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***Article 6 § 1
Elements of substantive law as obstacles to
access to a court within the meaning of
Article 6 § 1 of the Convention***

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STUDY OF THE ECHR CASE-LAW
ARTICLE 6 § 1

SUMMARY

The dividing line between substantive law and procedural law, a characteristic feature of the paradigm of modern legal thought, has reached its limits in certain cases considered by the Court. In examining complaints concerning the right of access to a court under Article 6 § 1 of the Convention, the Court has chosen not to follow the distinction between substantive law and procedural law in too rigid and “*dogmatic*” a manner. On the contrary, in certain cases, it tacitly agreed to examine the substantive obstacles; in two cases, it did not hesitate to find a violation of Article 6 § 1, taken alone and/or in combination with Article 14.

Furthermore, the Court has never identified specific criteria for determining what impairs the “*substance*” of the right of access to a court. In reality, it always takes a nuanced case-by-case approach, without providing a precise definition.

An analysis of the judgments and decisions issued by the Court under Article 14 of the Convention (prohibition of discrimination) taken together with Article 6 § 1 in respect of the right of access to a court does not indicate any common feature which would enable these cases to be placed in a specific category. Moreover, the Court has never made a distinction in these cases between direct and indirect discrimination.

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“Omnis definitio in jure civili periculosa est: parum est enim, ut non subverti posset.”

(“Every definition in civil law is dangerous, for there is very little that cannot be overthrown.”)

Javolenus Priscus, Lib. XI Epistularum, cf. *Digesta*, 50.17.202.

I. THE ISSUE OF A LIMITATION ON THE RIGHT OF ACCESS TO A COURT ARISING FROM THE APPLICATION OF SUBSTANTIVE LAW

A. *The source of the problem*

1. Can an element of *substantive* law that is unfavourable to a litigant constitute an “*impediment to access to the courts*”, contrary to the provisions of Article 6 § 1 of the Convention? In other words, **what is the situation with regard to the distinction between the provisions of substantive law and those of procedural law under Article 6 § 1?** A few historical reminders are necessary in appropriate in order to understand the roots of this problem and what is at stake.

2. Article 6 § 1 is usually understood as involving essentially *procedural* guarantees and as concerning solely the *procedural* aspect of the case – whether this be the fairness of the proceedings or access to a court (see the case-law cited below). Since we have all been trained in the school of modern law, this distinction between *substantive* law and *procedural* law seems self-evident to us today: both the structure of our codes and laws and the method of teaching law in our universities are based on the idea of such a distinction. We consider it almost natural and obvious, and it is not surprising that it has always been tacitly accepted by the Convention institutions under Article 6 § 1.

3. However, this evidence is misleading. In classical Roman law, which is the root and historical basis of all the legal systems belonging to the continental tradition, the **modern-day dichotomies between substantive and procedural law simply did not exist**. If this truth is not sufficiently emphasised and highlighted in the context of contemporary university studies, this is the result of the profound recasting of the principles of Roman law by the legal humanists of the 16th century and the 19th-century German Pandectists. Yet in *classical* Roman law the procedure and the merits were always treated as indistinguishable.

4. In this connection, it should be pointed out that the majority of Roman law was a judge-made construct which, at the outset, was intended to remedy the vast shortcomings left by the ancient Quirite law and to correct its excessive rigidity (incidentally, in a way that was highly similar to what happened in English law with regard to law and equity). Making use of his absolute authority (*imperium*), the Praetor created new actions (*actiones*) that were made available to litigants. At the beginning of his annual term of office, he would issue an *edict* (*edictum praetoris*), that is, a proclamation setting out the actions that he intended to examine during his term of office. For example, the Praetor Gaius Aquilius Gallus, a friend of Cicero's, introduced the action for fraud (*actio de dolo*), which enabled victims of fraud to take action against the person(s) who had swindled them, in order to obtain redress.

5. Thus, a *right* (understood in the modern sense, that is, a *subjective* right) was absolutely indistinguishable from the corresponding *action*; on the contrary, it resulted directly from it. In other words, **there were exactly as many rights as there were actions**. In Roman law, the plaintiff did not ask the question: “*Do I have such or such a right that I could raise before the Praetor?*”, but: “*Will the Praetor grant me the benefit of such or such an action?*”

6. This state of affairs was also reflected in the tripartite structure of the Gaius's Institutes (*Institutiones*), namely:

- (1) persons (*personae*);
- (2) things (*res*);
- (3) actions (*actiones*).

In this regard, it should be emphasised that the Institutes were a legal handbook, similar to casebooks in the Common Law countries, and that, unlike modern civil codes, it did not classify the *norms* of law, but the *things* and *facts* which constituted the object of law: the persons who take action, the things in respect of which they act, and lastly, the actions themselves. **The judicial procedure was thus considered as an objective fact of real life, on an equal footing with persons and things**, there were no reasons to separate it and to relegate it to a separate text.

7. So where does the clear dividing line that we perceive in modern law between substantive law and procedural law, a demarcation that is tacitly accepted by our Court's case-law under Article 6 § 1 of the Convention, come from? It would be interesting to explore the deepest philosophical origins of this phenomenon, but such an undertaking would extend beyond the scope of the present research paper; it suffices to say that this change occurred during the humanist period, and that its most obvious cause was the change in the meaning of the Roman concept of “*jus*” (which we translate by the word “*law*”). In classical times, this term referred to the

share of “*assets*” (in the broadest sense of the word, including honours and claims, but also debts and obligations) which fell due to such or such a person, as determined by the courts. In contrast, in modern times the term *jus* began to be used to refer to a **power** or a capacity – that is, what we call a *subjective* right (which, in Rome, was called *manus*, *potestas* or *dominium* depending on the circumstances – but never *jus*).

8. Yet this change entailed logically inevitable consequences. These are very clearly seen in the work of the famous 16th century French jurist Hugues Doneau, who adapted Gaius’s tripartite plan, no longer classifying *objective facts* but *subjective rights*. In Gaius’s schema, the second part of the Institutes analysed the types of things (tangible, intangible, etc.); for Doneau, it serves to classify *rights* over things. Doneau thus divides it into two sub-parts: first, rights over things which belong to us (hence Book II of the French Civil Code, entitled “*Of property and the various modifications of ownership*”), then rights over things which are due to us (hence Book III of the same Code, entitled “*Of the various ways in which ownership is changed*”).

9. What of the third part, that of *actions*? Under this logic, there is no longer a place for them in a Civil Code. The procedure is admittedly a fact of real life – but, as we have just seen, the facts are no longer the primary object of civil law. Actions are now considered only as the *means* to assert one’s subjective rights; in consequence, they have been excluded from civil law strictly speaking, and have become a separate branch of law, *civil procedure*.

10. It is for this reason that the distinction between substantive and procedural issues seems obvious to our contemporaries. Clearly, the Court functions in the system of modern law, and it is not called upon to question this dichotomy as such. However, under Article 6 § 1 of the Convention, it may sometimes be required to examine the limits of this distinction and to recognise its relative nature. As we shall see, the Court has already examined this question – at least implicitly.

B. The Roche judgment

11. The case in which the question of the distinction between substantive and procedural law under Article 6 § 1 was most clearly raised was that of [*Roche v. the United Kingdom*](#) ([GC], no. 32555/96, ECHR 2005-X). The applicant, a British former serviceman who was registered as disabled, maintained that his health problems were the result of his participation in toxic gas tests conducted under the auspices of the British Armed Forces in the 1960s. The relevant Secretary of State rejected his claim for a service pension claim on the ground that he had not demonstrated a causal link between the tests and his medical condition. When the applicant threatened to bring judicial review proceedings alleging, among other things,

negligence on the part of the Ministry of Defence, the Secretary of State issued a certificate under section 10 of the Crown Proceedings Act 1947, effectively blocking any such proceedings concerning events prior to 1987, while allowing the individual concerned to apply for a service pension.

12. The applicant appealed to the Pensions Appeal Tribunal (“the PAT”). Under the PAT Rules, he applied for the disclosure of official information to enable the PAT to decide whether his illness had been caused or aggravated by the gas tests. The PAT ordered the Ministry of Defence to disclose certain categories of records; certain documents were then disclosed. The PAT eventually concluded, on the basis of an expert report, that there was no evidence to link the applicant’s exposure to the gases in question with his present condition. Nevertheless, the PAT considered the “difficulties” experienced by the applicant in obtaining the records which were submitted to the PAT to be “disquieting”. In 2004 the High Court allowed an appeal by the applicant and referred the matter back to the PAT for a further hearing. The Government subsequently disclosed a further eleven documents, eight of which had not been seen before by the applicant.

13. Examining the applicant’s complaint under Article 6 § 1 of the Convention, the Court began by reiterating the general principles established in its case-law, namely:

“116. The right of access to a court guaranteed by Article 6 in issue in the present case was established in *Golder* (cited above, pp. 13-18, §§ 28-36). In that case, the Court found the right of access to a court to be an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlay much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court (see, more recently, *Z and Others*, cited above, § 91).

117. **Article 6 § 1 does not, however, guarantee any particular content for those (civil) “rights” in the substantive law of the Contracting States:** the Court may not create through the interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see *Fayed*, cited above, pp. 49-50, § 65). Its guarantees extend only to rights which can be said, at least on arguable grounds, to be recognised under domestic law (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, and *Z and Others*, § 81, and the authorities cited therein, together with *McElhinney v. Ireland* [GC], no. 31253/96, § 23, 21 November 2001).

118. The applicant maintained that there was a certain tension between this aforementioned principle, on the one hand, and, on the other, the established autonomous meaning accorded by the Court to the notion of “civil rights and obligations”. Connected to this, he questioned the distinction between a restriction which delimits the substantive content properly speaking of the relevant civil right, to which the guarantees of Article 6 § 1 do not apply (see *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, pp. 16-17, § 36, and *Z and Others*, cited above, § 100), and a restriction which amounts to a procedural bar preventing the bringing of potential claims to court, to which Article 6 could have some application (see *Tinnelly & Sons Ltd and Others and McElduff and Others*, p. 1657, § 62; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 48-49,

ELEMENTS OF SUBSTANTIVE LAW AS OBSTACLES TO ACCESS TO A COURT WITHIN THE MEANING OF
ARTICLE 6 § 1 OF THE CONVENTION

ECHR 2001-XI; *Fogarty*, § 26; and *McElhinney*, § 25). The applicant argued that it was not necessary to maintain that distinction (relying on the Commission decisions in *Ketterick, Pinder and Dyer*, cited above, together with paragraph 65 (p. 49) of *Fayed*, as cited in *Fogarty*, § 25): any restriction should be subjected to a proportionality test because the important point was to protect the courts from the assumption of arbitrary power and control on the part of the executive.

119. The Court cannot agree with these submissions of the applicant. It does not find any inconsistency between the autonomous notion of “civil” (see *König v. Germany*, judgment of 28 June 1987, Series A no. 27, p. 30, § 89, and, more recently, *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 24-31, ECHR 2001-VII) and the requirement that domestic law recognises, at least on arguable grounds, the existence of a “right” (see *James and Others*, cited above, pp. 46-47, § 81; *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, p. 70, § 192; and *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A, pp. 36-37, § 80). In addition, the Commission decisions in *Ketterick, Pinder and Dyer* must be read in the light, *inter alia*, of the judgment in *Z and Others* (cited above) and, in particular, in the light of the Court's affirmation therein as to the necessity to maintain that procedural/substantive distinction: fine as it may be in a particular case, this distinction remains determinative of the applicability and, as appropriate, the scope of the guarantees of Article 6 of the Convention. In both these respects, the Court would reiterate the fundamental principle that Article 6 does not itself guarantee any particular content of substantive law of the Contracting Parties (see, amongst other authorities, *Z and Others*, cited above, § 87).

No implication to the contrary can be drawn, in the Court's view, from paragraph 67 of *Fayed*. The fact that the particular circumstances of, and complaints made in, a case may render it unnecessary to draw the distinction between substantive limitations and procedural bars (see, for example, *A. v. the United Kingdom*, no. 35373/97, § 65, ECHR 2002-X) does not affect the scope of Article 6 of the Convention which can, in principle, have no application to substantive limitations on the right existing under domestic law.

120. In assessing therefore whether there is a civil “right” and in determining the substantive or procedural characterisation to be given to the impugned restriction, the starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, judgment of 28 September 1995, Series A no. 327-A, p. 19, § 49). Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see *Z and Others*, cited above, § 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law.

121. Finally, in carrying out this assessment, it is necessary to look beyond the appearances and the language used and to concentrate on the realities of the situation (see *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no. 50, pp. 20-21, § 38). The Court must not be unduly influenced by, for example, the legislative techniques used (see *Fayed*, pp. 50-51, § 67) or by the labels put on the relevant restriction in domestic law: as the Government noted, the oft-used word “immunity” can mean an “immunity from liability” (in principle, a substantive limitation) or an “immunity from suit” (suggestive of a procedural limitation).”

14. Turning then to the specific circumstances of the case, the Court accepted the reasoning of the national courts as to the effect of section 10 of the 1947 Act in domestic law. The House of Lords had found that section 10 did not intend to confer on servicemen any *substantive* right to claim damages against the Crown, but had simply maintained the existing and undisputed absence of liability in tort of the Crown to servicemen in the circumstances covered by that section. Section 10 did not therefore remove a class of claim from the domestic courts' jurisdiction or confer any immunity from liability which had been previously recognised; such a class of claim had never existed and was not created by the 1947 Act. The House of Lords had therefore considered that section 10 was **a provision of substantive law which delimited the rights** of servicemen to seek damages from the Crown and which provided instead, as a matter of substantive law, a no-fault pension scheme for injuries sustained in the course of service. Accordingly, the applicant had no civil "*right*" recognised under domestic law which would attract the application of Article 6 § 1. As this provision was not applicable, there had therefore been no violation of it.

15. Under Article 14 of the Convention, the applicant also submitted that the 1947 Act was discriminatory in nature. In the light of its findings that the applicant had no "*civil right*" within the meaning of Article 6 § 1, the Court held that Article 14 was therefore also inapplicable.

16. Several separate opinions were attached to the Grand Chamber's judgment. Among these, Judge Zupančič's dissenting opinion describes very precisely and explicitly the theoretical core of the problem set out above. It is therefore worth citing in its near entirety:

"... In conceptual terms, however, I find it difficult to accept that the issue should depend on the somewhat fictional distinction between what is 'procedural' and what is 'substantive'. However, this artificial separation of 'procedural' and 'substantive' has been maintained and further built upon by our own case-law. Article 6 and its precedential progeny such as 'access to a court' derive from an unconscious, or at any rate unstated, underlying premise.

The premise is that the procedure is a mere ancillary and adjective means, a transmission belt, to bring about the substantive rights.

At its inception it perhaps made political sense that an international instrument such as the European Convention on Human Rights should attempt to limit its effect to what was seen as a mere procedural means. The establishment of a substantive right would then, at least seemingly, remain in the sovereign domain of the domestic law. **With time, however, this imagined tectonic boundary between what is substantive and what is 'merely' procedural has developed into a seismic fault line.** It generates hard cases, as the split in the vote demonstrates, which make bad law. In a case, moreover, where the executive is given the discretion to interfere with access to a court, we face a checks and balances (separation of powers) issue typically to be resolved by a domestic constitutional judicial body.

It is ironic that we should, particularly in British cases, build on the distinction between what is procedural and what is substantive. While the Continental legal systems have, for historical reasons, **traditionally maintained the strictness of the**

distinction, it is precisely the common-law system which has always considered the right and the remedy to be interdependent. Is the remedy something ‘substantive’? Or is it ‘procedural’? Is the legal fiction ‘the Crown can do no wrong’ – and the consequent blocking of action (immunity) – merely procedural? Or has the substantive right of the plaintiff simply been denied? As we move from one British case to another the dilemma appears in cameo.

It is becoming clear that we **need to resort back to common sense**. Despite the slender majority’s vote to the contrary, it is easy to maintain that any immunity from any suit is a *procedural* block. **On the other hand, we are aware that both the intent and the effect of such [...] immunity is to deny one of the most logically compelling substantive claims in law.**

What then is a right? Is it not true that a ‘right’ – including a ‘human right’ – becomes something legally relevant, paradoxically, only when it is alleged to have been denied? Philosophers and politicians may have the luxury of being able to speak of rights deontologically and *in abstracto*. In law, however, **it is the adversary procedural context which makes the substantive rights come out in the open, that is to say, exist.** The right appears on the legal horizon when an infringed interest of a legal subject is procedurally asserted and the remedy actively pursued. A non-vindicated right is mere hypothetical abstraction.

Human relations in society may be saturated with all kinds of potential rights. Nevertheless, in most cases they remain unasserted either because they are not violated in the first place or because the aggrieved person omits to pursue them procedurally. Moreover, a right without a remedy is a simple recommendation (‘natural obligation’). It follows that a right is doubly dependent on its concomitant remedy. If the remedy does not exist a right is not a right; if the remedy is not procedurally pursued the right will not be vindicated. **The right and its remedy are not only interdependent. They are consubstantial.**

To speak of rights as if they existed apart from their procedural context is to separate artificially – say for pedagogical, theoretical or nomotechnical reasons – what in practical terms is inseparable. A substantive right is not a mirror image of its procedural remedy.

A substantive right is its remedy.

It is ironic that so often common sense and common law should come into direct collision. It is doubly ironic that the majority should speak of avoiding mere appearances and sticking to realities ... when the distinction the judgment is built upon is **pure legal fiction**. We may have muddled through another case but the underlying false premise remains. The dilemma is certain to come back.

The way to address this dilemma is, obviously, to cease subscribing to the false premise. It is difficult to address this in the abstract. However, at least in cases in which the fault line is potentially decisive, where it collides with justice and common sense, since we are a court of human rights, we should opt for an autonomous meaning of ‘substantive due process’. Intellectual honesty demands no less.”

C. Other relevant cases

17. *Roche v. the United Kingdom* is the case in which the distinction between the “*substantive*” and “*procedural*” aspects of access to a court was addressed most explicitly and directly. However, the Court had also been required to address this question in several other judgments, both preceding and subsequent to *Roche*. Three judgments are relevant in this respect; it is interesting to note that each of them brings into play a different obstacle arising under substantive law.

(1) The *National and Provincial Building Society* case: the enactment of legislation with retroactive effect on the merits

18. In the case of *National and Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* (23 October 1997, *Reports of Judgments and Decisions* 1997-VII), the applicants, “*building societies*” within the meaning of English law, complained about the fact that legal actions brought by them with a view to obtaining restitution of monies paid by them to the tax authorities under invalidated tax provisions had been extinguished under the effects of the *substantive* and retrospective provisions of two Finance Acts. The Court recognised that Article 6 § 1 was applicable, in that both sets of restitution proceedings were private-law actions, irrespective of the fiscal dimension; the judicial review proceedings were clearly related to the outcome of the second set of restitution proceedings and therefore decisive in terms of private rights. On the merits, the Court noted that the effect of the contested legislation was to render the applicants’ legal actions unwinnable. The question of whether this result constituted an interference with the applicants’ right of access to a court had to be determined in the light of all the circumstances of the case, and the Court had in particular to subject to careful scrutiny the justifications adduced by the authorities, in view of the retrospective nature of the impugned measures.

19. The applicants had clearly understood that Parliament intended to tax the interest paid during the gap period and it was reasonable to consider that they had anticipated that the Treasury would react as it did. The Leeds and the National & Provincial had in effect tried to pre-empt the enactment of remedial legislation by issuing writs in restitution immediately before the official announcement that Parliament would be asked to approve the retrospective measures. The impugned section (with retrospective effect) was not in fact specifically targeted at Leeds’ and National & Provincial’s restitution actions, even if its effect was to stifle these actions. The Court accepted that obvious public-interest considerations had justified the adoption of this section 53 with retrospective effect, having regard to Parliament’s need and resolve to reassert its original intention. In addition, there were compelling public-interest reasons for rendering the Treasury

Orders immune from the legal challenge mounted by all of the applicants in taking judicial review proceedings and bringing contingent restitution proceedings. These proceedings were in effect an indirect assault on Parliament's original intention to tax the interest paid in the gap period. In short, the applicants had to be considered as having appreciated that Parliament would intervene as it did. For these reasons, the Court concluded that there had been no violation of Article 6 § 1.

20. The applicants complained in addition that the impugned measures had violated Article 6 § 1 of the Convention taken in conjunction with Article 14 (prohibition of discrimination). In this respect, they reiterated that they were in a virtually identical situation to that of the Woolwich, another building society. Like the latter building society, they possessed common-law rights to restitution of the monies expropriated by the respondent State. Unlike the applicants, the Woolwich had been allowed to recover in full following independent judicial determinations of its claims. Unlike the applicant societies, the Woolwich was excluded from the retrospective effects of section 53 of the 1991 Act. Yet the Government minister who was responsible for the passage through Parliament of the 1992 Act had expressly acknowledged that there had been a disparity of treatment between the Woolwich and the other building societies. The Court dismissed this complaint in the following terms:

“118. The Court observes that the complaints raised by the applicant societies under this head reflect the substance of their earlier complaints under Article 1 of Protocol No. 1 taken in conjunction with Article 14 (see paragraphs 84–86 above). It concluded in connection with those complaints that the Woolwich and the applicant societies were not in a relevantly similar situation and that in any event there was a reasonable and objective justification for excluding the Woolwich from the retrospective effects of section 53 of the 1991 Act. Furthermore, it could not be validly contended that section 64 of the 1992 Act was discriminatory in its effect...”

119. The Court considers that the reasons which it has adduced in respect of the above finding equally support the conclusion that there has been no violation of Article 6 § 1 taken in conjunction with Article 14 of the Convention...”

(2) The case of *Tinnelly & Sons Ltd*: a conclusive presumption

21. In the case of *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (10 July 1998, *Reports of Judgments and Decisions* 1998-IV), the applicants – a company based in Northern Ireland and two of its senior managers – had not been chosen by the national electricity company in the context of public procurement. Considering that they had been refused the contracts on account of the religious convictions (Catholic) and/or political opinions (pro-IRA) of the second and third applicant, they lodged a complaint with the FEA, the public body charged with eliminating illegal discrimination. However, the Secretary of State for Northern Ireland issued a certificate to the electricity company indicating

that the decision not to grant the contract in question to the applicant company was “*an act done for the purpose of safeguarding national security or of protecting public safety or public order*”. By virtue of section 42(2) of the 1976 Act, the certificate was conclusive evidence that the act had been done for the stated purpose, thus depriving the action taken by the applicants of any chance of success.

22. The Court established at the outset that the right not to be discriminated against on grounds of religious belief or political opinion, in respect of which the finding of a violation by the domestic courts would guarantee the injured party the right to compensation, was a “*civil right*” coming within the scope of Article 6 § 1 of the Convention. Turning then to the merits of the complaint, it noted that that at no stage was there any comprehensive scrutiny of the facts which led the Secretary of State to issue the conclusive certificates under section 42 of the 1976 Act. The domestic court had been unable to go behind the terms of the certificate in order to verify whether national security grounds in fact existed for refusing the contract. Nor did the court have sight of all the relevant documents. The Court was mindful of the security considerations at stake; however, it discerned no reasonable relationship of proportionality between the concerns for the protection of national security invoked and the impact which the conclusive certificated had had on the applicants’ right of access to a court. In consequence, it held that there had been a violation of Article 6 § 1 of the Convention.

(3) The *Mizzi* case: a presumption and time-limit established in civil law

23. The case of [Mizzi v. Malta](#) (no. 26111/02, ECHR 2006-I) concerned the fact that it was impossible for the applicant to bring an action to contest the legal presumption of paternity. In the 1960s, the applicant’s wife became pregnant. The following year, the applicant and his wife separated and she gave birth to a daughter, Y. The applicant was automatically considered to be Y’s father under Maltese law and was registered as her natural father. Following a DNA test which, according to the applicant, established that he was not Y’s father, the applicant tried unsuccessfully to bring civil proceedings to repudiate his paternity of Y. According to the Maltese Civil Code, **a husband could challenge the paternity of a child conceived in wedlock if he could prove both the adultery of his wife and that the birth had been concealed from him** (thus was therefore a genuine *substantive* limitation rather than a *procedural* one). This latter condition was dropped when the law was amended in 1993 and a time-limit of six months from the day of the child’s birth was set as the cut-off point for introducing such proceedings. In 1997 the Civil Court accepted the applicant’s request for a declaration that, notwithstanding the provisions of

the Civil Code, he had a right to proceed with a paternity action and found that there had been a violation of Article 8. That judgment was subsequently revoked by the Constitutional Court.

24. Since the applicant's allegations that he was not Y.'s biological father were not manifestly devoid of substance, the Court considered that the applicant had an arguable right to challenge his paternity and that the dispute he wished to bring was genuine and serious. Article 6 was thus applicable to the case. At the time of Y's birth, any action which the applicant could have brought in order to challenge paternity would have had little prospects of success as he would have been unable to prove any of the elements required by the Civil Code in force at the time. On account of time-limit introduced by the 1993 amendments, the applicant had been unable to bring an action before the courts. Admittedly, the applicant could still file an application before the Civil Court, but a degree of access to a court that was limited to the right to ask a preliminary question could not be considered as sufficient to secure his "*right to a court*". The Civil Court's favourable decision had been revoked by the Constitutional Court, and this, coupled with the wording of the relevant domestic provisions, deprived the applicant of the possibility of obtaining a judicial determination of his claim.

25. The Court accepted that under certain circumstances, the setting of time-limits for the introduction of a paternity action might serve the interests of legal certainty and the interests of the children. However, the application of the rules in question should not have prevented litigants from making use of an available remedy. The practical impossibility for the applicant to deny his paternity from the day Y was born until the present day impaired, in essence, his right of access to a court. In the Court's opinion, the domestic courts had failed to strike a fair balance between the applicant's legitimate interest of having a judicial ruling over his presumed paternity and the protection of legal certainty and of the interests of the other people involved in his case. The interference thus imposed an excessive burden on the applicant, and so the Court held that there had been a violation of Article 6 § 1 of the Convention.

26. Under Article 14 taken in conjunction with Articles 6 § 1, the Court noted that in order to bring an action to contest his paternity the applicant had been subject to time-limits which did not apply to other "*interested parties*". It considered that the rigid application of the time-limit along with the Constitutional Court's refusal to allow an exception deprived the applicant of the exercise of his right of access to a court, which was still enjoyed by the other interested parties. The Court thus concluded that there existed discrimination, prohibited by Article 14.

Conclusion as to the first question

27. Thus, it is clear that in examining complaints concerning the right of access to a court under Article 6 § 1 of the Convention, the Court has not wished to follow the distinction between substantive law and procedural law in too rigid and “dogmatic” a manner. On the contrary, in certain cases, it has tacitly agreed to examine the substantive obstacles; in two cases, it has not hesitated to find a violation of Article 6 § 1, taken alone and/or in conjunction with Article 14.

II. THE QUESTION OF WHETHER A LIMITATION ON THE RIGHT OF ACCESS TO A COURT HAS INFRINGED THE VERY ESSENCE OF THIS RIGHT

28. In several judgments, the Court has in effect found that “*the very substance*” of the right of access to a court was impaired (see *Cadène v. France*, no. 12039/08, § 27, 8 March 2012; *Bayar and Gürbüz v. Turkey*, no. 37569/06, § 49, 27 November 2012; *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, § 134, 26 November 2013 (case referred to the Grand Chamber); *Belek and Özkurt v. Turkey (no. 6)*, no. 4375/09, § 23, 17 June 2014; and *Samoilă v. Romania*, no. 19994/04, § 45, 16 July 2015). However, it has never established precise criteria for deciding what does and does not impair the “*substance*” in issue. The Court always takes a nuanced case-by-case approach, and the question of whether the substance of the right of access to the courts has (or has not) been affected is always given as a *conclusion* rather than as an intermediary element of the reasoning.

29. In order to understand the concept of the “*substance*” of a law, it is necessary to refer to its source, namely Aristotelian metaphysics. The *substance* (*ousia* in Greek) is the “*the essence [‘quiddity’], the formula of which is a definition*”, or, in other words, “*the shape or form of each thing*” (*Metaphysics*¹, Book 5, part 8). The substance (or essence) is the opposite of **accident**, namely “*that which attaches to something and can be truly asserted, but [is] neither of necessity nor usually, e.g. if someone in digging a hole for a plant has found treasure. This - the finding of treasure - is for the man who dug the hole an accident; for neither does the one come of necessity from the other or after the other, nor, if a man plants, does he usually find treasure*” (ibid., part 30).

30. In other words, **the substance is what cannot be changed or removed without the thing in itself changing or disappearing.** Aristotle

¹. In the following translation: <http://classics.mit.edu/Aristotle/metaphysics.5.v.html>

distinguishes between the accidental (temporary) properties and the essential (persistent or eternal) properties of a being: an accidental property is what each thing may possess but which does not form part of its essence. **It seems that this is the only adequate criterion for determining, on a case-by-case basis, those guarantees which form part of the substance of the right of access to a court within the meaning of Article 6 § 1 of the Convention.**

III. DIRECT AND/OR INDIRECT DISCRIMINATION IN THE EXERCISE OF THE RIGHT OF ACCESS TO A COURT

31. Article 14 of the Convention has been relied on in several cases concerning the right of access to a court. In some of these, the Court has found a violation of Article 6 § 1 while stating that it was not necessary to examine the allegation of discrimination separately (see [Keegan v. Ireland](#), 26 May 1994, § 62, Series A no. 290; and [Philis v. Greece \(no. 1\)](#), 27 August 1991, § 68, Series A no. 209). In other cases, the Court has found a violation of Article 6 § 1 and, thereby, also of Article 14, through a mere reference to the reasoning under Article 6 (see *Tinnelly & Sons Ltd and Others and McElduff and Others*, cited above, §§ 81 and 87). In yet other cases, the Court concluded that there had been no violation of Article 6 § 1, and, on the same grounds, that Article 14 had also not been breached (see *National and Provincial Building Society*, cited above; *Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, cited above, §§ 118-119; [OAO Plodovaya Kompanya v. Russia](#), no. 1641/02, § 37, 7 June 2007; and [Wallishauser v. Austria \(no. 2\)](#), no. 14497/06, § 82, 20 June 2013).

32. The cases in which the Court carried out a separate examination under Article 14 can be divided into four categories:

- (1) a refusal by the courts to examine the merits of the dispute;
- (2) a refusal to examine a request on formal grounds;
- (3) immunities and privileges;
- (4) a refusal to grant legal aid.

(1) Refusal by the courts to examine the merits of the dispute

33. In the case of [Sâmbata Bihor Greek-Catholic Parish v. Romania](#) (no. 48107/99, 12 January 2010), the Court found a violation of Article 6 § 1 on account of the applicant parish's limited access to a court. The fact

that it was required to have its case examined by a joint committee had pursued the legitimate aim of preserving social harmony. However, the law had not laid down any rules on either the procedure for convening the joint committee or its decision-making process. Those legislative shortcomings had helped to create a drawn-out preliminary procedure which was capable of indefinitely blocking the applicant parish's access to a court. The Court reiterated that entrusting to a non-judicial body the task of ruling on certain civil rights – in the present case, to the joint committees, on a property issue – was not, in itself, in breach of the Convention, provided that that body's decision was subsequently reviewed by a judicial body with full powers. Yet in this case, the judicial scrutiny of the committee's activities had been limited to ensuring that the need to reflect the majority view was satisfied. However, for the determination of civil rights by a “*tribunal*” to satisfy Article 6 § 1, the “*tribunal*” in question must have jurisdiction to examine all relevant questions of fact and law.

34. With regard to Article 14, the Court held:

“79. The Court reiterates that in prohibiting discrimination, Article 14 affords protection against discrimination, that is, treating differently persons in relevantly similar situations. It notes that a difference in treatment is discriminatory for the purposes of Article 14 if it has no objective and reasonable justification, which means that it does not pursue a “legitimate aim” or that there is no “reasonable proportionality between the means employed and the aim sought to be realised”...

80. The Court notes that the difference in treatment affecting the applicant parish's enjoyment of its right of access to court was based on its adherence to the Greek Catholic Church. The Government has provided justifications for this difference in treatment, based on the specific situation of the denomination which had just been recognised again in 1990. The Court notes that, at that time, the problem of the restoration of places of worship and other buildings that had belonged to the Uniate church prior to its dissolution had been a fairly widespread and socially sensitive issue...

81. However, even supposing that such a justification could appear compatible with the requirements of Article 14 of the Convention, the domestic courts had nonetheless interpreted Legislative Decree no. 126/1990 in a contradictory manner, sometimes accepting and sometimes declining jurisdiction to deal with cases brought before them by Greek Catholic parishes, with the result that the applicant parish had been treated differently from other parishes involved in similar disputes... Yet no justification has been put forward by the Government for this difference in treatment (see, *mutatis mutandis*, *Beian v. Romania* (no. 1), no. [30658/05](#), § 40, ECHR 2007-XIII (extracts)).

82. These elements are sufficient for the Court to conclude that this difference in treatment to which the applicant parish was subjected had therefore no objective and reasonable justification, without its being necessary to rule on the question as to whether Article 3 of Legislative Decree no. 126/1990 discriminates against the Greek-Catholic denomination.

It follows that there has been a violation of Article 14 of the Convention taken together with Article 6 § 1.”

(2) Refusal to examine a request on formal grounds

35. In *Ivanova v. Finland* ((dec.), no. 53054/99, 28 May 2002), the applicant, a Russian national, complained about the refusal by a Finnish court to accept her claim, which had been written in Russian. The Court found no indication that there had been a violation of Article 6 § 1; nor did it discern any indication that the applicant had been discriminated against on the grounds of her nationality.

(3) Immunities and privileges

36. *A. v. the United Kingdom* (no. 35373/97, ECHR 2002-X) concerned the applicant's inability to take legal action against a Member of Parliament in respect of allegedly defamatory statements he had made during a parliamentary debate, on account of the MP's parliamentary privilege. The Court concluded that there had been no violation of Article 6 § 1. As to the applicant's complaint under Article 14, it raised issues which were identical to those already examined under Article 6 and had also to result in the finding of no violation. In any event, in the Court's opinion, no analogy could be drawn between what was said in parliamentary debates and what was said in ordinary speech.

37. The applicant in *Fogarty v. the United Kingdom* ([GC], no. 37112/97, ECHR 2001-XI) complained of the immunity granted to a foreign State in respect of a claim of sex discrimination arising from the refusal of a foreign embassy to employ her. The Court concluded that there had been no violation of Article 6 § 1 with regard to the right of access to a court. With regard to Article 14 taken together with Article 6, it noted that the immunity at issue applied to proceedings involving employment of all staff by an embassy, irrespective of the subject-matter and of the sex, nationality or other attributes of the individual concerned. Consequently, the applicant had not been treated differently from any other person wishing to bring employment-related proceedings against an embassy.

38. In *Ernst and Others v. Belgium* (no. 33400/96, 15 July 2003), the applicants had lodged a criminal complaint against a judge, and applied to be joined to the proceedings as civil parties. However, the Belgian Court of Cassation had decided that, since it was directed against a judge, who enjoyed immunity from jurisdiction, the applicants' application to be joined as civil parties was inadmissible. Having found no violation of the right of access to a court, the Court turned to the issue of the distinction between the applicants and the judge in question. According to the Court, this distinction had pursued a legitimate aim, namely to shield members of the judiciary from ill-considered proceedings and to allow them to perform their judicial duties dispassionately and independently. Since the applicants retained a right to bring a civil action against the Belgian State, the Court found that the requirement for there to be a reasonable relationship of proportionality

between the means used by the Belgian legislature and the aim pursued was satisfied.

39. In the case of *Esposito v. Italy* ((dec.), no. 34971/02, 5 April 2007), the applicant was himself a judge. The National Council of the Judiciary (“NCJ”) brought a procedure for his automatic transfer, in the course of which two members of that Council made a number of allegedly defamatory statements. However, the applicant’s claim against them for compensation was dismissed on account of the immunity that they enjoyed under the law. Examining the applicant’s complaint alleging discrimination, the Court held:

“In the present case the applicant has not shown that he was treated differently from other persons in a similar situation.

In any event, and even assuming that there has been a difference in treatment, the Court observes that it has already found, under Article 6 § 1 of the Convention, that the immunity conferred on members of the NCJ in respect of opinions “expressed in the performance of their duties in connection with the subject under discussion” was in accordance with the law, pursued legitimate aims and was proportionate to them. The situation complained of by the applicant was therefore justified by objective and reasonable grounds.

It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.”

(4) Legal aid

40. In *Dempsey v. Ireland* ((dec.), no. 41382/98, 6 April 2000), the applicant complained that she had been unable to obtain legal aid in proceedings concerning the adoption of her child. The Court held:

“The applicant also invokes Article 14 of the Convention in conjunction with Articles 6 and 8 submitting that she could not get urgent legal aid as required whereas the adoptive parents, who were wealthier, were legally aided. ...

The applicant essentially complains that both she and the prospective adoptive parents were legal aid applicants but were treated differently, the latter obtaining legal aid and advice in time for their proceedings and despite their advantageous financial position. However, given the absence of any information or detail as regards the circumstances in which the prospective adoptive parents obtained legal aid, the reasons for the grant of legal aid or about their financial circumstances, the Court concludes that the applicant has not demonstrated a discriminatory difference in treatment within the meaning of Article 14 of the Convention. In any event, as noted above, the applicant was in fact assisted by competent representatives in her legal action and has not therefore been able to demonstrate any way in which she was a victim of the discrimination she alleges.

This complaint is manifestly ill-founded and, as such, inadmissible pursuant to Article 34 § 4 of the Convention.”

41. The Court adopted similar reasoning in [Buonpane v. Germany](#) ((dec.), no. 61294/00, 20 November 2003), concerning a refusal to grant the applicant legal aid in insolvency proceedings, and in [Eckardt v. Germany](#) ((dec.), no. 23947/03, 10 April 2007), in which the applicant wished to bring a compensation claim in respect of damage caused by his degrading conditions of detention.

42. In [Granos Organicos Nacionales S.A. v. Germany](#) (no. 19508/07, 22 March 2012), the applicant company complained about the relevant German authority's refusal to grant it legal aid. After having found no violation of Article 6 § 1 of the Convention in respect of the right of access to the courts, the Court continued as follows:

“54. The applicant company further complained that it had been discriminated against in its capacity as a foreign legal person. It relied on Article 6 § 1 in conjunction with Article 14 of the Convention...

...

57. Having regard to its findings above, the Court considers that the Government have submitted relevant reasons for the different treatment of natural and legal persons – in particular the necessity to control the use of public funds for financing litigation by private companies – and between domestic and foreign legal entities, in particular the principle of reciprocity. It follows that there has been no violation of Article 6 § 1 in conjunction with Article 14 of the Convention.”

43. To sum up, an analysis of the judgments and decisions issued by the Court under Article 14 of the Convention taken together with Article 6 § 1 in respect of the right of access to a court does not indicate any common feature which would enable these cases to be placed in a specific category. Moreover, the Court has never made a distinction in these cases between direct and indirect discrimination.

CONCLUSION

44. The dividing line between substantive law and procedural law, a characteristic feature of the paradigm of modern legal thought, has reached its limits in certain cases considered by the Court. In examining complaints concerning the right of access to a court under Article 6 § 1 of the Convention, the Court has chosen not to follow the distinction between substantive law and procedural law in too rigid and “*dogmatic*” a manner. On the contrary, in certain cases, it tacitly agreed to examine the substantive obstacles; in two cases, it did not hesitate to find a violation of Article 6 § 1, taken alone and/or in combination with Article 14.

45. Furthermore, the Court has never identified specific criteria for determining what impairs the “*substance*” of the right of access to a court.

ELEMENTS OF SUBSTANTIVE LAW AS OBSTACLES TO ACCESS TO A COURT WITHIN THE MEANING OF
ARTICLE 6 § 1 OF THE CONVENTION

In reality, it always takes a nuanced case-by-case approach, without providing a precise definition.

46. An analysis of the judgments and decisions issued by the Court under Article 14 of the Convention (prohibition of discrimination) taken together with Article 6 § 1 in respect of the right of access to a court does not indicate any common feature which would enable these cases to be placed in a specific category. Moreover, the Court has never made a distinction in these cases between direct and indirect discrimination.