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"Revisiting subsidiarity in an era of shared responsibility"

Constitutional review and exhaustion of domestic remedies

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(1) Overview and objective

The requirement to exhaust domestic remedies is of direct concern to you, as judges of the highest courts. Yours is a key role in the operation of the European human rights mechanism.

First and foremost, the national authorities must be given the possibility of remedying an alleged violation of human rights precisely before the matter is brought before the European Court of Human Rights. Secondly, the Court must be able to refer back to the national courts in its judgments, as its interpretation of the Convention will rely on the opinions of the highest national courts, taking into account the specific circumstances in a given member State.

In other words, the Convention system will not work if the national constitutional courts do not take the lead in making it work. That is a fundamental principle.

It will thus be necessary, for the purposes of this paper, to identify specifically the procedural tasks vested in the highest courts. It is their role to provide a remedy for violations of the Convention in the very place where those violations have occurred, in the domestic context.

(2) Exhaustion of domestic remedies

With the passage of time, member States have increasingly incorporated the Convention into their respective constitutional orders through legislation and case-law. The Court has, by way of response, been applying the requirement to exhaust domestic remedies much more strictly. While it has become, one might say, easier for would-be applicants to complain of a violation of the Convention at the national level, Strasbourg also imposes a heightened obligation on them to do so.

But first of all, what does it mean to exhaust domestic remedies? It may at first sight seem straightforward to ascertain whether the available national remedies have been used.

However, one cannot overlook the Court's detailed case-law in this area. Under Article 35 § 1 of the Convention, the Court will examine, mainly on the basis of the following three criteria, a member State's objection that domestic remedies have not been exhausted:

1. The applicant must have used at least one of the available remedies, in accordance with the requirements of domestic law.

2. However, (only) remedies that are effective have to be used; and other significant reasons for not exhausting remedies may exceptionally be relied upon.

3. A complaint alleging a violation of the Convention must have been raised in that context, at least in substance.

It therefore has to be ascertained whether the applicant has given the highest court *every opportunity to examine* whether the facts at issue are compatible with the Convention. That is precisely the purpose of these three criteria. The domestic court must have been in a position, as a result of the proceedings before it, to prevent or provide redress for the violation alleged[1]. However, if a constitutional court has had the possibility of ruling on a violation of the Convention but has not done so, this will not be held against the applicant. From the Convention perspective, remedies will be considered exhausted.

If, in such a situation, the European Court of Human Rights has to examine an application on the merits without the matter having been considered by the national bodies, this runs counter to the idea that it is primarily for the national courts to determine whether the facts are compatible with the Convention. The machinery established by the Convention is subsidiary to national systems for the protection of human rights. The Court must be able to act on the basis of a primary assessment by a higher domestic court.

From the Convention perspective the relevant domestic remedies therefore have to be accessible[2] and effective[3] for the purpose of putting right an alleged violation of the Convention. As long as domestic remedies are effective they will be covered by the requirement to exhaust domestic remedies and prior access to the national Constitutional Court will be guaranteed.

But how do the member States ensure that their highest court will give prior consideration to an alleged violation of the Convention?

This requires, as has been said, accessible and effective remedies for litigants – and a corresponding practice of the highest courts. Some examples will now be considered.

(3) Incorporating the Convention into constitutional orders

3.1 Orders with constitutional courts

In Spain it is the task of the Constitutional Court, on the basis of Article 10, paragraph 2, of the Constitution, to examine rights and freedoms "in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on the same matters ratified by Spain", and therefore also in accordance with the Convention (*recurso de amparo*)[4]. Unlike the Spanish Constitution, the German Basic Law does not incorporate the Convention, which is given the rank of a statute. However, in its practice the German Constitutional Court uses the European Convention as an aid to interpretation. Fundamental rights are interpreted in the light of the Convention. The Convention is thus integrated into the examination of constitutional complaints

[1] See the finding in *Gäfgen v. Germany* [GC], no. 22978/05, § 142, 1 June 2010, and later in *Parrillo v. Italy* [GC], no. 46470/11, § 87, 27 August 2015. This becomes even clearer in the English version: "Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States, of preventing or putting right the violations alleged against them" (*Parrillo*, § 87).
[2] See the early finding in *Sejdovic v. Italy* [GC], no. 56581/00, § 46, 1 March 2006, and *Paksas v. Lithuania* [GC], no. 34932/04, § 75, 6 January 2011; for the European Court of Human Rights more generally, see Practical Guide on Admissibility Criteria 2023, § 118.
[3] See *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 73, 25 March 2014, referring to *Akdivar and Others v. Turkey*, no. 21893/93, § 67; see also *Vučković*, cited above, § 69, referring to Article 13 of the Convention.
[4] See, for example, *Cuenca Zarzoso v. Spain*, no. 23383/12, §§ 24 and 25, 16 January 2018.

(*Verfassungsbeschwerde*)[5] and must be relied on in that context for the purposes of exhausting remedies, as is the case for the *amparo* procedure in Spain.

In principle, access to a Constitutional Court is not an effective remedy if it is reserved for the authorities. This has led various member States to bring their systems into line. In the case of France, with the introduction of the *preliminary reference on constitutionality* (*question prioritaire de constitutionnalité or "QPC"*, in 2010), referral to the *Conseil constitutionnel* (Constitutional Court) is no longer reserved for the political[6] institutions. On the contrary it is now open to individuals, through this procedure, to challenge the constitutionality of applicable legislation in the course of a dispute. The court which examines the request then has to ascertain whether the impugned legislation is applicable to the dispute, whether the provision has already been declared constitutional by the Constitutional Council and whether the matter is "of a serious nature"[7].

This procedure affords a legal remedy that is now sufficiently available to everyone concerned. In addition, courts are obliged to refer the preliminary question if the conditions are met. It should be noted, in addition, that the preliminary question goes to whether the legislation itself is compatible with the Constitution. A provision declared unconstitutional will be repealed[8]. A declaration of unconstitutionality will be made to the advantage of the individual initiating the preliminary reference procedure[9].

From the perspective of the Convention, therefore, an applicant is only obliged to raise a preliminary question in cases where the national legislation itself is criticised for being incompatible with the Convention. However, if the matter concerns only an interpretation that is at odds with the Convention, not the legislation itself, it should not have to be raised in the context of the remedies to be exhausted for the purposes of the Convention.

The mere existence of a constitutional court does not therefore suffice for the exhaustion of domestic remedies to include such an avenue. Procedural subsidiarity should be applied flexibly.

3.2 Direct reliance on Convention in ordinary appeals

In many member States there is no separate constitutional court. The possibility of relying on a violation of the Convention is afforded through ordinary remedies: individuals may in principle rely on the Convention in the various domestic courts at all levels.

Reliance on the Convention is quite natural in systems where it takes precedence over national law, including the Constitution, as in the Netherlands[10]. In other countries, legislation provides for the primacy of the Convention. This is the case, for example, in Norway, where the Convention is incorporated into domestic law by the Law on the Strengthening of the Position of Human Rights in Norwegian Law. Under section 3 of that Law, the provisions of incorporated human rights conventions prevail in the event of conflict with provisions of national legislation[11].

If, on the other hand, there is no corresponding provision in the Constitution or in legislation – as is the case in a large number of member States – it will again be the practice of the highest courts which makes it possible to ensure that the Convention come before them first.

[5] See BVerfGE 111, 307, and *Görgülü*, §§ 317 et seq.

[6] Article 61-1 of the French Constitution; Institutional Law no. 2009-1523 of 10 December 2009 on the application of Article 61-1 of the Constitution.

[7] Art. 23-2 thus inserted in the Institutional Act on the Constitutional Council.

[8] Article 62 of the French Constitution.

[9] Decision no. 2024-1096, QPC of 12 June 2024.

[10] Article 93 et seq. of the Netherlands Constitution. In accordance with Article 94 thereof, national law may not be applied if it is not compatible with the provisions of an international treaty. See e.g. Hoge Raad, *Urgenda*, 20 December 2019, § 5.6.1: the Dutch courts must interpret the provisions of the Convention as the European Court did, relying on the latter's methodology of interpretation.

[11] Act on the Strengthening of the Position of Human Rights in Norwegian Law (Human Rights Act) of 21 May 1999 [as amended on 1 August 2021]; LOV-1999-05-21-30.

In Switzerland, which has no separate constitutional order, federal laws and international law are binding on the Federal Supreme Court (Article 190 of the Constitution). Verifying the conformity of federal laws with the Constitution does not therefore fall within its remit. The Federal Supreme Court does, however, ensure an initial access for questions of compatibility with the Convention. According to the so-called *PKK* (*Workers' Party of Kurdistan*) line of case-law, the Federal Supreme Court reviews the compatibility of federal laws with the Convention. This means that a case will not be declared well-founded by Strasbourg without a prior national assessment[12].

The European Court considers that the Convention may also be entrenched in a member State even though (whilst binding as a matter of international law) it is not explicitly stipulated as binding in the national legal order. In the United Kingdom, the Convention is given effect by the Human Rights Act (HRA). Any court, when deciding on a matter related to the Convention rights incorporated into domestic law by the HRA, is obliged to take into account (but is not formally bound by) the case-law of the Court. In practice, however, this means that the national courts follow the Court's interpretation, unless there is a particular reason not to do so.

While there is therefore no formal link between the Strasbourg Court and its counterparts in the UK's domestic constitutional order, neither through domestic law nor in Supreme Court practice, there is nevertheless a "collaborative engagement"[13], a working relationship, between them.

The bottom line is that the European Court will take account not only of formal binding effects, but also of collaborative engagements; these are intended to be effective (Article 35 § 1 ECHR).

(4) Best practice of constitutional courts

In the context of this increased entrenchment of the Convention in the constitutional orders of the member States, the Court has considerably increased the requirements for the exhaustion of domestic remedies under Article 35 § 1 ECHR. But what specific tasks arise from this for the constitutional courts? This question will be examined using some current examples.

4.1 Use of a remedy in accordance with the formalities of national law

States are free to impose formal requirements on appeals in accordance with their historically developed legal systems[14]. In principle, therefore, domestic remedies are considered not to be exhausted where the court of last instance has declined to hear the appeal on formal grounds.

The formal requirements must not, however, render the right of appeal devoid of substance, failing which remedies will nevertheless be exhausted. In my own member State, there are, in particular, heightened requirements for claiming violations of fundamental rights (as compared to ordinary statute law)[15], that is to say that the existence of a violation must be demonstrated. The Government have already acknowledged before the Court in some cases that the conditions had been applied too strictly. Domestic remedies are therefore exhausted, in particular where the highest court has not ruled on the merits but has applied the formal requirements for the examination of the appeal too restrictively from the Strasbourg perspective. This means that national procedural requirements must not be applied too rigidly in order to safeguard subsidiarity.

4.2 Alleged violation of Convention to be raised "in substance" before domestic courts

Article 35 § 1 ECHR requires that complaints intended to be submitted to Strasbourg at a later stage must have been raised with the appropriate national body, at least in substance. In more recent

[12] Federal Supreme Court judgment (ATF) 125 II 417. In the recent case-law of Public-Law Divisions I and II of the Swiss Federal Supreme Court, which most often deal with constitutional issues, the essential provisions of the Convention have priority over statutes (ATF 125 II 417) and priority of application over the Constitution (ATF 139 I 16 point. 5.3).

[13] See Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights*, Palgrave 2018, p. 188.

[14] See for example *Vučković and Others v. Serbia* (preliminary objection; note 3), § 72.

[15] Section 106(2) of the Federal Supreme Court Act.

judgments, the Court has required valid reasons for a failure to expressly cite Convention arguments in the domestic proceedings, as the Court held in the *Vučković* case (*Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, 25 March 2014[16]).

As has been seen, applicants may also have raised their complaint of a Convention violation "in substance". For example, it may be a matter of relying on equivalent provisions in national law or "domestic law arguments to the same or like effect" as one or more Convention provisions[17]. While the expression "in substance" had previously been used generally, it has become stricter: for example, on a factual level, it is not enough to complain about acts of torture committed only *in police custody* when complaints are made before the Court about acts of torture committed both in police custody *and in prison*[18].

From a legal standpoint, the Court has no power to substitute itself for the applicant and formulate new complaints simply on the basis of the arguments and facts advanced (see *Grosam v. the Czech Republic* [GC], no. 19750/13, § 91, 1 June 2023). Consequently, if an applicant argues, in the domestic context, that disciplinary measures examined by an assize court require a second level of jurisdiction in criminal matters, the question whether the assize court is an independent tribunal (Article 6 § 1 ECHR) cannot be central to the subsequent proceedings before the Court. In the *Unseen* case (*Unseen ehf. v. Iceland* (dec.), no. 55630/15, 20 March 2018), the applicant's company had been obliged to provide data without the applicant's having been heard beforehand. While the applicant had complained of a *lack of legal basis* in the domestic proceedings, he argued before the Court that *Article 6* ECHR had been violated. The application was declared inadmissible because the legal arguments had strayed too far from those which had initially been advanced. As the Court stated in *Fu Quan* (*Fu Quan s.r.o. v. the Czech Republic* [GC], no. 24827/14, 1 June 2023), the applicant is always required to raise before the domestic courts a complaint which he or she may intend to submit to the Court at a later stage[19]. Such judgments and decisions have accorded national proceedings considerably more importance and responsibility than they had previously been given under the Convention system.

4.3 Only remedies that are effective have to be used

As has been seen, only remedies that are effective need to have been used in the domestic proceedings. Recent practice has significantly reinforced the requirements for the applicant to demonstrate that using a remedy would be "obviously futile"[20].

In Türkiye there had long been no possibility for individuals to apply to the Constitutional Court. When an applicant lodged an application with the Court after the creation of a new constitutional complaint and argued that such a remedy was not effective, the Court declared the application inadmissible: the Constitutional Court, by virtue of the binding nature of its decisions (Article 153 § 6 of the Turkish Constitution), now has the power to make good a violation[21].

Conversely, from the Convention perspective, can a system which does not allow individuals direct access to the Constitutional Court constitute an effective remedy within the meaning of Article 35 § 1? In Italy, the constitutional order does not provide for a right of individuals to apply directly to the *Corte Costituzionale*[22]. Constitutional issues can only be submitted by the courts hearing the merits of a case and then only if the legislation itself is not compatible with the Constitution[23]. In the leading case of

[16] Also cited above (note 3), see in particular para. 83 et seq.

[17] See *Paulet v. the United Kingdom*, no. 6219/08, § 49, 13 May 2014. See also *N.M.T., J.B.B. and L.B.A v. Spain*, no. 17437/90, 8 December 1993 (Commission).

[18] *Aslan v. Turkey*, no. 38940/02, § 2, 1 June 2006.

[19] See *Fu Quan, S.R.O. v. the Czech Republic* [GC], no. 24827/14, § 172, 1 June 2023.

[20] *Vučković and Others v. Serbia* (preliminary objection; note 3), § 74.

[21] See *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 132, 20 March 2018; *Koçintar v. Turkey* (dec.), no. 77429/12, §§ 41-44, 1 July 2014.

[22] See sections 23 and 24 of the Law of 11 March 1953, no. 87, entitled "Norme sulla costituzione e sul funzionamento della Corte costituzionale".

[23] The judges of the ordinary courts must interpret domestic law in a manner which respects human rights. Where such an interpretation is impossible they are bound to raise a question of constitutionality before the Constitutional Court; see *Parrillo* (note **Error! Bookmark not**

Parrillo (*Parrillo v. Italy* [GC], no. 46470/11, ECHR 2015), which concerned hitherto unexamined issues relating to human reproduction, the majority concluded that, from the Convention perspective, indirect referral of a question to the Constitutional Court could not be included among the domestic remedies to be exhausted, as "[o]nly a court ... ha[d] the *possibility* of making a reference to the Constitutional Court" (emphasis added)[24].

A minority of judges – including the "national judge" – considered, however, that this was one of the remedies that should in principle have been exhausted, as according to the Constitutional Court's case-law a potential applicant had the right to have the matter adjudicated by that court. However, as the *Corte Costituzionale* had also decided that a court was required to refer a preliminary question only if there was well-established Strasbourg case-law, the minority were able to follow the majority's solution; as the case undeniably concerned a novel question, the applicant could not have been required to seek a ruling from the Constitutional Court[25].

4.4 Exception: major reasons for not exhausting remedies

Lastly, the requirement to exhaust remedies may exceptionally be waived on account of extraordinary (factual) circumstances[26], in line with the principle of effectiveness. However, such exceptions are rarely allowed in practice. In the case of *CGAS* (*Communauté genevoise d'action syndicale [SGAS] v. Switzerland* [GC], no. 21881/20, 27 November 2023), the applicants, who had intended to organise a demonstration, applied directly to the Court, without bringing proceedings before a national authority, after the adoption of the second COVID-19 regulation. Referring to another demonstration-related case, they argued that the Federal Supreme Court would have refused to give a ruling on their complaint on the ground that there was no "current interest"[27]. In the majority's view, the applicants should have done more to exhaust domestic remedies. The Court reiterated that the existence of mere doubts as to the prospects of success of a particular remedy which was not obviously futile was not a valid reason for failing to use this avenue of redress[28]. The minority of judges, referring to the actual circumstances of the pandemic, argued that requesting and obtaining an exemption from the prohibition of public gatherings seemed purely theoretical[29]. The Court was not divided as to whether domestic remedies should in principle be used before an application was lodged with it – or as to whether the review of legislation could be carried out on an interlocutory basis. However, it was divided as to whether, at the relevant time, there had been an effective remedy for a violation of the Convention in the member State concerned. It made an assessment of the Federal Supreme Court's case law at that particular stage of the pandemic, this being decisive for the issue of exhaustion of domestic remedies[30].

(5) Conclusion

The foregoing observations reflect an essential rule stemming from the principle of subsidiarity. This principle is expressed as follows by the Court: subsidiarity imposes "[a] shared responsibility between the States Parties and the Court" and "national authorities and courts must interpret and apply domestic law in a manner which gives full effect to the Convention" (*Grzęda v. Poland* [GC], no.

defined.), § 89; see also the partly concurring opinion of Judges Casadevall, Raimondi, Berro, Nicolau and Dedov in *Parrillo* (note **Error! Bookmark not defined.**), § 4.

[24] *Parrillo* (see also note **Error! Bookmark not defined.**), § 101.

[25] See partly concurring opinion of Judges Casadevall, Raimondi, Berro, Nicolaou and Dedov, *Parrillo* (note **Error! Bookmark not defined.**), §§ 5 et seq.

[26] See, for example, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 116-122, 13 November 2007.

[27] Communauté Genevoise d'action syndicale (CGAS) v. Switzerland, no. 21881/20, § 153, 27 November 2023.

[28] Communauté Genevoise d'action syndicale (CGAS) v. Switzerland (see note **Error! Bookmark not defined.**), § 164.

[29] *Communauté Genevoise d'action syndicale (CGAS) v. Switzerland* (note **Error! Bookmark not defined.**), joint dissenting opinion of Judges Bošnjak, Wojtyczek, Mourou-Vikström, Ktistakis and Zünd, §§ 9 et seq.

[30] See *Communauté Genevoise d'action syndicale (CGAS*) *v. Switzerland*, joint dissenting opinion of Judges Bošnjak, Wojtyczek, Mourou-Vikström, Ktistakis and Zünd (note 28), §§ 7, 9 et seq.

43572/18, § 324, 15 March 2022). Most Convention issues are addressed at the national level, whether through legislation, practice or judicial decisions.

This not only gives applicants the possibility of raising violations in the first place in the national system, but also implies specific tasks and *increased responsibility* for the constitutional courts of the member States. These tasks include the effective monitoring of compliance with the provisions of both the Convention and domestic law, the integration of Strasbourg jurisprudence into the interpretation of domestic procedural law, and the adoption of strategies for resolving a conflict between domestic law and an interpretation of the Convention.

In this sense both legal orders (international and domestic) pursue the same goal (implementation of human rights) and mutually complement each other[31]. Consequently, the review of procedural subsidiarity from the perspective of the Convention and the exhaustion of domestic remedies is also a golden rule[32], one which must be applied with some flexibility to accommodate the nuances of the various constitutional orders of the member States[33].

Questions of judicial practice – indeed best practice – in the Convention system are thus very often at the heart of an examination as to whether domestic remedies have been exhausted. I have endeavoured to bring some examples and suggestions to your attention on this subject. Thank you.

[31] See European Commission for Democracy through Law (Venice Commission), Report on the implementation of international human rights treaties in domestic law and the role of the Courts, 11 October 2014, § 114. See also Venice Commission, Revised report on individual access to constitutional justice, adopted by the Venice Commission at its 125th Plenary Session (online, 11-12 December 2020), §§ 192 et seq., 196 et seq.

[32] See European Court of Human Rights, Practical Guide on Admissibility Criteria, 2023, § 108: "The exhaustion rule may be described as one that is golden rather than cast in stone".

[33] See *Ringeisen v. Austria*, no. 2614/65, § 89, 16 July 1971; *Lehtinen v. Finland* (dec.), no. 39076/97, § 1, 14 October 1999; and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 87, 9 July 2015.