Extension of ECHR jurisprudence on respect for human rights in national criminal proceedings and compliance with its judgments in disputed territories

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Abstract.
This article contends that these proposals should not be interpreted as ministerial alterations in supranational judicial procedure, nor as resolving a dispute on whether the ECHR should prioritize individual or constitutional justice. Instead, they should be seen as posing more profound inquiries regarding the future identity of the Court. The Article specifically supports the ECtHR’s acknowledgment of ‘incorporation’ into national legal systems as a fundamental structural principle. This pertains to the ability to determine decisions made by the national court in criminal proceedings before the ECHR and to honor them in disputed territories. This contradicts the subsidiary theory that has always upheld the Convention since its establishment.

Keywords:
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Discussions

In general, the European Court of Human Rights (ECHR) is an international court dealing with violations of fundamental human rights in Council of Europe member states. It has jurisdiction over a number of European states and can receive individual or state referrals of alleged human rights violations in criminal proceedings, including.

The European Convention on Human Rights has a great influence on national criminal procedure legislation. Important areas of law (e.g. criminal law, criminal procedural law, civil law, contravention law) have changed as a result of the influence of the ECHR and the case-law of the European Court of Human Rights.

The European Court of Human Rights (ECHR) serves as the most advanced global framework for safeguarding and upholding human rights and freedoms. Nevertheless, in recent years, the European Court of Human Rights (ECHR) has encountered challenges due to its remarkable achievements. The Court is currently experiencing a significant crisis due to the increasing number of states under its jurisdiction, its positive public image, its broad interpretations of individual liberties, lack of trust in domestic justice systems in certain countries, and persistent human rights issues in others.

In the last five years, the Council of Europe has examined several suggestions to restructure the European human rights system and modify the European Convention on Human Rights in light of a rise in individual grievances. (EC).

National courts often refer to ECHR case-law, and their methods of review and argumentation in fundamental rights cases increasingly seem to be based on standards developed by the Court [1].

The European Court of Human Rights first considered that, if a question concerning the interpretation of European Union law is raised in proceedings before a national court against which decisions cannot be challenged under national law, that court must refer the matter to the Court of Justice of the EU for a preliminary ruling. However, this obligation is not absolute, since it is for the national courts to decide whether a preliminary ruling is necessary, in accordance with
the case-law established by Cilfit [2].

The judgments and decisions of the Court serve not only to resolve those cases brought before it but, more generally, to clarify, safeguard and develop the rules established by the Convention, thereby contributing to States' compliance with their commitments as contracting parties (Ireland v. United Kingdom, § 154, and, more recently, Jeronovičs v. Latvia [GC], § 109).

Therefore, the mission of the system established by the Convention is to establish, in the general interest, public policy issues, thereby raising standards of human rights protection and extending human rights jurisprudence throughout the community of States Parties to the Convention (Konstantin Markin v. Russia [GC], 30078/06, § 89, ECHR 2012).

Indeed, the Court has underlined the role of the Convention as a "constitutional instrument of European public order" in the field of human rights (Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], § 156, and, more recently, N.D. and N.T. v. Spain [GC], § 110).

Protocol No ... Article 15 of the Convention has recently introduced the principle of subsidiarity in the preamble to the Convention. This principle "imposes a shared responsibility between States Parties and the Court" with regard to the protection of human rights, and national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and its protocols (Grzęda v. Poland [GC], § 324) [3,p.5].

More broadly, subsidiarity serves as a limiting principle, protecting the nation's sovereignty against the expansion of Brussels bureaucracy [4 p. 616-640].

As regards national legislation, the ECtHR first noted that a number of international legal texts, such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights, do not require contracting states to hold foreign voting for expatriates. Similarly, the ECtHR pointed out that, in practice, certain European bodies, such as the Parliamentary Assembly of the Council of Europe and the Venice Commission, merely recommend or suggest to
their Member States to facilitate the exercise of electoral rights by expatriates, without elevating these recommendations to the status of binding obligations [5 p.10].

In addition to its numerous substantive provisions, the European Convention contains, in its Article 13, a requirement that Member States provide 'an effective remedy before a national authority for any person whose rights and freedoms laid down in the Treaty are violated [6].

The European Court of Human Rights has significantly expanded the scope of this "obscure" provision in recent years, encouraging states to expand existing domestic remedies and create new ones adapted to violations of various civil and political freedoms.

The ECtHR took a rather restrictive approach to Article 13 in its first judgments. It refused to interpret the provision providing either for internal incorporation of the Convention or for judicial remedies [7]. However, the Court called for an "effective" mechanism or mechanisms to examine "contestable" allegations that the government violated the Convention or similar provisions of national law. These mechanisms had to be independent of the officials or bodies that committed the alleged infringement, effective in both practice and law, capable of fully investigating the allegations and authorised to adopt legally binding decisions assisting affected persons. While these cumulative requirements suggest a sound perspective on domestic remedies, the early application of these principles by the ECtHR has rarely led to a finding of a violation of Article 13 [8].

In each case, the Court's primary concern is to assess the overall fairness of criminal proceedings. Compliance with the requirements of a fair trial must be examined in each case taking into account the evolution of the proceedings as a whole and not on the basis of an isolated examination of a particular issue or incident. However, it cannot be excluded that a particular factor may be so decisive as to allow the fairness of the process to be assessed at an earlier stage of the procedure (ibid., § 250).

Thus, for example, in the context of assessing the preliminary court proceedings confirming the accusation, the
Court stressed that it must consider the procedure as a whole, assessing how the preliminary judge dealt with the case in light of the subsequent trial, when determining whether the applicant's rights had been prejudiced.

As part of this determination, it is necessary to assess whether the measures taken during the proceedings before the preliminary judge weakened the applicant's position to such an extent that all subsequent stages of the proceedings were unfair (Alexandru–Radu Luca v. Romania,* § 63).

Where a procedural deficiency has been found, national courts must first carry out the assessment as regards remedying the procedural deficiency in subsequent proceedings, the absence of an assessment in this regard being prima facie incompatible with the requirements of a fair trial under Article 6 of the Convention (Mehmet Zeki Çelebi v. Turkey, 2020, 51). Moreover, the cumulative effect of various procedural deficiencies may lead to an infringement of Article 6, even if each deficiency, taken alone, would not have convinced the Court that the procedure was unfair (Mirilashvili v. Russia, 2008, 165) [9 p.7].

When it comes to contested territories, the situation can be legally complex. The ECHR focuses on respect for human rights in Member States and territories under their jurisdiction. If a territory is recognised as part of a member state of the Council of Europe, then the ECHR would have jurisdiction over that territory.

In contested territories, where sovereignty is disputed between two or more entities, things can get more complicated. The ECHR has no jurisdiction over a territory outside the context of the member state of the Council of Europe. However, the ECtHR could have jurisdiction over the Member State exercising effective control over that territory.

It is important to stress that compliance with ECHR judgments depends, to a large extent, on the cooperation of the states involved. If a state does not cooperate with or recognise the authority of the ECHR in a particular case, implementation of the judgment can be difficult.

The consideration of the ECHR incontested territories depends on the recognition of the jurisdiction of the ECHR by the states concerned and their cooperation in implementing
Two of the major problems related to the existence of international fundamental rights treaties are the application of these treaties to national criminal procedure law and the position these documents have in the system of sources of law in the Member States (especially with regard to the ECHR, this can be seen in some of the member countries as a constitutional source, in others as sub-constitutional, in others as ordinary, and so on) [10 p.27].

The influence of the Convention on national law appears to be at least partly due to the authoritative role played by the Court and to the mechanisms and techniques of interpretation developed in its case-law. The jurisdiction of the Court extends to all questions relating to the interpretation and application of the Convention.

The concept of criminal prosecution within the meaning of Article 6 § 1 of the Convention – as well as that of a civil dispute – has an autonomous and substantial meaning, rather than a formal one.

One of the points raised by the applicants before the Court is the failure of the State authority to correctly constrain the starting point of criminal proceedings.

For the defendant, the starting point of the criminal process is the beginning of the criminal investigation. This moment can begin when:
- Declaration of charges Neumeister v. Austria (no. 1936/63), §18
- initiation of criminal proceedings or when a person has become aware of criminal proceedings against him/her Eckle v. Germany (n. 8130/78), §73
- Wemhoff v. Germany arrest (no.2122/64), §19
- the beginning of the preliminary investigation Ringeisen v. Austria (no. 2614/65), § 110
- issuing an arrest warrant Manzoni v Italy (No 11804/85), § 16 Ferraro v Italy (No 13440/87), § 15 Triggiani v Italy (No 13509/88), § 15
- issue of a search warrant Eckle v. Federal Republic of Germany (b. 8130/78), § 75 Coeme and Others v. Belgium (no., 32492/96 et al.), § 133 Strategy and communications and Dumoulin v. Belgium (no. 37370/97), § 42
- date of receipt of judicial notification Pugliese v. Italy (No. 11840/85), § 14
- date of receipt of the notice of criminal procedure Adiletta and Others v. Italy (Nos. 13978/88 et al.), § 15
- the most recent date on which the applicant appointed defence counsel Mori v. Italy (No. 13552/88), § 14 Hozee v. Netherlands (No. 21961/93), § 45.

If a criminal case was originally initiated due to a crime committed by an unidentified individual, the reasonable time of criminal proceedings is calculated for the accused as soon as the criminal procedural status of suspect or accused is established [p. 21-23].

Article 6, read in its entirety, guarantees the right of the accused to participate effectively in criminal proceedings (Murtazaliyeva v. Russia [GC], 2018, § 91). In general, this includes, inter alia, not only his right to be present, but also his right to hear and follow the trial. These rights are implicit in the notion of adversarial procedure and may also be derived from the safeguards contained in Article 6(3)(c), (d) and (e) (Stanford v. United Kingdom, 1994, § 26). Consequently, poor acoustics in the courtroom and difficulties in hearing could give rise to a problem under Article 6 (§ 29).

The Court has also considered that the effective participation of an accused person in his criminal proceedings must also include the right to compile notes to facilitate the conduct of the defence (Pullicino v. Malta (dec.), 2000; Moiseyev v. Russia, 2008, § 214).

This applies regardless of whether or not the accused is represented by a lawyer. Indeed, the defence of the interests of the accused can best be served by the contribution that the accused makes to the conduct of the case by his lawyer before he is called to testify. The dialogue between the lawyer and his/her client should not be disrupted by the dismantling by the latter of material setting out his/her own views on the strengths and weaknesses of the evidence adduced by the prosecution.

However, the Court pointed out that the considerations may differ as to the actual use of notes by a defendant during his main examination or cross-examination. The credibility of
an accused can best be tested by how he reacts in the witness box to questioning. Therefore, a domestic court may be justified by preventing an accused person from relying on written memories of events or reading notes in a way that suggests that the evidence presented has been repeated (Pullicino v. Malta (dec.), 2000).

Similarly, the Court has held that Article 6 of the Convention does not provide for an unlimited right to use any defence arguments, in particular those constituting defamation (Miljević v. Croatia, 2020, §§ 55 and 64-66, relating to the defendant's freedom of expression under Article 10 of the Convention) [12 p.33].

The adaptation of domestic remedies to the 'nature of the complainant's complaint' is one of the more significant developments in Article 13 case-law [13].

In order to determine whether States have fulfilled their obligations under Article 13, the ECtHR has carefully analysed domestic avenues, often in detail [14]. Such scrutiny triggered a sharp response from some states, who argued that this approach risked overburdening their judicial and administrative systems. The Court's response was adamant: "Article 13 imposes an obligation on Contracting States to organise their judicial systems in such a way that their courts may meet its requirements" [15].

The European Court of Human Rights has even requested remedies for excessively long judicial proceedings, which, as mentioned above, represent a large percentage of applications made in Strasbourg. In this regard, the Court strengthened the treaty's right to speedy justice by obliging States "to prevent [] the alleged violation or continuation thereof, or ... provide for adequate repair of any infringements which have already occurred" [16].

In the absence of such domestic remedies, "individuals will systematically be obliged to refer complaints to the Court of Justice in Strasbourg which, otherwise, and in the Court's view, would be more appropriate, should be dealt with primarily within the national legal system" [17]. In short, the ECHR has used Article 13 both to ameliorate its own crisis and, more fundamentally, to reshape national legal systems to increase the likelihood that state officials will remedy human
rights violations in the country.

In situations where there are contested territories and there is a desire to ensure compliance with the European Court of Human Rights (ECHR), some important issues include:

1. Recognition of ECHR jurisdiction: States involved in the dispute should recognise the jurisdiction of the ECHR over that territory. This implies acceptance that ECHR judgments also apply in that territory, in accordance with international conventions and treaties to which those states are parties.

2. Cooperation of States: The States concerned must cooperate with the ECHR in proceedings relating to disputed territories. This includes providing relevant information, participating in legal proceedings and implementing judgments issued by the ECHR.

3. The role of international organisations: International organisations, such as the Council of Europe, can play an important role in facilitating dialogue and cooperation between the states involved. They can contribute to promoting human rights principles and ensuring compliance with ECHR decisions.

4. Involvement of the international community: The international community can also play a role in encouraging respect for human rights and ECHR decisions. Diplomatic pressure and international monitoring can help ensure compliance with international standards.

5. Dispute Resolution: Ideally, resolving the dispute over the disputed territory by diplomatic or legal means can help create a stable framework for respect for human rights.

Regarding the review of national court decisions before the European Court of Human Rights (ECHR) in criminal proceedings, we mention that this is an option when it is considered that a person's fundamental rights have been violated. The process of challenging and complying with decisions in contested territories involves the following general steps:

1. Evasion of Appeals at National Level:
   - Before applying to the ECHR, the claimant must exhaust all remedies at national level within the judicial system of that country. This may include appeals and complaints to
higher courts.

2. Submission of the Application to the ECHR:
   - Once national remedies have been exhausted, the applicant may submit an application to the ECHR in accordance with specific procedures laid down by the Court.

3. Examination of admissibility by the ECHR:
   - The ECHR will examine whether the application is admissible. This includes checking whether national remedies have been exhausted and compliance with other admissibility criteria.

4. Conduct of the settlement procedure:
   - If the application is deemed admissible, the ECtHR will begin the settlement process, which may involve the exchange of documents, hearings, and analysis of the arguments of the parties involved.

5. Issuance of the ECHR Judgment:
   - After assessing the case, the ECHR will issue a ruling. It may find that fundamental rights have been violated or not violated and order measures or compensation.

6. Implementation of the decision:
   - The implementation of the ECHR judgment is the responsibility of the Member State. National authorities must act accordingly to comply with the ECHR ruling.

7. Monitoring implementation:
   - The ECtHR can monitor the implementation of the judgment and take further measures if it is not carried out.

8. Issues specific to the contested territories:
   - In the case of contested territories, compliance with ECHR decisions may imply cooperation between the States concerned and recognition of ECHR authority in the region concerned.

   It is important to stress that this process can take a significant amount of time and the implementation of ECHR judgments may encounter political and practical difficulties, especially in the context of contested territories. Cooperation and respect for the principles of the ECHR are essential to preserve the integrity of the European human rights protection system.

References:


[14] Chonka v. Belgium, supra note 114, at para. 83 (reviewing the procedures and practices by which the Belgian Conseil State may stay execution of a collective expulsion order and concluding that the remedy was 'too uncertain to enable the requirements of Article 13 to be satisfied'); App. No. 75529/01, Sexy v. Germany (Grand Chamber, 2006), at paras 80-115 (examining in detail four distinct remedies that the government alleged were available to challenge excessively lengthy proceedings - a constitutional complaint, an appeal to a higher authority, a special complaint alleging inaction, and an action for damages - and concluding that all four were ineffective and thus insufficient to satisfy Art. 13).

[15] Ibid., at para. 84; see also App. No. 18015/03, Schütte v. Austria (2007), at para. 36 (rejecting the government's argument that states parties 'should not be required under Article 13 to provide a remedy against delays caused by one of its highest courts'); Sexy v. Germany, supra note 118, at para. 104 (stating that the ECtHR had recently 'undertaken a closer examination of the effectiveness, within the meaning of Article 13 of the Convention, of remedies in a number of Contracting States in respect of the length of proceedings').

[16] App. No. 30210/96, Shaggy v. Poland (2000), at para. 158. In more recent judgments, the ECtHR has stated that 'the best solution' is 'a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy' in the first instance: see, e.g., Sexy v. Germany, supra note 118, at para. 100.