respect to the reasonable-time requirement, a complication may result in that under the domestic legal system, an administrative court may order

66 On the scope of Article 6, also in relation to administrative procedures, see: P. van Dijk a.o., *Theory and Practice of the European Convention on Human Rights*, 4th edition, Antwerp 2006, pp. 524-539.

67 ECtHR, *König v. Germany (Article 50)*, judgment of 10 March 1980, § 19.

the authorities to pay damages only if the administrative decision concerned or the lower court decision has been found to be illegal. In the case of an administrative procedure, which has been held to have surpassed the reasonable time, the administrative decision or court decision itself may be in full conformity with domestic law. In a judgment of 13 June 2007, the Administrative Jurisdiction Division of the Netherlands Council of State decided that in such a case the administrative decision must be annulled for reason of violation of Article 6 of the Convention, which opens the way for deciding the issue of compensation. With respect to an alleged undue delay in the proceedings of the court of first instance, on 4 June 2008, the Administrative Jurisdiction Division, in a judgment of 4 June 2008, pronounced on the validity of the decision of the court concerned and opened a separate procedure for the establishment of the damages, for which procedure it summoned the State, in the person of the Minister of Justice, as the defendant.

Is *restitution* in the case of administrative procedures possible at all? One may think of the possibility that the administrative decision will be re-examined or the judicial procedure reopened. This measure, however, would seem inappropriate in case of a breach of the reasonable-time requirement because any re-examination may lead to further delays in the determination of the civil right or obligation at issue, or the criminal charge, as the case may be. It may be an appropriate measure, however, if the procedure is conducted in breach of any of the other procedural requirements of Article 6 or, as far as the judicial phase is concerned, in breach of the requirement of independence and impartiality. Indeed, in that case re-examination or reopening is the only measure that may lead to *restitutio in integrum*. Nevertheless, this measure presents several legal and practical problems in administrative cases; at least in those cases where third party interests are involved that may be unjustifiably injured by such re-examination or reopening.

Because third parties may rely on the final decision and may be harmed by a re-opening, the remedy of re-opening is quite common in criminal procedures, but less so in administrative procedures. Third party interests must be taken into account - both by the administrative authorities which re-examine the case and may consider taking a new decision, and by the court in the case of a re-opening of proceedings. If the weighing of interests opposes any such re-examination or re-opening, the only remedy is a fair compensation of material and immaterial damages or a symbolic satisfaction.