Accountability of the Judiciary on the National Level for Violations of the European Convention on Human Rights

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I. INTRODUCTION

The European Convention on Human Rights (ECHR) imposes human rights obligations on Member States. The European Court of Human Rights (ECtHR or Court) in Strasbourg can hold these states accountable for violations of these obligations. In this respect it is irrelevant which public body, ie the legislator, the administration or the judiciary, has been the (primary) cause of this violation. This means that—on the international level—the ECtHR can hold Member States accountable for violations of the ECHR caused by the judiciary and can oblige them under Article 41 ECHR to pay complainants financial compensation. This is all very clear and deserves no further attention in this contribution.

Less clear, however, is the accountability of the judiciary on the national level for violations of the ECHR. Article 13 ECHR obliges Member States to provide effective remedies on the national level with regard to arguable claims that a violation of the ECHR has occurred. In other words, Article 13 obliges states to create means and ways by which public bodies that are responsible for human rights violations, or the state itself, can be held accountable on the national level. For certain claims this obligation is reinforced by Article 6 ECHR, which guarantees the right of access to a court in the determination of 'civil rights and obligations'. By fulfilling the national remedy obligation, human rights violations can be remedied on the national level and complaints to the Strasbourg Court can be prevented. This last feature of the national remedy obligation is nowadays especially

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important since the ECtHR's caseload already seems too large to deal with cases in a proper and timely way. An interesting question is whether the national remedy requirement of Articles 6 and 13 ECHR also applies to human rights violations that can be attributed to the judiciary. This theme deserves further attention and will be the subject of this contribution.

The central question of this contribution is whether the ECHR obliges Member States to provide a remedy on the national level to hold the judiciary accountable for violations of the ECHR. If we—for the sake of brevity—speak of 'accountability of the judiciary' we of course mean accountability of the state for faults of the judiciary, as the latter is part of the state and is not regarded a separate legal entity. In order to answer this central question we will first try to find and examine ECHR obligations which are primarily aimed at the judiciary (part II). Subsequently we focus on the question whether the ECHR obliges states to provide effective national remedies against human rights violations by the judiciary (part III). In part IV we deal with the question whether there is a case for extension of the remedy requirement in this respect. It will also deal with recent case law of the Court of Justice of the European Communities (ECJ) that might serve as an example for future developments under the ECHR. In the final paragraph (part V) we will draw some conclusions.

It is clear that we will focus on *legal* accountability of the judiciary. In other words, we understand the 'catch-all term' 'accountability' as 'liability' in a legal sense. This, however, does not mean that we are of the opinion that other forms of accountability of the judiciary are less important. In our view legal procedures triggered by acts of the judiciary should be seen as an *ultimum remedium*. Liability of the judiciary should be prevented. Other forms of accountability can play an important role here: transparency, internal control mechanisms, audits etc.[1]

II. OBLIGATIONS OF THE JUDICIARY UNDER THE ECHR

The main obligations for the judiciary under the ECHR can be found in the so-called procedural rights, especially in Articles 5 and 6. Article 5(3) gives everyone who is arrested or detained the right to be brought promptly before a judge and the right to be tried within a reasonable time or to be released pending trial. Article 5(4) gives everyone who is deprived of his liberty by arrest or detention the right to a regular judicial review of the lawfulness of his detention within a reasonable time. Article 6 gives everyone, in the determination of his civil rights and obligations or of any crim-

[1] For the various meanings of the word 'accountability' see for instance C Harlow *Accountability in the European Union* (OUP Oxford 2002) 6–24.

inal charge against him, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, while judgments should be pronounced publicly. Article 6(2) and (3) contain additional rights which apply in particular to everyone who is charged with a criminal offence: presumption of innocence; the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; the right to adequate time and facilities for the preparation of his defence; the right to defend himself in person or through legal assistance or free legal aid if he has insufficient means to pay for legal assistance; the right to examine or have examined witnesses against him; and the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court. The Strasbourg case law contains many examples of violations of these rights primarily caused by the judiciary.[2]

This does not mean that the judiciary cannot cause violations of other, more substantial, ECHR rights. A violation can also follow from the (material) content of a judicial decision. For example, it is possible that a judge uses his discretionary power to issue a search warrant in contravention of Article 8 (right to privacy).[3] A judge could also cause a violation of Article 10, for instance by restricting the freedom of speech of a person.[4] This means that the judiciary can cause violations of ECHR rights by not respecting obligations flowing from the ECHR or from national law incorporating ECHR rights, which are (also) directed at the judiciary. As said, it is clear that the ECtHR can hold Member States accountable for violations of the ECHR (primarily) caused by the judiciary. If necessary, on the basis of Article 41 ECHR the Court can also award damages to the victim of such a violation.[5]

[2] For examples see DJ Harris, M O'Boyle, and C Warbrick *Law of the European Convention on Human Rights* (1995) (Butterworth London/Dublin/Edinburgh) 97–273.

[3] See eg ECrtHR 15 July 2003, *Ernst ao v Belgium*.

[4] See eg ECrtHR 8 July 1986, *Lingens v Austria* (libel suit with regard to a journalist who presumably insulted the then Austrian Prime Minister).

[5] See ECrtHR 21 Mar 2000, *Dulaurans v France* (violation of the fair trial requirement of Art 6 (1) because the French Court of Cassation declared the applicant's appeal inadmissible on manifestly wrongful grounds; the ECrtHR awards a compensation of 100.000 French Francs). Compare ECrtHR 28 July 1999, *Ferrari v Italy* (civil procedure takes more than 8 years which is a violation of Art 6 ECHR; the ECrtHR awards a compensation of 15 million Italian Liras); ECrtHR 6 May 1985, *Bönisch v Austria* (violation of the fair hearing requirement of Art 6 para 1 because a judge appointed an expert who's impartiality was doubted because of his involvement with the case in an earlier stage of the procedure; the ECrtHR awards a compensation of 700.000 Austrian Schillings).

III. DOES THE ECHR OBLIGE STATES TO PROVIDE NATIONAL REMEDIES AGAINST HUMAN RIGHTS VIOLATIONS CAUSED BY THE JUDICIARY?

Having concluded that the ECHR imposes obligations on the judiciary and that the ECtHR can award damages for violations of the ECHR which can be attributed to the judiciary, a very important question to be answered is whether Article 13 ECHR obliges Member States to provide a remedy on the national level to hold the judiciary accountable for violations of the ECHR. We focus on mistakes by the judiciary made within the framework of the procedure and not on faults committed outside this framework, such as a judge violating the privacy of a suspect by providing information to the press.

A. Historical development of case law

The former European Commission of Human Rights (the Commission or EComHR) was of the opinion that Article 13 did not apply to acts or omissions by the judiciary. The main reason for this point of view was the fact that otherwise a right of appeal would be created, while this right cannot be inferred from the ECHR in general, nor from Article 13. Only Article 2 of the Seventh Protocol to the ECHR guarantees the right to appeal, and only in certain criminal and immigration law cases. According to the Commission, this meant that (Article 13 of) the ECHR can neither oblige Member States to create a national remedy in relation to acts or omissions by the judiciary which presumably lead to a violation of the ECHR. The Commission first took this point of view in the case *Pizzetti v Italy*.[6] It should be stressed, however, that a large minority of the Commission dissented and expressed the view that the applicability of Article 13 to judicial acts or omissions should not be excluded. The minority held that Article 13 obliges Member States to provide national law remedies to deal with presumed violations of Article 6 by the judiciary, and also of other Convention rights.

Until a short time ago, the ECtHR did not express an opinion on this matter, although it had some opportunities to give a principal ruling.[7] Furthermore, in cases also involving alleged violations of Article 5(4) and/or Article 6 of the ECHR, the ECtHR often refrained from discussing the question whether there (also) was a violation of Article 13, because the guarantees of Article 13 were already deemed to be contained in Article 5

[6] EComHR 10 Dec 1991, *Pizzetti v Italy* (report), with dissenting opinion of Weitzel, Danelius, Thune Hall, Rozakis, and Pellonpää.

[7] See eg ECrtHR 26 Feb 1993, *Pizzetti v Italy*.

(4) and/or Article 6.[8] More generally, the Court did not investigate whether adequate national legal protection was available concerning all aspects of the complaint. An investigation of a breach of Article 13 was also passed over by pointing at the ascertained violation of a material ECHR right (eg Article 8), without investigating at the same time the level of national protection under this material right.

This reluctant attitude of the ECtHR was much criticized because in many cases the availability of national legal protection was not investigated. Nor was it made clear whether or not states should provide national remedies with regard to acts and omissions by the judiciary.[9]

B. Present case law

However, in the case *Kudla v Poland* the Grand Chamber of the ECtHR partly changed its attitude.[10] After the ECtHR had found a violation of Article 6(1) because of a total delay of close to one year and eight months in a criminal case, it investigated the complaint under Article 13. The ECtHR considered first that in many previous cases in which it had found a violation of Article 6(1), in the sense that the right to trial within a reasonable time had not been respected, it did not consider it necessary to rule also on an accompanying complaint made under Article 13 because the requirements of Article 6(1) were more stringent than those of Article 13. In the *Kudla* case, the ECtHR upheld the opinion that in cases where the substance of the complaints was the same, there was—and would be—no legal interest in re-examining the same complaint under the less stringent requirements of Article 13. However, the ECtHR also found that there was no overlap since, as in the *Kudla* case, the alleged ECHR violation that the individual wished to bring before a 'national authority' was a violation of the right to trial within a reasonable time, contrary to Article 6(1). The question whether the applicant in a given case did benefit from trial within a reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from whether the applicant had available an effective remedy under domestic law to bring a complaint on that ground. In the case at hand the issue to be determined before the Article 6(1) 'tribunals' was the criminal charge brought against the applicant, whereas the complaint he wanted to have examined by a 'national authority' for the purposes of Article 13 was the separate one of the unreasonable length of proceedings.

[8] ECrtHR 9 Oct 1979, *Airey v Ireland*; ECrtHR 8 July 1987, *W, B & R v United Kingdom*.

[9] See with further references T Barkhuysen and ML Emmerik *Legal Protection against Violations of the European Convention on Human Rights: Improving (co-)operation of Strasbourg and Domestic Institutions* (Leiden Journal of International Law 1999) 833–45.

[10] ECrtHR 26 Oct 2000, *Kudla v Poland*.

In the ECtHR's view, the time had come to review its case law also in the light of the increasing number of applications it received in which the only, or principal, allegation was, or had been, that there had been a failure to ensure a hearing within a reasonable time in breach of Article 6(1). The growing number of cases in which such violations were, and had been, found had already led the ECtHR to draw attention to 'the important danger that exists for the rule of law' within national legal orders when 'excessive delays in the administration of justice' occur 'in respect of which litigants have no domestic remedy'. Against this background, the ECtHR now recognised the need to examine the complaints about the lack of an effective remedy against excessive length of the proceedings under Article 13 separately from its earlier finding of a violation of Article 6(1) for failure to ensure an individual trial within a reasonable time.

The ECtHR further stressed that Article 13, which directly expresses the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively can enjoy those rights. It said, among other things, that the object of Article 13:

> is to provide a means whereby individuals can obtain relief at the national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6 par. 1, rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings.

The ECtHR emphasized that a remedy for complaining about unreasonable length of proceedings did not as such involve an appeal against the 'determination' of any criminal charge or of civil rights and obligations and that requiring a remedy under Article 13 was not tantamount to a 'right of appeal', guaranteed only in criminal matters under Article 2 of Protocol No 7 to the ECHR.

In the *Kudla* case the Government could not prove that an effective national remedy existed. Accordingly, the ECtHR held that there had been a violation of Article 13 in that the applicant had had no domestic remedy for enforcing his right to a 'hearing within a reasonable time' as guaranteed by Article 6(1).

From an analysis of the *Kudla* judgment it follows that the remedy requirement of Article 13 has been extended by the ECtHR, but only with regard to violations by the judiciary of the reasonable time requirement of Article 6(1) ECHR. The ECtHR anxiously tried to make it clear that states are not obliged to provide remedies concerning other acts or omissions by

the judiciary which lead to violations of other ECHR obligations. According to the ECtHR, Article 13 does not offer absolute protection and allows limitations of the right to legal protection. The ECtHR also stressed that Article 13 does not oblige Member States to provide a national remedy against primary legislation (Acts of Parliament), nor does it grant the right to complain of a lack of access to the courts. On the other hand, from the general wording of the judgment it can be concluded that, although the *Kudla* judgment concerned undue delay in a criminal case, the obligation to provide national remedies against undue delay also encompasses cases concerning civil rights and obligations and undue delay cases under Article 5 ECHR.

The judgment in the *Kudla* case failed to make clear what kind of remedy should be provided. The ECtHR only stated that there should either be a remedy that can prevent a (further) violation of the reasonable time requirement, or a possibility to obtain damages for the violation of Article 6. According to the ECtHR, states should be left a certain freedom of choice in this respect. Its Grand Chamber clarified the meaning of the Kudla judgment on this point in its admissibility decision in the case *Mifsud v France*.[11] As the ECtHR stated in this case, the remedy requirement of Article 13 can be met by offering the possibility to obtain damages. This necessarily means that states are not also obliged to offer a remedy that can prevent (further) violations of the reasonable time requirement. One can question whether effective legal protection at the national level is sufficiently guaranteed in this way because states are not obliged to provide applicants with means to put an end to an ongoing violation of the reasonable time requirement.

IV. EXTENSION OF THE REMEDY REQUIREMENT?

The question to be answered now is whether the national remedy requirement with regard to violations of the reasonable time requirement caused by the judiciary as introduced by the ECtHR in its *Kudla* judgment should be extended to other violations of ECHR rights by the judiciary.

The following arguments against an extension of the remedy requirement can be mentioned. To start with, such an extension would be contrary to the rule inferred from Article 6 ECHR and—*a contrario*—from Article 2 of Protocol No. 7 to the ECHR that the ECHR does not contain a right to appeal.[12] Furthermore the applicability of Article 13 to acts and/or omissions

[11] ECrtHR 11 Sept 2002, *Mifsud v France* (admiss dec).
[12] ECrtHR 17 Jan 1970, *Delcourt v Belgium*.

by the judiciary would force Member States to provide remedies even against decisions of the highest courts and tribunals. This would not be in line with consistent case law that the ECHR does not oblige Member States to provide remedies such as the re-opening of (closed) proceedings with regard to decisions with the status of *res judicata*.[13]

Apart from these more formal arguments in the context of ECHR case law, some more general arguments can be put forward. First, the principles of legal certainty and *res judicata* can be mentioned. Extension of the remedy requirement could endanger these principles. The law disfavours re-litigation of judicial decisions except through an appeal. Otherwise judicial proceedings would never come to an end: *lites finiri oportet*. The interests of the successful party have to be protected, as well as the public interest in legal certainty. Secondly, the authority and reputation of the judiciary could be diminished if a violation of the Convention could result, for instance, in an action for damages. Thirdly, extension of the remedy requirement to all judicial acts could endanger the independence of the judiciary.

Arguments in favour of an extension of the remedy requirement are the following. First, it should be stressed that the wording of Article 13 makes no distinction between the different national authorities that may violate ECHR rights. Neither does the wording make a distinction between the different rights guaranteed by the ECHR.[14] The text of Article 13 suggests that Member States have a general obligation to provide effective national remedies against violations of all guaranteed rights irrespective of which public body is involved. Secondly, the extension of the remedy requirement would force Member States to provide effective national remedies with regard to judicial acts, which could save parties a long procedure before the ECtHR. This might also help to diminish its caseload.

How to weigh the arguments mentioned? As the text of Article 13 suggests a broad applicability, which has also clear advantages for the legal protection of citizens against human rights violations, only strong arguments can lead to the conclusion that acts of the judiciary should be excluded from its applicability. The *res judicata* and legal certainty (*lites finiri oportet*) argument are not convincing in this respect. The importance of these principles cannot be disputed, but the extension of the remedy requirement does not in itself result in the original judicial decision being called into question. It is possible to provide a national remedy without violating these principles. For instance if the national law provides remedies such as appeal and—with regard to judicial impartiality—the possibility to

[13] EComHR 12 Dec 1963, appl nr 1552/62 (admiss dec) Digest, 33; EComHR 8 Oct 1991, *Times Newspapers and heirs*, appl nr 14644/89 (report) D&R 73, 58–9.

[14] Art 13 ECHR: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

challenge the judge(s) in question. The use of these remedies would then not lead to a violation of the principles mentioned. Secondly—if the national law does not provide such remedies—the Article 13 requirement could be fulfilled by creating the possibility of an action for damages against the State. Such an action does not have the same purpose and does not necessarily involve the same parties as the proceedings which resulted in the decision with the status of *res judicata*. Neither can the argument be accepted that the authority and reputation of the judiciary and judicial independence could be endangered by an extension of the remedy requirement to judgments of the highest courts. An action for damages does not concern the personal liability of a judge, but that of the State. In the long run it could even enhance the authority and reputation of the judiciary, because national remedies for judicial mistakes could in the end improve the quality of the legal system in a broader sense.

This brings us to the conclusion that the remedy requirement with regard to judicial acts should be extended. The ECtHR should assume that Article 13 is applicable to all acts (and omissions) by the judiciary. The remedy requirement can then be met by providing remedies such as appeal and the possibility to challenge judges. These should be used within the given (reasonable) time limits. It should be stressed however that Article 13 does not oblige Member States to provide such remedies. This article respects that national procedural law also protects the principles of *res judicata* and legal certainty. However, if the national law provides no such remedy at all with regard to certain judicial acts—for instance when judgments of the highest courts are concerned—an action for damages against the State should be available to meet the remedy requirement of Article 13 ECHR.

If the ECtHR were to follow this suggestion, it would also bring its case law in line with a judgment of the ECJ. In the case *Köbler v Austria* the ECJ has given a preliminary ruling on the question whether its case law that in the case of a breach of Community law it is immaterial for State liability which institution of a Member State is responsible for such breach,[15] also applies when it involves a decision of the supreme court of a Member State and, if so, under which conditions. The ECJ answered this question in the affirmative. According to the ECJ, the principle that Member States are obliged to compensate for damage caused to individuals by infringements of Community law for which they are responsible also applies to alleged infringements stemming from a decision of a court adjudicating in last instance if the rule of Community law that has been infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained

[15] See Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029.

by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the competent court to settle disputes relating to such reparation.[16] It should be stressed, however, that the requirement of 'a sufficiently serious breach' as a condition for State liability is a typical feature of EC law and does not play a role under the ECHR. The case law with regard to the Articles 13 and 41 ECHR shows that Member States are liable for all (possible) damage caused by violations of ECHR rights, irrespective of the seriousness of the violation.

Of course one could argue that such an extension of the remedy requirement would force applicants to use yet another national law remedy with an uncertain outcome before they can file a complaint with the ECtHR.[17] This concern deserves to be taken very seriously, but is not a *fundamental* argument against the extension of the remedy requirement. However, it makes clear that it is very important that the remedies against judicial acts should be really effective, which also means that the proceedings concerned should end within a reasonable time. The ECtHR should strictly supervise the fulfilment of this obligation, in the way it supervizes other ECHR obligations. In this respect it is also important that applicants, as can be inferred from consistent case law, are not obliged to exhaust ineffective remedies before going to Strasbourg.

V. CONCLUSION

The central question of this contribution whether the ECHR obliges Member States to provide a remedy on the national level to hold the judiciary accountable for violations of the ECHR, can be answered as follows. The former Commission answered this question in the negative, while the ECtHR avoided giving an opinion of principle on the matter, although it had many opportunities to do so. In the case *Kudla v Poland* the ECtHR changed this attitude by finding that Article 13 ECHR obliges Member States to provide a remedy on the national level to hold the judiciary accountable for violations of the reasonable time requirement as laid down

[16] ECJ 30 Sept 2003, *Gerhard Köbler v Republik Österreich* Case C-224/01. See also the opinion by Advocate General Léger, delivered on 8 Apr 2003, Case C-224/01 *Gerhard Köbler v Republik Österreich*.

[17] This point of view was taken by Judge Casadevall in his dissenting opinion in ECrtHR 26 Oct 2000, *Kudla v Poland*.

in Article 6 ECHR. The ECtHR did not extend the remedy requirement for judicial acts and/or omissions to other ECHR-obligations.

In our view, however, there is a case for extending the national remedy requirement to other violations of ECHR rights by the judiciary. In this way the underlying principle of Article 13, namely to remedy all (possible) violations of ECHR obligation on the national level, can be respected as far as possible. In this regard there is no reason whatsoever to make a distinction between different institutions of the state or between different ECHR rights. An effective protection of human rights starts on the national level, with Strasbourg as a watchdog when the requirements of the ECHR, including Article 13, have not been fulfilled.