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3 Creating a European-wide standard of effective legal protection

The European Convention on Human Rights

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1 Historical background

The Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as the 'European Convention on Human Rights' (ECHR),[1] has arisen out of the disastrous events of World War II. At a time when the project of European integration under the auspices of the (then) European Communities had not even been launched,[2] the Convention was a first response of European states (mainly of the Western hemisphere) to the atrocities of Nazism and Fascism. This necessitated a fundamental change of thinking in public international law: until the end of World War II, the individual had almost no place in international law whatsoever.[3] The lesson learned from the Nazi era was that it did not suffice to leave protection of fundamental rights to national constitutions. What was needed was a second level of protection, this time being an international one. As a consequence, the individual became a subject (though only a partial one) of international law.[4] The first step in this direction was made, at UN level, by the Universal Declaration of Human Rights (UDHR) of 10 December 1948.[5] Important as it undeniably was, the Universal Declaration lacked a legally binding character and it was no earlier than almost 20 years later, in 1966, when legally binding instruments were set up at the universal level.[6] Against this background, one cannot but praise the Member States of the Council of Europe for having achieved consensus on a strong human rights catalogue as early as 1950 when the Convention was opened for ratification.

1 ETS No 5.

2 The European Coal and Steel Community was founded in 1952, the European Atomic Energy Community and the European Economic Community in 1958 respectively.

3 cf L. Oppenheim, *International Law, Vol. I: Peace* (Longmans, Green, and co., London, New York [etc.] 1905) 346: '[The so-called rights of mankind] do not in fact enjoy any guarantee whatever from the Law of Nations, and they cannot enjoy such a guarantee, since the Law of Nations is a law between States, and since individuals cannot be subjects of this law.'

4 cf generally C. Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn., 2014).

5 GA Res 217 (III); for further reading, see G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999).

6 International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, both of 19 December 1966.

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The Convention entered into force in 1953, and the European Court of Human Rights (ECtHR) was established six years later.[7] However, the human rights protection of the early days significantly differed from the level of protection guaranteed today: First, as for the substance, the Convention contained only the core of (mainly liberal) rights. Other guarantees were added in the course of time by means of additional (and facultative) protocols, such as the right to property (Art. 1 Protocol No 1)[8] or the prohibition of death penalty in times of peace (Protocol No 6)[9] and war (Protocol No 13).[10] Secondly, the enforcement machinery significantly differed from the way it looks like today: the Court's jurisdiction was facultative and subject to a separate declaration of acceptance.[11] In cases where a state had not made such a declaration, it was for the Committee of Ministers – i.e. for a political body within the Council of Europe – to establish whether or not there had been a violation.[12] What is more, even the individual complaint procedure was not compulsory but subject to another (facultative) declaration of acceptance.[13] As a consequence, some Council of Europe Member States hid for years in the shadow since no individual could blame them at the European level for not complying with their Convention obligations.[14] Lastly, even in cases where a state had accepted both the Court's jurisdiction and the individual complaint procedure, the potential victim of a human rights violation had no direct access to the Court. Instead, complaints were lodged with the then European Commission of Human Rights (EComHR) which decided on the admissibility. If the complaint had been found admissible, the case was brought before the Court (mainly) by the Commission which set up a (confidential) report on the merits.[15]

The new era began in November 1998 when Protocol No 11 entered into force.[16] This Protocol brought about a number of innovations which are still central to today's design of the Convention machinery. The right to individual complaint which is nowadays the centrepiece of the Convention[17] became obligatory for all states (Art. 34 of the Convention), as well as the Court's compulsory jurisdiction. Today, it goes without saying that the victim himself or herself has direct access to the Court.[18] The former Commission has been abolished in favour of a Court which is now composed by full-time judges (under the old system, the judges met only irregularly on part-time basis). The role of the Committee of Ministers has been reduced to the surveillance

7 J. A. Frowein, 'Einführung' in J. A. Frowein and W. Peukert (eds.), *Europäische Menschenrechtskonvention: EMRK-Kommentar* (3rd edn., 2009) MN 2, 4.

8 ETS No 9.

9 ETS No 114.

10 ETS No 177.

11 Former Art. 46 of the Convention.

12 Former Art. 32 of the Convention.

13 Former Art. 25 para 1 of the Convention.

14 Turkey e.g., being one of the original Parties to the Convention, made the declaration only in 1987.

15 Former Art. 31 of the Convention.

16 ETS No 155.

17 cf C. Tomuschat, 'Individueller Rechtsschutz: das Herzstück des "*ordre public européen*" nach der Europäischen Menschenrechtskonvention' (2003) 30 *Europäische Grundrechte-Zeitschrift* 95.

18 The direct access to the Court had been introduced by Protocol No 9 (ETS No 140) which was, however, an optional protocol. Hence, it was only by Protocol No 11 that direct access to the Court became obligatory for all Contracting Parties.

of the states honouring their obligations after a finding of a violation (Art. 46 para 2 of the Convention). Protocol No 11 saw the introduction of a new Court formation, the Grand Chamber which decides on serious questions affecting the interpretation or application of the Convention or the protocols thereto, or serious issues of general importance (Art. 43 para 2 of the Convention). Although there have been subsequent procedural innovations (Protocols No 14,[19] which entered into force in June 2010, and Protocols No 15[20] and 16,[21] not yet in force), the fundamental nature of the change brought about by Protocol No 11 cannot be overestimated.

Another factor which had an immense impact on today's functioning of the system was the enlargement of the Council of Europe after the fall of the iron curtain. When the Convention was opened for signature in 1950, the Council of Europe consisted of thirteen Member States, most of them belonging to the Western hemisphere (except for Turkey). Within this part of Europe, there was a large consensus about central human values. After the end of the cold war in 1990, the Council of Europe decided to open its gates and to let in the newly established democracies.[22] This decision, understandable as it might have been, had strong repercussions on the Convention system. Today, the Council of Europe consists of 47 Member States, some of which are facing systemic problems in safeguarding the rule of law. This has led to an immense influx of incoming applications up to the number of 160,000 pending cases, a number which severely endangered the functioning of the system as a whole. Although the Court managed to reduce the number of pending cases to just under the mark of 100,000 by the end of 2013 and even further to 70,000 by the end of 2014, the long-term functioning of the Convention system is still one of the most pressing – and, one might add, still unanswered – questions.[23]

2 Rights-based perspective

It might be rather unusual to cite the European Court of Justice (ECJ) in a contribution dedicated to the European Convention on Human Rights. However, this is exactly what shall be done here. The ECJ has held in a long-standing jurisprudence that the right to effective judicial protection is 'one of the general principles of law stemming from the constitutional traditions common to the Member States', a right that has also been 'enshrined in Arts. 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms'.[24] One aspect is striking: The ECJ mentions, in the same breath, both Arts. 6 and 13 of the Convention as if there was no difference between them. Indeed, from a Union law perspective, this is exactly the case since nowadays, both Convention articles have been merged together into what is now Art. 47 of the Charter of Fundamental Rights (CFR). From a genuine

19 CETS No 194.
20 CETS No 213.
21 CETS No 214.
22 cf V. Djerić 'Admission to Membership of the Council of Europe and Legal Significance of Commitments Entered Into by New Member States' (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 605; J. F. Flauss, 'Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe' (1994) 5 *European Journal of International Law* 401.
23 Figures according to ECtHR, *Annual Report 2013* (2014) 9; *Annual Report 2014* (2015) 5.
24 Case 50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677, para 39.

Convention perspective, however, things are quite different. Arts. 6 and 13 of the Convention follow different dogmatic concepts. This has strong repercussions on the subject under consideration, namely, the effective legal protection in administrative law matters. Therefore, as a first step, it is necessary to address the respective dogmatic concepts of Art. 6 para 1 and Art. 13 of the Convention.

2.1 Dogmatic concept of Art. 6 para 1 and Art. 13 of the Convention

Art. 6 para 1 of the Convention is at the same time both larger and narrower in scope, compared to Art. 13.[25] It is larger in scope because it does not only apply to alleged breaches of other Convention rights, as Art. 13 does. Instead, it applies to rights protected under national law alone. However, Art. 6 is narrower in scope in that it applies only to disputes concerning 'civil rights and obligations' and 'criminal charges' respectively. This might give rise to the impression that Art. 6 para 1 does not apply to administrative law matters at all. This, however, would be misconceived. The ECtHR has developed an autonomous concept of what is meant by 'civil rights and obligations' and by 'criminal charges'.[26] Large parts of the law which at the national level are regarded as belonging to the administrative branch of law are covered by Art. 6 para 1 as interpreted by the ECtHR.[27] E.g., if a person is denied a building permission by the relevant authority, this would be regarded under many – if not most – national laws as an administrative law matter. In Convention terms, however, Art. 6 para 1 of the Convention applies since the right to property is at the heart of this dispute and the right to property is regarded a 'civil right' by the ECtHR.[28] This is not to say that Art. 6 para 1 of the Convention applies to all administrative law matters. Cases concerning the expulsion of aliens, e.g., are not regarded as being 'civil' in nature.[29] Here, Art. 13 steps in.[30]

There is yet another difference between Art. 6 para 1 and Art. 13 of the Convention. Supposed, Art. 6 para 1 applies, the wording of the provision requires that the dispute be settled by a 'tribunal'. This is different for Art. 13, here, the wording requires only a 'national authority' (in French: '*une instance national*'). The Court has acknowledged that a 'national authority' must not necessarily be a court.[31] In other words, Art. 13 is less strict than Art. 6 para 1 in that it does not require in all cases a judicial remedy. From this, it is generally concluded that Art. 6 para 1 is *lex specialis*

25 cf M. Breuer, 'Art 13' in U. Karpenstein and F. C. Mayer (eds.), *EMRK: Kommentar* (2nd edn., 2015), MN 5. Art. 6 para 1, first sentence of the Convention reads: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Art. 13 of the Convention reads: '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.'

26 C. Grabenwarter, 'Art 6' in idem, *European Convention on Human Rights: Commentary* (2014), MN 3 et seq.

27 J. Gundel, 'Art 146. Verfahrensrechte' in D. Merten and J. Papier (eds.), *Handbuch der Grundrechte in Deutschland und Europa* (2010) volume VI/1, MN 21 et seq.

28 *Allan Jacobsson v Sweden (No 2)*, Appl no 16970/90 (ECHR, 19 February 1998), paras 38 et seq.

29 *Maaouia v France* [GC], Appl no 39652/98 (ECHR, 5 October 2000), paras 33 et seq.

30 *Infra* at n. 66.

31 *Klass and Others v Germany*, Appl no 5029/71 (ECHR, 6 September 1978), para 67.

with regard to Art. 13 of the Convention.[32] There is only one exception to this, which will be dealt with later, namely the cases of unduly long proceedings.[33] Against this dogmatic background, one might now deal with the different facets of the principle of effective legal protection from a rights-based perspective.

2.2 Right of access to court

The right of access to court is at the very heart of any effective legal protection. From the Convention perspective, an anomaly comes into play. Whereas Art. 13 expressly requires an 'effective remedy before a national authority', Art. 6 para 1, surprisingly, remains silent on the question of access to court. In fact, Art. 6 para 1 enshrines a number of procedural guarantees once a tribunal has been seized, like fair and public hearings, that the tribunal be independent and impartial or that it be established by law. According to the strict wording of the provision, however, it would not be forbidden to deny access to court altogether. Yet, there is a long-standing jurisprudence of the ECtHR going back to the Golder judgment in 1975 where the Court convincingly held that it:

> would be inconceivable . . . that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.[34]

From that, the Court concluded that 'the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1'.[35] This interpretation was heavily criticised, at the time, by judge Sir Gerald Fitzmaurice.[36] Meanwhile, however, it is a well-established and, one might add, a well-accepted jurisprudence.

2.3 Right to appeal

Art. 6 para 1 enshrines a right of access to court but no more than that. In particular, it does not recognise a right to appeal as such. To quote from the Court's jurisprudence:

> The Court reiterates that Article 6 of the Convention does not compel the Contracting States to set up courts of appeal. However, where such courts do exist, the requirements of Article 6 must be complied with, so as for instance to guarantee to litigants an effective right of access to court for the determination of their 'civil rights and obligations'. The 'right to a court', of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in

32 Grabenwarter (n. 26), Art. 13 MN 8.
33 *Infra* at n. 51.
34 *Golder v United Kingdom*, Appl no 4451/70 (ECHR, 21 February 1975), para 35.
35 Ibid. para 36.
36 Ibid. Separate Opinion of Judge Sir Gerald Fitzmaurice.

> particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired.[37]

There is, in fact, a right to appeal under Protocol No 7.[38] Art. 2 para 1 of this Protocol gives 'everyone convicted of a criminal offence by a tribunal' the right to have 'his conviction or sentence reviewed by a higher tribunal'. Again, one might conclude at first sight that this provision is automatically inapplicable in administrative law disputes. However, the concept of autonomous interpretation has lead the Court to apply this provision in administrative law cases as well.[39] Administrative sanctions, therefore, might be regarded a conviction of a 'criminal offence' in terms of Protocol No 7. If, in such a case, the decision at first instance has been issued by an administrative authority, it follows from the right of appeal under Art. 2 of Protocol No 7 that there must be two more levels of jurisdiction by an independent tribunal.[40]

2.4 Right to intervention

With respect to stakeholders' right to intervene into proceedings, the application of Art. 6 para 1 to administrative law disputes becomes highly relevant. This is so because Art. 6 para 1 *inter alia* guarantees a 'fair hearing' and the Strasbourg Court has interpreted this as encompassing the principles both of equality of arms and of adversarial proceedings. The principle of equality of arms implies that each party is given 'a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent'.[41] According to the principle of adversarial proceedings, 'the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision'.[42]

This concept has put considerable pressure on long-established institutions like the '*commissaire du gouvernement*' under French administrative law. The *commissaire du gouvernement*, who is today called '*rapporteur public*', is a member of the *Conseil d'Etat.* His or her task is to present concluding observations (*les conclusions*) at the end of the oral proceedings, very much like the Advocate General does before the ECJ. He does so in full independence. The problem is that the parties to an administrative law dispute have no opportunity to comment on the conclusions. The ECtHR did not see a problem of equality of arms, given that the conclusions were presented orally during the public hearing and neither party had access to them beforehand.[43] Nor did it find a violation of the principle of adversarial proceedings, although this aspect was

37 *Anghel v Italy*, Appl no 5968/09 (ECHR, 26 June 2013), para 50.
38 ETS No 117.
39 *Grecu v Romania*, Appl no 75101/01 (ECHR, 30 November 2011), paras 81 et seq.
40 Grabenwarter (n. 26) P7–2, para 2.
41 *Krčmář and Others v Czech Republic*, Appl no 35376/97 (ECHR, 3 March 2000), para 39.
42 Ibid. para 40.
43 *Kress v France* [GC], Appl no 39594/98 (ECHR, 7 June 2001), para 73.

more delicate. The Court held that the possibility of filing a so-called *note en delibéré* in advance to the oral presentation of the conclusions 'helps to ensure compliance with the adversarial principle'.[44] What the Court did criticise, however, was the fact that the *commissaire du gouvernement* took part in the private deliberation of the judgment, although without a vote.[45] As a consequence, French administrative procedural law was amended to the effect that in cases before the *Conseil d'Etat*, any party, at the beginning of the oral proceedings, might object to the commissaire's taking part in the deliberation of the judgment.[46]

It was already mentioned that the Advocate General at the ECJ was modelled after the French *commissaire du gouvernement*. Hence, it has been questioned whether the Luxembourg proceedings live up to human rights standards. The Luxembourg Court itself has found no breach of the fair trial principle, given the possibility of having the oral proceedings reopened if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties.[47] In the subsequent Strasbourg proceedings, the applicant company failed for formal reasons.[48]

2.5 Right to an administrative act within reasonable time

With respect to legal protection against inactive administrations, there is a remarkable difference between the Convention and the Charter of Fundamental Rights.[49] The Charter contains, in Art. 41, the right to good administration. This includes that a matter be handled, by the administration, within reasonable time (Art. 41 para 1 CFR). Under the Convention, no such guarantee is expressly acknowledged. This does not mean that there is no legal protection whatsoever against an administration which remains silent. Such protection, however, can be construed only indirectly, by means of an extensive interpretation of Art. 6 para 1 of the Convention.

What Art. 6 para 1 actually does guarantee is a court trial within reasonable time. The question remains, however, what is the temporal scope of this guarantee. Does the 'trial' begin at the time when the claim is lodged with the administrative court? Or does Art. 6 para 1 also encompass proceedings before the administrative bodies preceding the administrative court trial? The Strasbourg Court has decided in the latter sense, thereby extending the temporal scope of Art. 6 para 1 well beyond the sole court trial.[50] As a consequence, the Convention grants an indirect right that an administrative act

44 Ibid. para 76.

45 Ibid. paras 77 et seq.

46 Décret n° 2006–964 du 1er août 2006 modifiant la partie réglementaire du code de justice administrative, JORF n°178 du 3 août 2006 page 11570.

47 Case C-17/98 *Emesa Sugar* [2000] ECR I-665, para 18; see R. Lawson, 'Case C-17/98, Emesa Sugar (Free Zone) NV v Aruba, Order of the Court of Justice of 4 February 2000, nyr. Full Court' (2000) 37 *Common Market Law Review* 983; T. Schilling, 'Das Recht der Parteien, zu den Schlußanträgen der Generalanwälte beim EuGH Stellung zu nehmen' (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 395.

48 *Emesa Sugar NV v the Netherlands*, Appl no 62023/00 (ECHR, 13 January 2003); see M. Breuer, 'Offene Fragen im Verhältnis von EGMR und EuGH' (2005) 32 *Europäische Grundrechte-Zeitschrift* 229.

49 Gundel (n. 27) MN 43.

50 *König v Germany*, Appl no 6232/73 (ECtHR, 28 June 1978), para 98; *Nowicky v Austria*, Appl no 34983/02 (ECtHR, 24 February 2005), para 47.

be issued within reasonable time. This right, it is to be noted, has no standing of its own. The proceedings before the administrative bodies form part of Art. 6 para 1 only insofar as they are a precondition for seizing the administrative courts. If no court proceedings are initiated, Art. 6 para 1 of the Convention is inapplicable.

Art. 6 para 1 enshrines the right to a court trial within reasonable time as such. Another question is whether the Convention also guarantees a national remedy against unduly delayed proceedings. The answer to this question is to be found in Art. 13 of the Convention. In its famous Kudła judgment, the Court has held that there must be a national remedy against unduly long proceedings.[51] This has been expressly acknowledged in cases of unduly long administrative court proceedings as well.[52] Here, Art. 13 applies in addition to Art. 6 para 1 of the Convention. It has been mentioned above that normally, Art. 6 para 1 is deemed to be *lex specialis* with regard to Art. 13.[53] This is not so for length of proceedings cases.[54] The Convention does not only protect the right to proceedings within a reasonable time, it also requires a national remedy against undue delays.

The Court's jurisprudence has led to a number of changes in legislation introducing a national remedy against unduly long court proceedings (be they administrative or otherwise).[55] In some states, the internal law was brought in line with the Convention requirements by way of a change of jurisprudence, a noticeable example being the Magiera judgment of the French *Conseil d'Etat*.[56] The Strasbourg Court has acknowledged the effectiveness of this jurisprudential affiliation.[57] In Germany where the implementation of the Court's jurisprudence took the form of a legislative enactment, the Supreme Administrative Court at least partly seceded from the Strasbourg jurisprudence. The Court found that the administrative proceedings preceding the administrative court trial should not be considered when calculating the length of proceedings.[58] This is not in line with the Strasbourg Court's jurisprudence which held in the opposite direction.[59]

2.6 Locus standi of persons no longer affected

It is in the very nature of police measures that they are typically of only short endurance. The assembly has been dissolved, the house search has been carried out, the surveillance measure has ended well before the person concerned had the chance to go to court. In those situations, the question comes up whether the potential victim still has *locus standi* before the national courts. In the Camenzind case, the Swiss Federal Court

51 *Kudła v Poland* [GC], Appl no 30210/96 (ECtHR, 26 October 2000).

52 *Rumpf v Germany*, Appl no 46344/06 (ECtHR, 2 September 2010); *Vassilios Athanasiou and others v Greece*, Appl no 50973/08 (ECHR, 21 December 2010).

53 *Supra* at n. 33.

54 cf T Vospernik, 'Das Verhältnis zwischen Art 13 und Art 6 EMRK – Absorption oder "Apfel und Birne"?' (2001) 56 *Österreichische Juristenzeitung* 361.

55 cf *Taron v Germany*, Appl no 53126/07 (ECHR, 29 May 2012); *Techniki Olympiaki AE v Greece*, Appl no 40547/10 (ECtHR, 1 October 2013).

56 CE Ass, judgment of 28 June 2002, Recueil Lebon p 247; see Calmes-Brunet in this book.

57 *Broca and Texier-Micault v France*, Appl nos 27928/02, 31694/02 (ECtHR, 21 October 2003), paras 19 et seq.

58 BVerwGE 147, 146 para 24.

59 *Supra* n. 50.

denied *locus standi* on account of the fact that the applicant was no longer affected by the police measure in question. This was arguable from the national point of view because under section 28(1) of the Federal Administrative Criminal Law Act, an investigative measure could be appealed in court by anyone who was affected by it and had an interest worthy of protection in having it quashed or varied. According to settled Swiss jurisprudence, the 'interest' had to be a present one in the sense that persons had only *locus standi* when they were still affected by the impugned measure.[60] This result, however, did not live up to Convention standards. Since neither 'civil rights and obligations' nor 'criminal charges' were directly at stake, the application did not come in the ambit of Art. 6 para 1 of the Convention.[61] Instead, Art. 13, taken in conjunction with Art. 8 of the Convention, was the applicable yardstick. The Court pointed to its longstanding jurisprudence according to which Art. 13 required for an 'effective remedy before a national authority'.[62] Since the applicant was denied, by the interpretation of the national law, any form of judicial remedy, the Court found a violation.

It is interesting to note that the German Constitutional Court changed its case law quite at the same time.[63] Although the Strasbourg Court had not yet given judgment, it is arguable that the ruling of the German Constitutional Court was at least influenced by the Strasbourg proceedings, given the fact that the (then) Commission had already submitted its report and equally found a violation of Art.13.[64]

2.7 Suspensive effect

The effectiveness of legal protection may require that an administrative act not be executed as long as the court trial is pending. However, this requirement contradicts states' interest namely in cases concerning the expulsion of aliens. Typically, national law used to provide that legal remedies against deportation orders are without suspensive effect. What is more, the European asylum system used to exclude, as a rule, suspensive effect in cases where the asylum seeker was to be deported to another Member State where he or she had first entered the European Union.[65] In the widely-noticed MSS judgment, the Strasbourg Court found that this was not in line with the Convention. The Court recalled its established jurisprudence according to which 'in view of the importance [of] Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires [. . .] that the person concerned should have access to a remedy with automatic suspensive effect'.[66]

60 BGE 103 IV 115.

61 *BC v Switzerland*, Appl no 21353/93 (EComHR 27 February 1995).

62 *Camenzind v Switzerland*, Appl no 21353/93 (ECtHR, 16 December 1997), para 53.

63 BVerfGE 96, 27.

64 *BC v Switzerland*, Appl no 21353/93 (EComHR 3 September 1996); see Gundel (n. 27) MN 82, n. 717.

65 Art 19 para 2, fourth sentence of the so-called Dublin II Regulation (Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1).

66 *MSS v Belgium and Greece* [GC], Appl no 30696/09 (ECtHR, 21 January 2011), para 293, citing *Čonka v Belgium*, Appl no 51564/99 (ECtHR, 5 February 2002), paras 81–83 and *Gebremedhin [Gaberamadhien] v France*, Appl no 25389/05 (ECtHR, 26 April 2007), para 66.

This judgment was echoed by the ECJ in the NS case.[67] The ECJ mainly subscribed the findings of the Strasbourg Court in MSS as for the deficiencies of the Greek asylum system but avoided to pronounce itself on the question of suspensive effect.[68] Meanwhile, a new regulation has been set up which provides for a differentiated system of suspensive effect.[69]

2.8 Execution of national judgments

In administrative law, execution of (national) judgments at first sight seems to pose no serious problems: whenever the administrative court decides in favour of the claimant and quashes the impugned administrative act, no question of execution arises. Things are different, however, in cases where e.g. social security benefits are concerned: here, a mere court judgment that the administrative body has to pay a certain amount of money does not suffice to settle the claim since the administrative authority has to become active. In a functioning *Rechtsstaat*, it is not worth mentioning that binding court decisions must be executed. From the Convention perspective, however, non-execution of national court judgments is one of the pressing problems, at least in certain (mostly Eastern European) countries.[70]

In Convention terms, the first question to be assessed is which right is at stake when a binding court judgment is not being executed. Given that most of those cases concern the payment of money, it is arguable to hold that the non-execution of the court judgment infringes the right to property (Art. 1 Protocol No 1). On the other hand, the non-enforcement concerns a procedural aspect. Therefore, the Court in those cases finds a violation not only of Art. 1 Protocol No 1 but also of Art. 6 para 1 of the Convention.[71] This presupposes that Art. 6 para 1 applies even after the national court has given judgment. This is exactly what the Court found in Hornsby:

> However, [the right to a court] would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (. . .). Execution of a

67 Case C-411/10 *NS and others* [2011] ECR I-13905.

68 cf K. Hailbronner and D. Thym, 'Vertrauen im europäischen Asylsystem' (2012) 31 *Neue Zeitschrift für Verwaltungsrecht* 406, 408 et seq.

69 Art 26 paras 3 and 4 of the Dublin III Regulation (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31).

70 F. Jacobs, R. White and C. Ovey, *The European Convention on Human Rights* (6th edn., 2014) 262.

71 *Burdov v Russ (No 2)* [GC], Appl no 33509/04 (ECtHR, 15 January 2009), paras 65 et seq.

> judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6.[72]

It goes without saying that in the administrative law context, Art. 6 para 1 of the Convention applies only where the dispute concerns a 'civil right and obligation' or 'criminal charges' respectively.[73]

2.9 State liability

Many procedures in administrative law aim at eliminating the unlawful decision of the administrative authorities.[74] There are situations, however, where the mere quashing of the impugned decision does not suffice because a non-reparable damage has been caused. In those circumstances, the issue of state liability is at stake. According to the Court's settled case law,

> where an individual has an arguable claim that he has been ill-treated by agents of the State, the notion of an 'effective remedy' entails, *in addition to the payment of compensation where appropriate*, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.[75]

From that, it might be concluded that Art. 13 of the Convention does not in all circumstances require a compensatory remedy but only 'where appropriate'. On the other hand, the interplay between primary and secondary remedies has become particularly clear in cases of unduly long proceedings. The Court has held that 'where length-of-proceedings violations already exist, a remedy designed to expedite the proceedings – although desirable for the future – may not be adequate to redress a situation in which the proceedings have clearly already been excessively long'.[76] In those cases, Art. 13 of the Convention requires for a compensatory remedy at national level. This has led many states to introduce compensatory mechanisms.[77]

3 Institutional perspective

3.1 The notion of 'tribunal'

It is not necessary for the States Parties to the Convention to set up administrative courts. The ECtHR has accepted that a full examination of administrative acts by civil courts is in compliance with the requirements under Art. 6 para 1 of the Convention.[78] In fact, the Court is cognisant of the reluctance with which states

72 *Hornsby v Greece*, Appl no 18357/91 (ECtHR, 19 March 1997), para 40.
73 *Supra* at n. 25.
74 Cf '*Anfechtungsklage*' in German Law, '*recours pour excès de pouvoir*' in French Law.
75 *El-Masri v the Former Yugoslav Republic of Macedonia* [GC], Appl no 39630/09 (ECtHR, 13 December 2012), para 255 with further references (emphasis added).
76 *Scordino v Italy (No 1)* [GC], Appl no 36813/97 (ECtHR, 29 March 2006), para 185.
77 cf M. Breuer, *Staatshaftung für judikatives Unrecht* (2011) 554 et seq, with further references.
78 *Oerlemans v the Netherlands*, Appl no 12565/86 (ECtHR, 27 November 1991), paras 54 et seq.

have reacted to the demand of their administrative authorities being subjected to any kind of judicial review. To use the words of the Court:

> Admittedly, the very establishment and existence of administrative courts can be hailed as one of the most conspicuous achievements of a State based on the rule of law, in particular because the jurisdiction of those courts to adjudicate on acts of the administrative authorities was not accepted without a struggle. Even today, the way in which administrative judges are recruited, their special status, distinct from that of the ordinary judiciary, and the special features of the way in which the system of administrative justice works [. . .] show how difficult it was for the executive to accept that its acts should be subject to review by the courts.[79]

Irrespective of this general sympathy and understanding, the Court's jurisprudence has brought about some far-reaching changes in the institutional structure of legal protection in administrative law. Again, this is due to the extensive application of Art. 6 para 1 to administrative law cases. This Article requires that each dispute covered by it be settled by a 'tribunal' showing certain characteristics like impartiality, independence and establishment by law. In Austria, traditionally the only court having jurisdiction in administrative law matters used to be the Supreme Administrative Court. The problem, however, was that its jurisdiction was confined to questions of law, as opposed to questions of fact. As a consequence, the Austrian legislator created the so-called 'Independent Administrative Panels' (*Unabhängige Verwaltungssenate*), which are administrative authorities enjoying independence and having full jurisdiction on questions of fact and of law.[80] The Court has accepted those entities as being 'tribunals' for the purposes of Art. 6 para 1.[81] However, the debates about the issue of effective legal protection did not come to an end in Austria. By the year 2014, Austrian administrative law saw the creation of fully-fledged administrative courts of first instance.[82] This is only one example of institutional changes induced by Art. 6 para 1 which could be supplemented by others from the Netherlands, Sweden and Switzerland.[83]

3.2 Judicial review of administrative regulations

According to settled case law, Art. 13 of the Convention does not go so far as to guarantee 'a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to

79 *Kress* (n. 43) para 69.

80 Bundes-Verfassungsgesetz-Novelle 1988, Bundesgesetzblatt Nr 685/1988, introducing Art. 129a et seq Bundes-Verfassungsgesetz (Austrian Constitution); see Ulrike Giera & Konrad Lachmayer in this book.

81 *Baischer v Austria*, Appl no 32381/96 (ECtHR, 20 December 2001), para 25.

82 H. P. Lehofer, ' "Verwaltungsgerichtsbarkeit neu" – die wichtigsten Änderungen im Überblick' (2013) 68 *Österreichische Juristenzeitung* 757, 759.

83 cf Gundel (n. 27) MN 28; R. Hofmann, 'Erweiterung des verwaltungsgerichtlichen Rechtsschutzes in Schweden' (1990) 17 *Europäische Grundrechte-Zeitschrift* 10; Kley-Struller, *Art 6 EMRK als Rechtsschutzgarantie gegen die öffentliche Gewalt* (1993) 86; A. Knutsson, 'Some Aspects of the Jurisdiction of the European Court of Human Rights and Its Influence on Swedish Law' in P. Mahoney et al. (eds.), *Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal* (2000) 715 et seq; see also Karianne Albers, Lise Kjellevold & Raymond Schlossels (concerning the Nethelrands) and Felix Uhlmann (concerning Switzerland) in this book.

equivalent domestic legal norms.'[84] In other cases, the Court formulates that 'Article 13 cannot be interpreted as requiring a remedy against the state of domestic law'.[85] This jurisprudence, however, is concerned with acts of Parliament. It reflects the situation that in many European states, judicial review of acts of Parliament used to be, and partly still is, unknown, due to separation of power arguments. With respect to administrative regulations, this rationale does not hold true. Therefore, it can generally be deduced that under Art. 13, there must be some kind of remedy to a national 'authority' against administrative regulations, capable of challenging their conformity with Convention standards.[86]

4 Conclusion

The Convention sets standards for the effective legal protection in administrative law matters. This is mainly due to the autonomous understanding of Art. 6 para 1, which has lead the Court to apply this guarantee to many administrative law cases in a way definitely not anticipated by the Contracting States in 1950. The overview of the Court's jurisprudence has shown a certain preponderance of Art. 6 para 1, compared to Art. 13 of the Convention, which results from the *lex specialis* character of the former. Still, a full picture of the principle of effective legal protection under the Convention requires that both Articles be taken into account.

From a Convention perspective, strengthening of legal protection at national level is a demand for at least two reasons: First, it is well in line with the principle of subsidiarity, which underlies the whole Convention machinery.[87] According to the principle of subsidiarity, the State concerned should have the opportunity first to wipe out the consequences of a Convention violation. This is so because the national authorities are usually better-equipped to do that, compared to the judges in Strasbourg. Hence, the principle of subsidiarity serves an effective protection of human rights.

Secondly, strengthening national remedies is also in the Court's own interest. National systems where the legal protection is deficient lead to hundreds and thousands of applications being lodged with the Court in Strasbourg. It is common knowledge that the long-term functioning of the Court mainly depends on the improvement of the legal protection at the national level. Hence, the importance of the issue of effective legal protection cannot be overestimated.

84 *James and Others v the United Kingdom*, Appl no 8793/79 (ECtHR, 21 February 1986), para 85.
85 *IG and Others v Slovakia*, Appl no 15966/04 (ECtHR, 13 November 2012), para 156.
86 Breuer (n. 25), Art 13 MN 16.
87 Kudła (n. 51), para 152; see also the Preamble of the Convention, as amended by Protocol No 15 (n. 20).