European Convention for the Protection of Human Rights and Fundamental Freedoms

Commentary

von

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states of the rule of law.[363] Moreover, it is necessary to take into account the diversity of the submissions of the litigants, whether a decision was issued by a court of first instance or a court of appeal, and the degree of precision of the applicable legal act. Discretionary decisions regularly impose a stronger obligation to reason a judgment.[364] At any rate it is insufficient to only repeat the content of legal provisions and to determine that they are applicable to the case.[365] If the decision of a national court is contrary to established (domestic) case law, the latter requires a more substantial statement of reasons justifying the deviation.[366] In certain circumstances the ECtHR concludes that the decisions reached by a national court have not been adequately reasoned, for example if obvious dicrepancies in the statements of witnesses are not at all or not sufficiently addressed. According to the Court, in such circumstances it can be said that the decisions of the national courts did not observe the basic requirement of criminal justice that the prosecution has to prove its case and were not in accordance with one of the fundamental principles of criminal law, namely, *in dubio pro reo*.[367]

Article 6 does not require **jurors** to give reasons for their decision. In order to protect the accused from arbitration and to ensure that the accused and the public understand the verdict appropriate measures have to be taken. Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced, and precise, unequivocal questions put to the jury by the judge, so that the applicant may recognize the evidence and facts on which the verdict was based.[368]

89 The principle of fair trial may also be violated if the **legislator** aims at influencing the imminent outcome of proceedings by way of enacting new laws. Thus, legal acts whose real objective is to be decisive in certain proceedings are in breach of Article 6 (1).[369] Moreover, it has to be assessed whether the interference in pending proceedings by the legislator is proportionate with regard to the detrimental effects of the legal amendment on the parties to the proceedings.[370]

90 The Court also draws a link between the right to a fair trial and the requirement of **legal certainty** flowing from the rule of law. Against this background the right to a fair trial also protects from unreasonable contradictory interpretation and arbitrary changes in jurisdiction. National procedural law must provide for mechanisms which ensure legal certainty in cases of conflicting case law or of difficulties in the interpretation of laws.[371] However, the requirements of legal certainty and the

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[363] ECtHR, 9/12/1994, *Hiro Balani* v ESP, No. 18064/91, § 27; ECtHR, 20/3/2009 (GC), *Gorou (No. 2)* v GRE, No. 12686/03, §§ 37 et seq (the public prosecutor has no duty to give reasons for rejecting the request of a civil party to criminal proceedings to appeal against an acquittal).

[364] ECtHR, 30/11/1987, *H.* v BEL, No. 8950/80, § 53; ECtHR, 23/6/1994, *De Moor* v BEL, No. 16997/90, § 55.

[365] ECtHR, 15/1/2004, *Sakkopoulos* v GRE, No. 61828/00, § 51.

[366] ECtHR, 14/1/2010, *Atanasovski* v MKD, No. 36815/03, § 38.

[367] ECtHR, 13/12/2011, *Ajdaric* v CRO, No. 20883/09, § 51.

[368] ECtHR, 16/11/2010 (GC), *Taxquet* v BEL, No. 926/05, §§ 90 et seq; cf. already ECtHR, 15/11/2001, *Papon* v FRA, No. 54210/00.

[369] ECtHR, 9/12/1994, *Stran Greek Refineries* v GRE, No. 13427/87, § 50.

[370] ECtHR, 29/3/2006 (GC), *Scordino (No. 1)* v ITA, No. 36813/97, §§ 126 et seq; ECtHR, 31/5/2011, *Maggio a. o.* v ITA, No. 46286/09 et al, §§ 45 et seq.

[371] ECtHR, 6/12/2007, *Beian* v ROM, No. 30658/05, §§ 33 et seq; ECtHR, 24/3/2009, *Tudor Tudor* v ROM, No. 21911/03, §§ 26 et seq; ECtHR, 5/10/2010, *Rakić a. o.* v SRB, No. 47460/07 et al, § 43; ECtHR, 2/11/2010, *Stefănică a. o.* v ROM, No. 38155/02, §§ 34 et seq.

protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law. Neither is case-law development, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement.[372] Two courts, each with its own area of jurisdiction, for example, examining different cases may very well arrive at divergent but nevertheless rational and reasoned conclusions on the same legal issue raised by similar factual circumstances. Divergences like these may be tolerated when the domestic legal system is capable of accommodating them.[373]

Additionally, legal certainty presupposes respect for the principle of *res iudicata*, the principle stating that final judgments are legally binding and may either not be reviewed or be reviewed only if it is justified by circumstances of a substantial and compelling character.[374] Extraordinary legal remedies may lead to the quashing of a final judgment only under strict conditions. Their purpose should only be the correcting of judicial errors and miscarriages of justice, but not to carry out a new examination of the whole case.[375]

91 In extending the Convention's personal scope of application, certain provisions are interpreted as prohibiting the Member States from contributing to possible violations of fundamental rights by **third states**. Article 6 is among the provisions having such an 'indirect effect'. Thus, it is prohibited, for instance, to extradite in order to enable the enforcement of a judgment, or to open *exequatur* proceedings to enforce a foreign court's decision, which do not conform to the standards of Article 6.[376] In this context, Member States have to make sure that the decision to be implemented is not the result of an evident denial of justice. In certain cases, it might even be necessary that Member States examine whether third state courts complied with all requirements under Article 6.[377] In addition to that, an issue might exceptionally arise under Article 6 by an **extradition** decision in circumstances where the individual would risk suffering a flagrant denial of a fair trial ('a flagrant denial of justice') in the requesting country.[378] A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. The breach of the principles of fair trial must be so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.[379] A mere reference to the general human rights situation in a country, however, does not suffice.[380]

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[372] ECtHR, 10/5/2012, *Albu a. o.* v ROM, No. 34796/09 et al, § 34.

[373] ECtHR, 20/10/2011 (GC), *Nejdet Sahin a. Perihan Sahin* v TUR, No. 13279/05, §§ 86 et seq.

[374] For basic considerations ECtHR, 28/10/1999 (GC), *Brumarescu* v ROM, No. 28342/95, §§ 61 et seq; also ECtHR, 24/7/2003, *Ryabykh* v RUS, No. 52854/99, §§ 51 et seq; ECtHR, 12/1/2006, *Kehaya a. o.* v BUL, No. 47797/99, § 68; no violation, however: ECtHR, 31/7/2008, *Protsenko* v RUS, No. 13151/04, §§ 30 et seq (the setting aside of the final judgment was necessary to protect the rights of a third person who, due to a fault of the first instance court, had not been party to the proceedings).

[375] ECtHR, 6/12/2005, *Popov (No. 2)* v MOL, No. 19960/04, § 47; ECtHR, 3/4/2008, *Ponomaryov* v UKR, No. 3236/03, §§ 40 et seq; ECtHR, 29/1/2009, *Chervovenko* v RUS, No. 54882/00, §§ 33 et seq.

[376] *Grabenwarter/Pabel,* § 24 m.n. 131.

[377] ECtHR, 18/12/2008, *Saccoccia* v AUT, No. 69917/01.

[378] ECtHR, 7/7/1989, *Soering* v UK, No. 14038/88, § 113; ECtHR, 4/2/2005, *Mamatkulov a. Askarov* v TUR, No. 46827/99, §§ 90 et seq; ECtHR, 27/10/2011, *Ahorugeze* v SWE, No. 37075/09, §§ 113 et seq; ECtHR, 17/1/2012, *Othman (Abu Qatada)* v UK, No. 8139/09, §§ 258 et seq.

[379] ECtHR, 17/1/2012, *Othman (Abu Qatada)* v UK, No. 8139/09, § 260.

[380] ECtHR, 10/02/2011, *Dzhaksybergenov* v UKR, No. 12343/10, § 44.

4. Length of proceedings

According to Article 6 (1) tribunals have to come to a decision **'within a reasonable time'**. This guarantee is, on the one hand, a component of the requirement of effective legal protection. On the other hand, there is a tense relationship with the individual safeguards of a fair trial as more procedural rights regularly result in a prolongation of proceedings.[381] Especially with regard to criminal proceedings the time of uncertainty about the outcome of the proceedings shall be kept as short as possible. **92**

The Court is, of all guarantees under Article 6, mostly concerned with the reasonable time requirement. Many applications lodged with the Court are at least among others based on this procedural safeguard. This constitutes one of the reasons for the Court's case overload.

In civil proceedings the **period** to be taken into consideration in the application of Article 6 (1) starts with the institution of the proceedings or the assertion of a claim respectively, thus regularly with the filing of a suit.[382] In criminal proceedings the relevant period begins prior to the opening of the main trial, namely at the time when the first steps of criminal investigations that substantially affect the accused are being taken.[383] In proceedings before administrative courts the length of previous proceedings may have to be taken into account.[384] Enforcement proceedings have to be included in the calculation of the duration of proceedings.[385] **93**

The end of proceedings is usually marked by the moment when a judgment becomes final,[386] in criminal proceedings when the accused is informed that the proceedings are discontinued.

Constitutional proceedings following the appeal stages are also to be considered when ascertaining the length of proceedings.[387] However, when ascertaining the reasonableness of the duration of proceedings the Court takes into account the special role of constitutional courts in proceedings and as regards their tasks as compared to ordinary courts.[388] The role of a constitutional court as guardian of the

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[381] ECtHR, 28/6/1978, *König* v GER, No. 6232/73, § 100.

[382] ECtHR, 26/3/1992, *Editions Périscope* v FRA, No. 11760/85, § 43; cf. *van Dijk/Viering,* in: van Dijk/van Hoof/van Rijn/Zwaak, p. 603.

[383] ECtHR, 15/7/1982, *Eckle* v GER, No. 8130/78, § 73; ECtHR, 10/12/1982, *Corigliano* v ITA, No. 8304/78, § 34; ECtHR, 19/2/1991, *Manzoni* v ITA, No. 11804/85, § 16; ECtHR, 2/10/2003, *Hennig* v AUT, No. 41444/98, § 32. *Leigh,* The Right to a Fair Trial and the European Convention on Human Rights, in: Weissbrodt/Wolfrum (ed.), The Right to a Fair Trial, 1997, p. 653: demands that the relevant period begins prior to the taking of any formal procedural step in order to prevent delays in the proceedings, e.g. due to the unavailability of witnesses or documents.

[384] ECtHR, 28/6/1978, *König* v GER, No. 6232/73, § 98; ECtHR, 23/4/1987, *Erkner a. Hofauer* v AUT, No. 9616/81, § 64.

[385] ECtHR, 23/3/1994, *Silva Pontes* v POR, No. 14940/89, §§ 35 et seq; ECtHR, 5/3/2009, *Sandra Janković* v CRO, No. 38478/05, § 68; *van Dijk/Viering,* in: van Dijk/van Hoof/van Rijn/Zwaak, p. 605.

[386] ECtHR, 28/6/1978, *König* v GER, No. 6232/73, § 98; ECtHR, 15/7/1982, *Eckle* v GER, No. 8130/78, § 77; ECtHR, 23/9/1997, *Robins* v UK, No. 22410/93, § 28 (all stages of legal proceedings for the 'determination of … civil rights and obligations', including the cost proceedings have to be resolved within a reasonable time); ECtHR, 27/7/2006, *Mamič* v SLO, No. 75778/01, §§ 27 et seq.

[387] ECtHR, 27/7/2000, *Klein* v GER, No. 33379/96, § 39.

[388] ECtHR, 16/9/1996, *Süßmann* v GER, No. 20024/92, §§ 57 et seq; ECtHR, 25/2/2000, *Gast a. Popp* v GER, No. 29357/95, § 75; ECtHR, 27/7/2000, *Klein* v GER, No. 33379/96, §§ 39 et seq; ECtHR, 12/6/2001, *Tričković* v SLO, No. 39914/98, § 63; ECtHR, 10/12/2009, *Almesberger* v AUT, No. 13471/06, § 26.

constitution may sometimes make it necessary for it to deal with cases not in a chronological order but according to the nature of a case and its importance in political and social terms.[389] Legal remedies within the European Union system of legal protection are to be considered as domestic legal remedies for the purposes of Article 6. Hence, the duration of proceedings for a reference for a preliminary ruling of the CJEU has to be taken into account.[390] This evaluation may change after a possible accession of the EU to the Convention.

94 The **reasonableness** of the length of proceedings is to be determined in each instance by reference to the particular circumstances of the case and having regard to the following four criteria:[391]

a. Importance of what is at stake for the applicant: Depending on what was at stake for the applicant already a short period of time may exceed the reasonable time limit. In criminal proceedings such an important personal interest is recognised when the applicant is held in detention; in civil proceedings if family law matters are concerned, or if the proceedings affect the subsistence of the applicant.[392] In view of the age of the applicants proceedings concerning pension rights are of an important personal interest, too.[393] Special diligence is also required as regards child custody cases since any procedural delay may result in the *de facto* determination of the issue.[394] Due diligence is furthermore required in proceedings on the right to education[395] since a period exceeding the reasonable time limit may be decisive for educational opportunities. Even if only small amounts of money are concerned proceedings may be of a special importance due to the necessity to examine the constitutionality of a regulation.[396]

b. Complexity of a case: If particularly complex factual or legal issues are to be determined in proceedings the length of the relevant period may be comparatively longer (e.g. in complex commercial criminal law cases or environmental criminal law cases[397]). Delays may be justified if, for instance, there is a great number of suspects, a number of house searches that have to be carried out at which voluminous business records are seized, if a comprehensive expert opinion is required,[398] if evidence has to be taken from many witnesses,[399] or if inter-state cooperation is necessary.[400]

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[389] ECtHR, 16/3/2010 (GC), *Oršuš* v CRO, No. 15766/03, § 109.
[390] EComHR, 19/1/1989, *Christiane Dufay* v EEC, No. 13539/88.
[391] Cf. in an exemplary manner ECtHR, 29/05/1986, *Deumeland* v GER, No. 9384/81, §§ 78 et seq.
[392] E.g. in proceedings on labour law, see ECtHR, 29/1/2004, *Kormacheva* v RUS, No. 53084/99, § 56; see also ECtHR, 30/9/2004, *Krastanov* v BUL, No. 50222/99, § 70; cf. also ECtHR, 16/3/2010 (GC), *Oršuš* v CRO, No. 15766/03, § 48 (right to education).
[393] ECtHR, 16/9/1996, *Süßmann* v GER, No. 20024/92, § 61; cf. also ECtHR, 2/6/2009, *Codarcea* v ROM, No. 31675/04, § 89.
[394] ECtHR, 18/2/1999 (GC), *Laino* v ITA, No. 33158/96, § 22; ECtHR, 4/12/2008, *Adam* v GER, No. 44036/02, § 66; ECtHR, 21/1/2010, *Wildgruber* v GER, No. 40402/05 et al, § 61.
[395] ECtHR, 16/3/2010 (GC), *Oršuš* v CRO, No. 15766/03, § 109.
[396] ECtHR, 27/7/2000, *Klein* v GER, No. 33379/96, § 46.
[397] ECtHR, 31/5/2001, *Metzger* v GER, No. 37591/97, § 40; ECtHR, 30/9/2004, *Zaprianov* v BUL, No. 41171/98, § 80.
[398] ECtHR, 27/11/2008, *Potzmader* v AUT, No. 8416/05.
[399] ECtHR, 16/12/2003, *Mianowski* v POL, No. 42083/98, § 47.
[400] ECtHR, 17/2/2009, *Ancel* v TUR, No. 28514/04, § 54; as to proceedings on the prosecution of organised crime: ECtHR, 13/10/2009, *Tunce a. o.* v TUR, No. 2422/06 et al, § 30.

c. Conduct of the applicant: It has to be taken into account if an applicant bears some responsibility for the delays of proceedings of which they complain. However, it may not be to the detriment of the applicant if he takes the advantage of every avenue of appeal available to him,[401] or challenges the impartiality of the presiding judge.[402] In particular it is not required that applicants actively co-operate with judicial authorities in criminal cases.[403] On the other hand, the applicant bears responsibility for delays on account of the abusive filing of dozens of complaints[404] or for delays on account of defendants asking many times for the postponement of the trial.[405]

d. Conduct of authorities: It is decisive whether courts (or equivalent authorities) conduct proceedings with the efficiency that can be expected or whether there have been significant periods of inactivity on their part.[406] Article 6 provides for a right to acceleration of proceedings.[407] State authorities bare responsibility for a delay of proceedings when they themselves repeatedly file appeals against court orders in order to postpone its enforcement.[408] Delays are also attributable to the authorities if there is a conflict of competence,[409] as well as in cases of poor coordination between the various authorities involved in a case,[410] the non-dismissal of a court appointed expert who is delayed with submitting his opinion,[411] the appointment of experts who are unavailable for oral hearings,[412] and if they do not take adequate steps against the repeated failure of defendants and witnesses to appear at hearings.[413]

When examining the reasonableness of the length of proceedings the Court **95**
considers each of these four criteria in each particular case. However, they do not constitute a benchmark. The case law does not either set reasonable periods of time in the abstract for particular types of proceedings. The reasonableness of the length of proceedings always depends on the particular circumstances of a case.[414]

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[401] ECtHR, 8/12/1983, *Pretto a. o.* v ITA, No. 7984/77, § 34; ECtHR, 23/4/1987, *Poiss* v AUT, No. 9816/82, § 57; ECtHR, 11/12/2003, *Girardi* v AUT, No. 50064/99, § 56.

[402] ECtHR, 13/7/2004, *Lislawska* v POL, No. 37761/97, § 34.

[403] ECtHR, 15/7/1982, *Eckle* v GER, No. 8130/78, § 82.

[404] Cf. ECtHR, 24/7/2003, *Smirnova* v RUS, No. 46133/99 et al, § 86; no abusive filing of complaints, however, in ECtHR, 11/12/2003, *Girardi* v AUT, No. 50064/99, § 57.

[405] ECtHR, 20/1/2004, *G.K.* v POL, No. 38816/97, § 102.

[406] ECtHR, 2/10/2003, *Hennig* v AUT, No. 41444/98, § 35 (request of another authority to transfer tax files); ECtHR, 26/7/2007, *Vitzthum* v AUT, No. 8140/04, § 21 (violation due to a period of inactivity for more than one year).

[407] *Grabenwarter/Pabel,* § 24 m.n. 70.

[408] ECtHR, 4/3/2004, *Pibernik* v CRO, No. 75139/01, §§ 56 et seq.

[409] ECtHR, 4/3/2004, *Löffler* v AUT, No. 72159/01, §§ 56 et seq.

[410] ECtHR, 8/7/2004, *Vachev* v BUL, No. 42987/98, § 96.

[411] Cf. ECtHR, 8/7/2004, *Wohlmeyer Bau GmbH* v AUT, No. 20077/02, § 52; ECtHR, 23/9/2004, *Rachevi* v BUL, No. 47877/99, § 90.

[412] ECtHR, 21/10/2010, *Grumann* v GER, No. 43155/08, § 28.

[413] ECtHR, 21/9/2004, *Kuśmierek* v POL, No. 10675/02, § 65; also ECtHR, 13/7/2006, *Stork* v GER, No. 38033/02, §§ 43 et seq: In the present case, the length of the proceedings, in four levels of jurisdiction, including the preliminary administrative proceedings, lasted over sixteen years and five months. The delay was caused by the repeated remission of the case to the lower instance courts since they had failed to provide sufficient reasons for their decisions. The Court, in view of the total duration of the proceedings, regarded the prolongation caused by the applicants by not lodging an action with the German Administrative Court for a period of two years and eight months as small.

[414] Scientifically established by *van Dijk/Viering,* in: van Dijk/van Hoof/van Rijn/Zwaak, p. 610.

96 The Court does not consider each of the established criteria in detail if the particular circumstances of a case, especially the total length of the proceedings, call for a **global assessment** and suffice to find a violation of Article 6.[415] On the other hand, if it is a certain procedural stage that has been delayed the Court does not assess the proceedings as a whole but limits itself to find that a breach of Article 6 has occurred due to the inactivity of authorities.[416]

If proceedings before a tribunal of first instance have been delayed there's a particular obligation to speed up the appeal proceedings; this, for instance, by adhering to a tight time schedule or by setting (final) time limits for the parties to ensure the swift compliance with court orders.[417] Inactivity on the part of a court may be appropriate if it is for the purpose of waiting for a decision of a constitutional court (especially in cases where the inactivity can be considered to be in the applicant's interest since without a positive decision of the constitutional court he had no prospect of success[418]), or if a constitutional court sets a transitional period for the legislator to pass a new bill that should be applied in the respective proceedings.[419]

97 The Court derives from the reasonable time requirement an **obligation** of the Member States to **organise their legal systems** in such a way that their courts obtain a final decision on disputes within a reasonable time.[420] The same applies to disciplinary proceedings in which the right to continue to exercise a profession is at stake as this is considered a dispute over civil rights.[421] Thus, the right to obtain a decision within a reasonable time is not only a right of individuals but also includes the Member States' general obligation to organise their judicial systems in such a way that their courts can meet the requirements of Article 6. States may thus be required to take a range of legislative, organisational, budgetary and other measures.[422]

Delays in proceedings attributable to the **excessive workload** of a court are – in the Court's view – acceptable for some time.[423] Chronic work overload does, however, lead to a violation of the duty of a state to organise its judicial system effectively, and in the individual case to a violation of the reasonable time requirement.[424] The obligation of Member States to organise their judicial systems, including proceedings before constitutional courts, in such a way that their courts hear cases within a reasonable time.[425] Moreover, Member States are obliged under

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[415] Cf. ECtHR, 16/12/2003, *Mianowski* v POL, No. 42083/98, § 46.
[416] ECtHR, 21/12/1999, *G.S.* v AUT, No. 26297/95, §§ 33 et seq.
[417] ECtHR, 25/2/2010, *Müller* v GER, No. 36395/07, § 44.
[418] ECtHR, 16/9/2010, *Breiler* v GER, No. 16386/07, § 31.
[419] ECtHR, 10/2/2009, *Niedzwiecki (No. 2)* v GER, No. 30209/05.
[420] ECtHR, 27/6/1997, *Philis (No. 2)* v GRE, No. 19773/92, § 40; ECtHR, 30/8/1998, *Podbielski* v POL, No. 27916/95, § 38; ECtHR, 23/3/1994, *Muti* v ITA, No. 14146/88, § 15; ECtHR, 16/9/1996, *Süßmann* v GER, No. 20024/92, § 55; ECtHR, 27/7/2000, *Klein* v GER, No. 33379/96, § 47; cf. ECtHR, 14/1/2003, *Rawa* v POL, No. 38804/97, § 53 (responsibility of the state to ensure the efficiency of the system of obtaining expert opinions); ECtHR, 2/10/2003, *Hennig* v AUT, No. 41444/98, § 38 (complex criminal proceedings for fiscal offences); ECtHR, 8/6/2006 (GC), *Sürmeli* v GER, No. 75529/01, § 129.
[421] ECtHR, 12/6/2003, *Malek* v AUT, No. 60553/00, § 48.
[422] ECtHR, 12/5/2011, *Finger* v BUL, No. 37346/05, §§ 95 et seq.
[423] Cf. *van Dijk/Viering*, in: van Dijk/van Hoof/van Rijn/Zwaak, p. 609.
[424] ECtHR, 27/7/2000, *Klein* v GER, No. 33379/96, § 43.
[425] ECtHR, 25/2/2000, *Gast a. Popp* v GER, No. 29357/95, § 75; ECtHR, 20/2/2003, *Kind* v GER, No. 44324/98, §§ 52 et seq.

Article 13 to grant the right to an **effective remedy** against unreasonably lengthy proceedings (as to that see Article 13 m.n. 16).

The reasonable-time requirement is not necessarily violated if tribunals exceed the reasonable length of proceedings. Member States may avoid a violation of Article 6 by means of **compensating** for the excessive duration of proceedings, namely by, for example, reducing a fine, closing criminal proceedings, or by paying a compensation.[426]

5. Public hearing

Article 6 (1) first sentence entitles 'to a […] public hearing'. This guarantee is to be understood comprehensively. It encompasses the right to a **public trial** as well as to a **publicly pronounced judgment**. The right to a public hearing is not only a right of the parties to proceedings. As a consequence, 'everyone' has the right to access to court hearings. **98**

The right to a public hearing also includes **media** coverage. Journalists are part of the public within the meaning of Article 6 (1) first sentence. This conclusion is confirmed by the exception contained in Article 6 (1), which allows the exclusion of the 'press and the public' from the trial. Electronic media are not expressly mentioned. However, this does not mean that they are excluded from the scope of application of Article 6.[427] Rather, the media hold a special position since it is in particular them who ensure that proceedings, especially the course of proceedings become **public**. Article 6 regulates the **admission** of representatives of radio or television but does not provide for any rules governing the question of whether any audio or picture recording is permissible. Audio or video recording may be prohibited within the boundaries set by Article 10 or may even be required under Article 8 for the protection of the rights of the parties to proceedings. **99**

The right to a public hearing is subject to two limitations. First, the public may be excluded from hearings by decision made in the course of a trial. Second, there are cases where oral hearings need not to be held; thus, the public is excluded from the trials from the very beginning. **100**

The possibility to **exclude the public** in the course of proceedings finds express mentioning in Article 6 (1) second sentence. This article also provides for a list of cases where the public might be excluded from trials. However, contrary to Articles 8 to 11, it does not require that the grounds for exclusion be prescribed by law. In Member States where the Convention forms part of the internal legal order courts may apply the rules directly.[428] This does not prevent the legislator from issuing respective legal acts. The grounds for exclusion however, may not go beyond what is stipulated in Article 6. On the other hand, fundamental rights, in particular Article 8 require the prescription of a certain minimum of grounds for exclusion. The legislator does not allow the exclusion of the public on grounds that do not fulfil certain minimum requirements. The exclusion of the public always constitutes, **101**

[426] For instance ECtHR, 12/2/2009, *Mitterbauer* v AUT, No. 2027/06; ECtHR, 7/7/2009, *Stein* v GER, No. 12895/05; ECtHR, 13/11/2008, *Ommer (No. 1)* v GER, No. 10597/03, §§ 68 et seq; also *van Dijk/Viering*, in: van Dijk/van Hoof/van Rijn/Zwaak, p. 611.

[427] *Grabenwarter/Pabel,* § 24 m.n. 72.

[428] *Vegleris,* Valeur et signification de la clause "dans une société démocratique" dans la Convention européenne des droits de l'homme, RDH 1968, 219 (223).

among others, an interference with the freedom of information (Article 10) of all those people who want to attend proceedings to receive information.[429] Article 6 (1) second sentence insofar constitutes *lex specialis* to Article 10 (2).

102 The right to a public hearing may be limited in various regards. With respect to the personal scope it is the **'press and the public'** that might be excluded. With regard to the subject of proceedings the public may be excluded from all or part of the trial. The substantial requirements under which the public may be excluded are laid down in Art 6 (1) second sentence.

103 Aricle 6 (1) second sentence provides for the **exclusion** of the public **from all or part of the trial**. The authority conducting the trial may thus exclude the public from all or part of the trial, in particular from all the hearings, from one of several hearings or from part of a hearing held in the course of a trial.[430] Whether or not the public may be excluded from trials and to what extent depends on the exception concerned and its requirements.

104 In general, the exclusion of the public has to comply with the principle of **proportionality** as established by the Court in its case law relating to Articles 8 to 11. This conclusion is based on the concurring wording of Article 6 (1) second sentence and of paragraph 2 of Articles 8 to 11.

So far the Court has only once been concerned with the question of whether the exclusion of the public had been proportional. It identified a disproportionate burden on state authorities if they were obliged to open disciplinary proceedings within prisons to the public, or if they were bound to hold disciplinary proceedings concerning convicted prisoners outside of a prison.[431]

105 The **necessity test** under Article 6 (1) second sentence consists of three steps:

(a) One of the aims stipulated has to be pursued.

(b) The exclusion of the public has to actually pursue the respective aim. Thus, in criminal trials concerning petit larceny, for instance, the public may not be excluded for the grounds of morals or national security.

(c) There has to be an appropriate balance between the grounds for exclusion of the public and the interest in a public hearing. It has to be kept in mind that decisions on the exclusion of the public from trials regularly also require decisions on other basic rights under the Convention. The appropriateness of the exclusion regularly depends on the individual circumstances of a case. In this context it has to be assessed whether the exclusion of the public is necessary, or whether other less intrusive measures are sufficient to achieve the aim sought. Such less restrictive measures might be, for example, restrictions on the media to name names,[432] or the anonymisation of witnesses. Article 6 itself defines the exclusion of the public from part of a trial as a less intrusive measure than the exclusion from all of the trial and thereby confirms the requirement of necessity.

106 Article 6 (1) second sentence provides for three **types of grounds for the exclusion** of the public:

(a) First, there are **general grounds for exclusion**, namely the interests of morals, public order or national security. These grounds do not depend on specific trials,

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[429] As to the (passive) right to freedom of information under Article 10 see Article 10 m.n. 9 et seq.
[430] Expressly held in ECtHR, 26/9/1995, *Diennet* v FRA, No. 18160/91, § 34.
[431] ECtHR, 28/6/1984, *Campbell a. Fell* v UK, No. 7819/77 et al, § 87.
[432] *Grabenwarter/Pabel,* § 24 m.n. 80.