



NATIONAL INSTITUTE OF JUSTICE

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The right of access to court

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Overview

- Right to a court
- Institutional Requirements
- Right to an effective remedy

Right of access to a court: essentials

- Everyone has the right to have any claim relating to his “*civil rights and obligations*” brought before a court or tribunal.
 - Article 6 § 1 embodies the “*right to a court*”, of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect (*Golder v. the United Kingdom*, § 36).
 - i.e. fair trial guarantees useless if unable to start proceedings.
 - Not absolute rights: can be limited
 - E.g. re vexatious claims – OK since 1985.

...

- But limits must not restrict / reduce the access left to the individual in such a way or to such an extent that the essence of the right is impaired
 - *Airey v UK (1979)* – legal aid required if indispensable for effective access to court, including as defendant (McLibel – *Steel & Morris v UK (2005)* – re freedom of expression).
 - *Stanev v Bulgaria (GC) (2012)* – e.g. re. inability to challenge restriction to psychiatric hospital

...

- Access is re rights under national law
 - Cannot use access to challenge content of national law.
 - But not always clear whether substantial limitation or procedural bat
 - e.g. re. immunity from suit of UK police: *Osman v UK* (1998) – held disproportionate.
 - re. absence of duty of care from local authority re childcare (*Z & others v UK* (2001)).
 - But: *Markovic v & others v Italy* (GC)(2006) – some issues genuinely non-justiciable.
- Though no right to have criminal proceedings brought / no right to an appeal.

Effective proceedings

- Final court decisions should be effective.
- Criminal context: *Assanidze v Georgia* (2004) (non-release of Georgian mayor following acquittal)
- Particularly problematic when state is judgment debtor.
- Emblematic: *Burdov (no. 2)* (2009): remedy required for non-payment, to be granted within one year.
- Binding nature of final decisions.
 - Legacy problems of extraordinary appeals:
 - *Ryabakh v Russia* (2003) (re. savings valuations % inflation – supervisory review of final judgment)

Institutional requirements

- ... and what about the Court itself?
 - An “independent and impartial tribunal established by law”
- **Autonomous concept**
 - Characterised by judicial function: deciding; competence’ rules of law / procedure

Structural issues

- Structure
 - Basis of office
 - Guarantees against outside interference
- Powers
- Composition
 - Lay judges?
 - Requires guarantees – e.g. non-conflict, tenure
- E.g. *Findlay v UK* (1997) re. army court martial tribunal - convening officer in charge of tribunal and appointing prosecution / defence & quashing / varying power.
- *Incal v Turkey* (1998) – inclusion of military officer in trial of civilian.
- Judicial review may remedy: defects.

Impartiality / independence

- Subjective / objective elements
 - Subjective – lack of bias presumed for rebuttal
 - Objective – structure / appearance – legitimising doubts?
 - E.g. *Salam v UK* (2000) – judge, deceased, beneficiary – all freemasons. Held – irrelevant unless circumstances indicate otherwise.
 - More generally – all depends on circumstances...
 - *Pullar v UK* (1996): juror / witness relationship held factually irrelevant
 - But: *Holm v Sweden* (1993): 5/9 jurors in defamation trial members of party subject of defamation claim. Procedurally sound selection process, but objective independence / impartiality questionable.
 - Cf. *Sander v UK* (2000) – jury members disclaimed racism, but risk of tainted conviction.

Right to an effective remedy

- Article 13 ECHR
 - Available
 - Sufficient
 - Certain in practice (and theory)
 - Effective in practice (and law)
 - Depends on circumstances of case
- Margin of discretion / aggregation
- Types
 - Expository
 - Compensatory (tho nb *Pinto* risks)