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**ON THE OCCASION OF THE**

**5<sup>TH</sup> PLENARY OF THE UACCC SCIENTIFIC SYMPOSIUM**

**ON**

**“FAIR TRIAL”**

**Saana, Yemen**  
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**REPORT**

**“Fair Trial – The Cyprus Experience”**

by  
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Until 1960 Cyprus was a British Colony. Guaranteed rights and the supremacy of the Constitution were introduced with Independence and the birth of the Republic of Cyprus. Fundamental rights and freedoms are explicitly safeguarded in Part II of our Constitution, drafted on the model of the European Convention of Human Rights.

In 1962 the Republic of Cyprus ratified the European Convention on Human Rights. Our jurisprudence is quite rich in judgments declaring and enforcing the rights set out in the Convention. The case law of the European Court of Human Rights is followed by our courts and, therefore, our jurisprudence is in accord with that of the Strasburg Court.

Fundamental human rights are a basic norm of the legal order from which there can be no departure. No state authority or anyone else can disregard, ignore or violate the rights of the individual. Human rights constitute the substratum for the exercise of state power and define the parameters of individual action.

Human rights operate erga omnes. Respect for human rights is owed by the State, as well as everybody else. They are universal in nature.

The amenity to limit at least some of such rights is recognized both by the European Convention of Human Rights and other international instruments. There is, however, consensus that human rights cannot be limited in the absence of express authority to that end in the basic law guaranteeing human rights. Moreover where there is authority for limitation, the causes for the protection of which human rights may be confined or restricted must be explicitly stated.

Limitations or restrictions to the rights and liberties guaranteed are interpreted strictly. They are not applied for any purpose other than the one for which they have been prescribed (**Article 33 of the Constitution**). Any restrictions imposed by law must refer to and serve exclusively the purpose for which the Constitution permits limitations of the rights protected.

The final arbiter of the existence of the necessity justifying limitation of human rights is the judiciary. They have to decide whether the prerequisites for limitation are satisfied, although it has been decided<sup>(\*)</sup> that the legislator is credited with bona fide appreciation that circumstances exist that justify limitation or restriction of a right, an assumption in no way conclusive as to the existence of necessitous circumstances.

Of all human rights today we will concentrate on the right to have a fair trial. The rights of the accused and every litigant which are safeguarded by the Constitution are inseparable features of a fair trial. The rights of the accused and every litigant are an incident of the freedom of man not to be denied at any time.

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment of deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person.

The right to a fair trial is applicable to both the determination of an individual's rights and duties in a civil action (includes also administrative proceedings) as well as with respect to the determination of any criminal charge against him or her.

The determination of the civil rights and obligations of a person or any criminal charge

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(\*) *President of the Republic v. House of Representative (2000) 3 CLR 238.*

against any individual becomes unfair if the trial is held contrary to or outside the norms of a fair trial.

The notion of a fair trial entails the right of any litigant to be present at his trial. When the court unjustifiably refused an application for adjournment on grounds of illness, thus depriving the litigant of the right to be present at his trial, the proceedings were declared void and a retrial of the case was ordered.

Article 30 of the Constitution, which is similar to Article 6 of the Convention, epitomises the notion of fair trial:

1. *No person shall be denied access to the court assigned to him by or under this Constitution. The establishment of judicial committees or exceptional courts under any name whatsoever is prohibited.*
2. *In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law. Judgment shall be reasoned and pronounced in public session, but the press and the public may be excluded from all or any part of the trial upon a decision of the court where it is in the interest of the security of the Republic or the constitutional order or the public order or the public safety or the public morals or where the interests of juveniles or the protection of the private life of the parties so require or, in special circumstances where, in the opinion of the court, publicity would prejudice the interests of justice.*
3. *Every person has the right-*
  - (a) *to be informed of the reasons why he is required to appear before the court;*
  - (b) *to present his case before the court and to have sufficient time necessary for its preparation;*
  - (c) *to adduce or cause to be adduced his evidence and to examine witnesses according to law;*
  - (d) *to have a lawyer of his own choice and to have free legal assistance where the interests of justice so require and as provided by law;*
  - (e) *to have free assistance of an interpreter if he cannot understand or speak the language used in court.*

Further, Article 12.5 of the Constitution stipulates:

*Every person charged with an offence has the following minimum rights-*

- (a) *to be informed promptly and in a language which he understands and in detail of the nature and grounds of the charge preferred against him;*
- (b) *to have adequate time and facilities for the preparation of his defence;*
- (c) *to defend himself in person or through a lawyer of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice so require;*
- (d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

### **European Court of Human Rights:**

Every person who feels that in his case there has been a violation of Article 6 of the Convention may file an application with the European Court of Human Rights. The task of the Court is not to act as a court of appeal against the judgment of the domestic court. Its role is to

interpret and apply the relevant rules of national procedural and substantive law. Furthermore, it is not its function to deal with errors of fact or law allegedly committed by a national court unless, and in so far as, they may have infringed rights and freedoms protected by the Convention<sup>(1)</sup>. The mere fact that somebody is dissatisfied with the outcome of the proceedings cannot in itself raise an issue under Article 6 of the Convention. The Court time and again recalled that Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their judicial system in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time<sup>(2)</sup>.

### **A duly constituted court**

Due to the separation of powers principle, the Cyprus judiciary is completely independent. The Supreme Court is vested with the jurisdiction to supervise subordinate courts and to ensure that they operate in accordance with the rules of natural justice. The Supreme Court is also responsible for the appointment, promotion and discipline of judges (Article 157.2 of the Constitution). As a result the judiciary is absolutely independent and their impartiality fully guaranteed.

Even the appointment of the Chairman of the Arbitration Tribunal was considered unconstitutional, as the provisions of the relevant law envisaged the involvement of the Executive in its making, violating thereby the doctrine of separation of powers. Equally the nomination of the lay members of the Military Court, by the Chief Commander of the National Guard, was also considered objectionable for the same reasons.

### **An independent and impartial court**

Impartiality is another aspect of the notion of fair trial. The test of impartiality is objective. A judge has the liberty to excuse himself from the composition of the court in which he is a member, whenever he thinks this is to be in the interests of justice. Apart from self exclusion, if objection is raised on grounds of bias, the court will address the issue itself and will resolve the matter at a preliminary stage. If a Judge has a degree of connection with the case, or the parties, or an interest, be it remote, in the outcome of a case, that does not, in his view, disqualify him from participation in the trial of the case, he must disclose it, affording the parties thereby the opportunity to raise objection to his participation. If objection is raised on grounds of bias, the Court will address the issue itself and resolve the matter before proceeding further in the case.

The exclusion of a judge without valid reasons is considered as an abdication of duty with visible dangers to the administration of justice. One such danger is that we would be coming close to acknowledging to a litigant the right to choose the judge who will try him. A judge is not allowed to be merely guided by sentiment.

The norm for determination of bias on the part of the court is the reaction of a reasonable man acquainted with the facts relevant to the "interest of the Judge in the case". If the reaction of such a person would be that no fair trial could be held, then disqualification applies. A Judge dealing with an application for the remand of a suspect in custody cannot be deemed to be biased against the suspect merely on account of the fact that he dealt with a similar application against the same person on a previous occasion. Remand in custody does not involve findings of credibility of witnesses or the suspect.

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<sup>(1)</sup> *Garcia Ruiz v. Spain [GC], no. 30544/96, § 28, ECHR 1999-I.*

<sup>(2)</sup> *Pelissier and Sassi v. France [GC], no. 25444/94, § 74 ECHR 1999-II.*

Neither a decision on a question of law is a bar to a Judge sitting in another case involving determination of the same or a similar question of law. A Judge cannot be charged with having an “interest” in appearing to be infallible. Before and during the trial a Judge must strenuously avoid leaving an impression of partiality. In a case<sup>(\*)</sup> the Supreme Court set aside the decision of the arbitrators, a body exercising inherently judicial duties, because one of them made, after the conclusion of the case and reservation of judgment, a comment to a director of the defendant company, outside the court, to the effect that their case was a waste of time. The Supreme Court observed that such conduct was unbecoming a person exercising judicial duties. Judges must conduct themselves in a manner compatible with the requisites of impartiality and the impersonal character of the judicial process. Departure from these standards tends to undermine faith in the Judges and the institutions of justice, casting doubts on the impartiality of the court.

During the trial a Judge must avoid interfering beyond the limits, although he may intervene in order to ensure that the proceedings follow the proper course. He must, especially, refrain from passing unnecessary comments that may create the impression of descending into the arena of the dispute. He must strictly maintain his arbitral position throughout the proceedings. Otherwise his impartiality may be compromised in the eyes of the litigants, or the general public. Discourtesy to counsels, parties, witnesses or members of the public on the part of the Judge is not permitted. It lowers the dignity of the court and may weaken confidence in the patience of the judiciary to transact judicial business in a calm atmosphere. Patience and firmness are two essential attributes for robust judgmentship.

It is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused<sup>(3)</sup>. Therefore a tribunal should not only be impartial, but its impartiality should not appear even open to doubt.

Impartiality is clearly a mental attitude. It normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Strasburg Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect<sup>(4)</sup>. As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to the court’s impartiality. In this respect even appearances may be of some importance<sup>(5)</sup>. When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified<sup>(6)</sup>.

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(\*) *Bank of Cyprus Ltd v. Dynacon Ltd, a.o. (1999) 1 C.L.R. 717.*

(<sup>3</sup>) *Padovani v. Italy, judgment of 26 February 1993, Series A no 257-B, p. 20 § 27.*

(<sup>4</sup>) See *Piersack v. Belgium, judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30, and Grieves v. the United Kingdom [GC], no. 57067/00, § 69, 16 December 2003.*

(<sup>5</sup>) See *Castillo Algar v. Spain, judgment of 28 October 1998, Reports 1998 – VIII, p. 3116, § 45, and Morel v. France, no. 34130/96, § 42, ECHR 2000-VI.*

(<sup>6</sup>) *Ferrantelli and Santangelo v. Italy, judgment of 7 August 1996, Reports 1996-III, pp. 951-52, § 58, and Wettstein v. Switzerland, no. 33958/96, § 44, ECHR 2000-XII.*

In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary<sup>(7)</sup>. As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal reasons. The Court has recognised the difficulty of establishing a breach of Article 6 of the Convention on account of subjective partiality and for this reason has in the vast majority of cases raising impartiality issues focused on the objective test. However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test). Judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty<sup>(8)</sup>.

The impartiality of the Court may be tainted by factors extraneous to the proceedings. Publications tending to prejudge the outcome of a case or are prejudicial to a party to judicial proceedings and more so tending to stigmatise litigants are more likely to pollute the climate in which justice is administered. Trial by the press should not be allowed. It undermines the foundations of justice. The courts of law should be left the sole arbiters of the criminal responsibility and the civil rights and obligations of litigants. Prejudicial statements defy the rights of the litigants to a fair trial and tend to undermine the Judiciary.

Of course, we must not overlook the fact that the risk of the Judge being biased on account of prejudicial atmosphere created by adverse comments in the press is minimised as courts in Cyprus are composed solely of professional Judges who try their cases without the help of a Jury, a body more likely to be influenced by an adverse publication.

### **Public hearing**

Every case should be heard in public. The administration of justice should be done in the open and should be the subject of public scrutiny. Evidence should be heard in public. The right to confront witnesses is not absolute. Where the interests of justice are not at risk, exceptions are accepted. The exception applies in civil cases only. To the contrary, in a criminal case the judgment of the trial court was quashed because the accused was denied the opportunity to cross-examine a witness for the prosecution.

Judgment shall be pronounced publicly. The press and public, however, may be excluded from all or part of the trial in the interest of public morals, public order and national security. A trial may be held in camera in case of juveniles, for the protection of the private life of the parties and where, in the opinion of the court, publicity would prejudice the interests of justice. The right to a public hearing, is a procedural right and therefore an accused is free to waive it.

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<sup>(7)</sup> *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, § 47.

<sup>(8)</sup> *Buscemi v. Italy*, no. 29569/95, § 67, ECHR 1999-VI.

### **Reasoning of judicial decisions**

All judgments must be reasoned. This is an indispensable element of fair trial. Faith to the judiciary depends, to a large extent, on the persuasiveness of the reasons given by the courts in support of their decisions. The impression of arbitrariness is the only element that must constantly be kept well outside the sphere of judicial deliberations.

A duly reasoned judgment, in civil cases, must contain an analysis of the evidence adduced in the light of the issues arising, concrete findings as the necessary prelude to the judgment of the court and a clear judicial pronouncement indicating the outcome of the case. A judgment confined to recording the outcome of the case without reference to the reasons founding it, should be set aside for lack of due reasoning. The supply of proper reasoning for the deliberations of the court, is mandatorily warranted by the Constitution (Article 30.2), and is considered a fundamental attribute of the judicial process.

The extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case<sup>(8)</sup>. Although Article 6 § 1 of the Convention obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument of the parties involved<sup>(9)</sup>.

### **Trial within a reasonable time**

It has been correctly said that "justice delayed is justice denied". The necessity of holding a trial within reasonable time is safeguarded by our Constitution. It is a necessary element of a fair trial. The right to have a judicial cause determined within a reasonable time is entrenched as a fundamental right with a corresponding duty cast on the Judiciary to ensure observance of that right. The prosecution of the offenders as early as their criminal conduct comes into light is a component of the due and fair administration of justice. When a judgment was delivered with considerable delay, the Supreme Court set it aside.

Reasonableness of the length of the proceedings varies and is not decided in abstracto but by reference to the facts and circumstances of the case, particularly its complexity, factually or legally, the conduct of the parties and the relevant authorities and what was at stake for the person complaining for the delay. Another relevant factor is the volume of evidence. The need to conclude the proceedings within a reasonable time is not a rule of prescription but a fundamental principle of the administration of justice. Even when the total length of proceedings does not appear on the face of it to be extensive but there are periods of inactivity which contribute significantly to the prolongation of the proceedings the Court considered it an unjustified delay. The European Court of Human Rights repeatedly stressed that Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their judicial system in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time. Delays hardly reconcile with the need to render justice with the effectiveness and credibility required by the Convention.

In the case of ***kyriakidis and Kyriakidou v. Cyprus***, Application no. 2669/02, 19

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<sup>(8)</sup> *Higgins and Others v. France*, 19 February 1998, § 42, *Reports of Judgments and Decisions 1998-I*.

<sup>(9)</sup> *Van de Hurk v. the Netherlands*, 19 April 1994, § 61, Series A, no. 288.

**January 2006**, the Court observed that the Government of the Republic of Cyprus have not made reference to specific case-law on the availability of adequate damages for delays already suffered or on the possibility of such an action being preventative of further delay.

In civil proceedings time begins to run from the date the action is initiated. In a criminal case time begins to run from the date of the arrest of the accused or the date of the lodgement of the complaint against him, whichever is the earliest. A case must be investigated without delay. As early as the investigation is completed it is the duty of the prosecuting authority to lay charges before the court. A litigant responsible for delays when discharging his duty to present his case before the court cannot complain about them.

### **Equality of arms**

The requirement of fairness is fundamental. There must be an equal and reasonable opportunity for all parties to present their case. There should be equality of arms. One party should not be placed at a procedural advantage over the other.

The right of equality before the law, and equal treatment thereby, are not subject to limitation. Equality in terms of rights and treatment is what fedges social existence.

When a plaintiff was denied the opportunity to be represented by an attorney at the stage of final addresses, the judgment of the court was set aside.

### **Presumption of innocence**

Article 6 § 2 of the Convention, as well as Article 12.4 of our Constitution stipulate that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The presumption of innocence enshrined in paragraph 2 of Article 6 of the Convention is one of the elements of a fair trial that is required by paragraph 1. The presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law<sup>(10)</sup>. However, the scope of Article 6 § 2 is not limited to criminal proceedings that are pending<sup>(11)</sup>. It may also be applicable where the criminal proceedings have terminated in an acquittal and other courts issue decisions voicing the continued existence of suspicion regarding the accused's innocence or otherwise casting doubt on the correctness of the acquittal<sup>(12)</sup>. It has been stressed by our Supreme Court that evidence obtained as a result of violation of human rights is inadmissible. The confession of an accused in custody was rejected as inadmissible on the account that at the time it was given the authority for his detention had expired. It was also decided that the detention of a person for purposes other than for those for which detention was authorized rendered his statement to the police inadmissible.

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<sup>(10)</sup> *Deweert v. Belgium*, Judgment of 27 February 1980, § 56, Series A no. 35; *Minelli v.*

*Switzerland*, 25 March 1983, §§ 27 and 37, Series A no. 62.

<sup>(11)</sup> *Allenet de Ribemont v. France*, 10 February 1995, §§ 35-36, Series A no. 308.

<sup>(12)</sup> *Zollmann v. the United Kingdom (dec.)*, no. 62902/00, ECHR, 2003-XII.



**Consequences of breach of the principle of fair trial**

Deviation from the principles of fair trial derails the proceedings and leads to the voidance of the trial. Breach of or deviation from the principles of fair trial renders the proceedings abortive. Article 30 of the Constitution defines the prerequisites for a valid determination of the civil rights and obligations of a litigant in civil proceedings and the criminal responsibility of an accused person in a criminal case. Breach of the principles of fair trial leads the proceedings to a nullity. The judgment of the trial court is quashed. Usually a retrial is ordered, unless the inevitable delay which will be caused will render trial within a reasonable time impossible. I am afraid Cyprus has been found responsible for contravening the Convention in a few cases in regard to violation of human rights, especially in cases for delay in the administration of justice.

Human rights have a universal dimension and as such must be received and applied in every society. Our judiciary gives the utmost importance to the issue of human rights and, I am proud to say, is fully and truly committed to their application and protection.