

THE SUBSIDIARY PROTECTION OF EUROPEAN CONVENTION ON HUMAN RIGHTS

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ÖZET

Bu makale İnsan Hakları Sistemi'nin ikincil olması yoluyla haklar ve ihlal edildiğinde hakların yerine getirilmesi arasındaki mündemiç bulunan bağı incelemeyi hedeflemektedir. Sınırlı bir çalışma olması hasebi ile konunun tüm detaylarının incelenmesi mümkün değildir. Çalışmamız Hakkın Yerine Getirilmesi konseptinin Uluslararası İnsan Hakları Sistemi içindeki tarihsel gelişimi bağlamında iki konsept arasındaki teorik ilişkiyi açıklamakla başlayacaktır. Sonra, Hak ve hakkın Yerine Getirilmesi arasındaki ilişki Avrupa İnsan Hakları Sistemi bağlamında incelenecektir. Çalışmamız Avrupa İnsan Hakları Sözleşmesi Sisteminde İkincillik (Subsidiarity) Prensiplerinin incelenmesi ile sona erecektir.

ANAHTAR KELİMELER: Avrupa İnsan Hakları Sözleşmesi, İkincillik Prensipleri, Hak, Hak İhlali, Hakkın Yerine getirilmesi.

İNSAN HAKLARI SÖZLEŞMESİNİN İKİNCİL KORUMASI

ABSTRACT

This study tries to explain the intrinsic relationships between rights and remedy through the subsidiarity of the European Human Rights System. Since it is a small study we are unable to examine the topic in all details. It will begin with theoretical relationships between the two concepts as well as historical development of remedy in international human rights law mechanism. Then rights-remedy relationships in the context of the European Convention system will be explained. The study will finish by looking into the principle of subsidiarity in the structure of the European Convention on Human Rights

KEY WORDS: European Convention on Human Rights, Subsidiarity Principle, Right, Violation of Right, Remedy.

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I. GİRİŞ

The European Convention on Human Rights is a treaty of a Western European international organization namely Council of Europe. The object of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles that are their common heritage. In this respect, the rule of law and respect for human rights are two pillars of the organization.

One of the basic principles underlying the Convention, which aims to strike balance between sovereignty of State Party and Conventions' international institutions, is the Principle of Subsidiarity. In the field of human rights, the sovereignty of States requires that central matters should be left to them to reach promotion and protection of fundamental rights. The European Court of Human Rights has determined that the role of the Convention is subsidiary to national protection systems. This outcome is not just interpretative since the principle can be found in the structure of the Convention.

This study tries to explain the intrinsic relationships between rights and remedy through the subsidiarity of the European Human Rights System.

II. DEVELOPMENT OF THE RIGHT A TO REMEDY

1. Development of International Human Rights Law: An Increasing Tendency for a Better Status for Individuals

International human rights law developed rapidly in the last century. Having seen the atrocities of Second World War, the international community established the United Nations with the aim of preventing such tragic occurrences and maintaining international peace and security. The United Nations Charter explains one of its basic principles in its preamble as '*...promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,*'¹ And its Article 55 requires the international community to promote 'universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'² Furthermore, United Nations has spent considerable much effort in the field of human rights and has produced important standard setting documents and instruments, both non-binding and

¹ Article 1(3) of UN Charter, reprinted in Brownlie I, *Basic Documents on Human Rights 3rd edition*, (Oxford University Press, 1999) p.4

² *Supra* n.8, p.6

binding in nature³ These efforts contributed to strengthen the position of individual against the State.

2. Regional Protection: Strengthening Global Protection

In addition to the universal improvements of the United Nations, regional human rights protection systems were established. The Council of Europe was established in 1949 and adopted The European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. The European system is unique; as it is the first system to have created an international court, thereby allowing the individual to become an actor in international law.⁴ The Inter-American human rights system and African system are two other regional systems. Those regional systems contributed the promotion of the human rights at regional level.

II. RIGHTS AT HOME NOT AT STRASBOURG IN THE CONTEXT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

When we examine the whole protection structure of the ECHR we see that it requires that rights and freedoms should be secured at the domestic level. In this regard, Articles 1, 13 and 35 reflect this notion clearly. In this chapter the relationship between those Articles is being examining.

1. Obligation to Respect Human Rights (Article 1)

The ECHR at the first place obliges the states parties to secure the rights embodied in the ECHR at their national level. Article 1 of ECHR provides that ;

³ Universal Declaration of Human Rights, otherwise UDHR, was adopted on 10 December 1948 and today it is a part of customary international law. The Universal Declaration was followed by two main covenants which are binding on States parties: International Covenant of Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966). Furthermore, there are subject specific instruments produced by United Nations.

⁴ Article 34 of ECHR reads: “ The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the convention or the protocols thereto. The High Contracting Parties not to hinder in any way the effective exercise of this right.” Supra n.8 p.36

The Subsidiary Protection of European Convention on Human Rights

‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’⁵

The high contracting parties of the Convention, according to the requirement of Article 1, are obliged to bring their domestic law and practices to the level of the Convention. But the states are free on how to comply with this requirement.⁶ This means that, the state party is not obliged to incorporate the convention into its domestic law. However, goodfaith interpretation of Article 1 requires that state party should provide a mechanism that individuals enjoy guarantees of the Convention. In this regard the European Court of Human Rights has the duty to assess compatibility of domestic law with the Convention when relevant law became the subject of its judgement. It is implicit from this Article that the obligation of state party is immediate. Another obligation of state under this provision is that it has a positive duty to secure rights of individuals. Thus, for example where necessary the state should criminalise the actions of other members of the society which violate an individual’s rights. Accountability for human rights violations rests with the state party but not on individuals. No complaint can be brought against other individuals for human rights violations. Solely the state is responsible for the violation.

The word everyone means that there is no distinction between nationals and non-nationals (citizens/non-citizens) with regard to rights embodied in the convention.⁷ All individuals who are living in the territory of state and even

⁵ Supra note 8, p.327

⁶ Cameron I, *An introduction to the European Convention on Human Rights*, (Iustug Forlag, Upsala, 1998), p.30, This conclusion that the state party is not obliged to incorporate the convention into its domestic law or to secure rights in a given manner referred in a number of cases e.g. in Swedish Engine Drivers’ Union v. Sweden case, Judgement of 6 February 1976, para.50 the Court stated that; ‘...In addition, neither Article 13 (art. 13) nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention.’

⁷ The Court in Ireland v. UK Judgement of 18 January 1978 para. 239 stated that; ‘...By substituting the words "shall secure" for the words "undertake to secure" in the text of Article 1 (art. 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law ... The Convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; as is shown by Article 14

outside of the states' territory on condition that being effected by its jurisdiction are entitled to complain when their rights violated.⁸ In *Loizidou v. Turkey*⁹ the Court considered the issue of jurisdiction stating ; '...The responsibility of a contracting party may also arise when, as a consequence of military action – lawful or unlawful- it exercises effective control of an area outside its national territory.'

The question of whether Article 1 can be subject of violation separately or in conjunction with any other Article was answered in *Ireland v. UK*¹⁰

Article 1 (art. 1) is drafted by reference to the provisions contained in Section I and thus comes into operation only when taken in conjunction with them; a violation of Article 1 (art. 1) follows automatically from, but adds nothing to, a breach of those provisions; hitherto, when the Court has found such a breach, it has never held that Article 1 (art. 1) has been violated.

Article 1 of the Convention is a general safeguard for individuals; States Parties are obliged to make improvements in good faith to ensure protection and promotion of human rights in their territory.

(art. 14) and the English text of Article 1 (art. 1) ("shall secure"), the Convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels." By the word everyone it should be understood that it includes legal and natural persons.

⁸ In *Issa and Others v. Turkey* Application No:31821/96 , The European Court of Human Rights declared admissible the allegations of applicants that their relatives were killed by Turkish security forces while conducting military operation in northern Iraq outside the territory of Turkey. It was said in an outstanding text book regarding the jurisdiction of state that; '...Whereas the Commission emphasises control over persons and property, the court has introduced the test of 'effective control of an area outside its national territory'. It has now been placed beyond doubt that the Convention is applicable to army operations abroad and more subtly, to any subordinate administration that results from such activities...The effect of *Loizidou v. Turkey* (Preliminary objections) is that the state cannot insulate itself from the Convention scrutiny...by operating beyond state frontiers. *Supra* n.37 Harris D.J pp.643, 644

⁹ Preliminary Objections, Judgement of 23 March 1995 para.62

¹⁰ Judgement of 18 January 1978, para.238

III. RIGHT TO AN EFFECTIVE REMEDY (Article 13)

1. The Origin of Article 13

The right to an effective domestic remedy, as explained in first chapter, is found in all international human rights treaties. This right is the crucial one to protect fundamental rights and basic freedoms of individuals. Article 13 of ECHR, which provides the right to an effective domestic remedy, is based on Article 8 of the Universal Declaration of Human Rights. During the drafting procedure of the UDHR Article 8 was proposed by the Mexican delegate based on the amparo¹¹ procedure and this proposal was adopted. As Article 8 of UDHR was originated from the amparo procedure of Latin American states, so it can be said that the amparo procedure is the origin of Article 13 of ECHR as well.¹²

2. The Purpose of Article 13 : Remedy at Home?

The obligation of a state party to the Convention under Article 1¹³ requires that state party should secure the rights and fundamental freedoms by measures one of which is providing effective domestic remedies under Article 13. According to the whole protection system of ECHR, the state party is obliged to implement the rights and freedoms set forth by the Convention at the domestic level by providing domestic remedies. Effective domestic remedy is obviously very important in order to 'secure' the rights and freedoms guaranteed by the Convention as a requirement of Article 1.¹⁴ The protection system of the European Convention aims to secure the rights in two ways. Primarily the contracting parties are obliged to ensure protection and promotion of fundamental rights at the domestic level. In this regard, Article 13 of Convention provides a general right to an effective remedy before a national authority. The individuals, according to the Article 13, should have the right to full redress of their human rights violations. However, should the domestic procedures fail to

¹¹ The amparo procedure in Latin American States is somewhat like Habeas Corpus that aims to provide citizens with a judicial protection against the violation of their constitutional freedom.

¹² Raymond J, *A Contribution to the Interpretation of Article 13 of the European Convention on Human Rights*, in *Human Rights Review*, V HRR (1980) 161

¹³ "The high Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." Article 1 of ECHR supra n.8, p.327

¹⁴ Gomien D, Harris, D, Zwaak L, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, p.336

do this, secondly the international review procedures of the Convention come into play.¹⁵

3. Effective Domestic Remedies and Exhaustion of Them

When we examine Article 1, 13 and 26 of the Convention together, we see that one of the main aims of Convention is to protect rights and freedoms by providing effective and accessible domestic remedies, in the state party itself. By the wording of Article 13 ‘effective remedy before a national authority’ it is understood that there is no need that effective remedy be a judicial one. As long as it is effective any kind of remedy (judicial, administrative, legislative) is sufficient to meet requirement of Article 13.¹⁶

It is crucial that the domestic remedy should be effective to redress the violation of rights set forth in the convention.¹⁷ Therefore, Article 26 does not require to exhaust un-effective domestic remedies.. It should be clarified that in which circumstances domestic remedies are effective or visa versa. We can find the answer in the case-law of the Court.

The Court stated explaining this problem:

“ An action for damages may be relevant for the purposes of Article 26 of the Convention, but the only remedies which that article requires to be exhausted are those that relate to the breaches alleged and which are at the same time *available and sufficient*. The existence of such remedies must be sufficiently certain *not only in theory but also in practice*, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied. (emphasis added)¹⁸

The wording of Art.13 and as it was developed by the case-law the exhaustion rule requires that provided domestic remedies must be effective. Effectiveness should be assessed in terms of alleged violation of right set forth in Convention in relation to assessing the cumulating of remedies available in the domestic law.¹⁹

¹⁵ Ibid Gomien D et al. p.336

¹⁶ Clements L, Mole N, Simmons A, *European Human Rights: Taking A Case Under The Convention*, Second Edition (Sweet & Maxwell, London , 1999) p.29
Golder v. United Kingdom , Judgement of 21 February 1975, series A, No: 18 para.33, Silver and others v. UK Judgement of 25 March 1983 para.113

¹⁷ Supra n.54, Gomien D et al., p.340

¹⁸ Navarra v. France Judgement of 23 November 1993 Series A No: 273-B para.24

¹⁹ Supra n.37, p.450

Hypothetical availability of effective domestic remedies in national legal system is not enough. In addition to existence of effective domestic remedies in law, there should be facility of applicant to take effective advantage of those remedies. The Court stated:

“ The only remedies which Art.26 of the Convention requires to be exhausted are those that relate to the alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. It falls to the respondent state to establish that these various conditions are satisfied.”²⁰

4. Exceptions of the Application of Exhaustion Rule

The exhaustion of domestic remedies rule can be applied with a degree of flexibility when required by the particular conditions of the case concerned. The Court explained in the *Guzzardi v. Italy*²¹ case that Article 26, which refers to "the generally recognised rules of international law", should be applied with a certain degree of flexibility and without excessive regard for matters of form. Merrills has the opinion that it is not necessary to exhaust every conceivable remedy, but only those that are available and sufficient.²² It was clearly established by the case-law of the European Court of Human Rights that if provided domestic remedies are not effective according to its case-law there will be no need to exhaust them as a prerequisite of admissibility.²³

The Court explained:

“...under international law, to which Article 26 makes express reference, the rule of such exhaustion of local remedies demands only the use of such remedies as are available to the persons concerned and are sufficient that is to say, capable of providing redress for their complaints.”²⁴

²⁰ De Jong Balget & Van Den Brink v. Netherlands , Judgement of 22 May 1984, para.89

²¹ Judgement of 6 November 1980, para.72

²² Merrills J.G, *The Development of International Law by the European Court of Human Rights* (Manchester University Press) p.213

²³ Campbell and Fell v. UK Judgement of 28 June 1984 paras. 60-61, Van Oosterwijck v. Belgium Judgement of 6 November 1980 para.27, Deweer v. Belgium judgement of 27 February 1980 para.29, Airey v. Ireland judgement of 9 October 1979, para. 19

²⁴ Supra n.69, Vagrancy case, para.60

International Law Commission at the time of preparing draft Articles on state responsibility adopted a provision on exhaustion of domestic remedies and expressed that exhaustion rule requires:

- (a) that the usable remedies must be effective and
- (b) that they must genuinely available in the case in point.²⁵

By implication from these arguments, it is obvious that the effectiveness of domestic remedies depends not only their existing in the national legal system but availability and accessibility of them by applicants.

The exhaustion of domestic remedies issue examined in Andersson (M and R) v. Sweden case. In that case a mother and her son were applicant. They claimed that the removal of the child to public care and the conditions of the care violated the Article 8 the right to respect for family and privacy. There were available remedies in the Swedish law to challenge such decisions. However, the child could take advantage of those remedies only thorough his / her guardian, in that case his mother. The separation of mother from her child made it impossible for her to take effective action to protect the child's rights.²⁶ If individuals are denied or prevented in their access to remedies, those remedies cannot be accepted as genuinely available in practice.²⁷

To be an effective remedy, the remedy must have capability of redressing the violation directly but not merely indirectly. This principle is applied extensively to a state's expulsion of foreign nationals. Expulsion issue has repeatedly been held that where an individual alleges that expulsion would face him / her to serious danger, an appeal without suspensive effect cannot be regarded as an effective remedy. Therefore, in that case there is no need to exhaust ineffective appeal stage. Another situation, which makes a domestic remedy ineffective, is its extensive delay.

Effective domestic remedies should have capacity of satisfying person whose rights have been violated and should be capable to deter such violations. So, such effective remedy should punish perpetrator(s) of violation. If perpetrators of violations (are) punished for their unlawful acts, it expected that it would reduce or stop their repetition.

²⁵ Yearbook of the ILC part 2 p.47 (1977) quoted from Amnesty International written comments in the case of Akdivar v. Turkey Judgement of 16 September 1996

²⁶ Andersson (M and R) v. Sweden, Judgement of 25 February 1992, paras.98-103

²⁷ The Amnesty International comments submitted in the case of Akdivar v. Turkey

The Court stated that:

“ Article 13 imposes, without prejudice to any other remedy available and effective domestic system, an obligation on states to carry out a thorough and effective investigation of incidents of torture. Accordingly as regards article 13 where an individual has an arguable claim that he has been tortured 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 individual to the investigatory procedure.”²⁸

The Court found in Aksoy case that the compensation itself is not sufficient, in addition to compensation; there is requirement of a thorough investigation for identification and punishment of perpetrators. This test should be applied to not only torture cases but also other violations such as violation of the right to life, disappearances, village destruction cases etc. it is crucial that besides awarding compensation for violation of rights and freedoms, a thorough investigation to find and punish perpetrators at domestic level will definitely reduce repetition of violation. So far, this paper has tried to examine the effectiveness of the domestic remedies in a general frame. It came to the conclusion that the requirement of Art.13 that states parties should provide effective domestic remedies to recourse the violations of rights and freedoms first of all at domestic level is one of the core aims of the Convention.

While Article 13 provides obligation of states, Article 26 provides obligation of individual. Article 26 of the Convention provides a condition of admissibility. It requires that applicants should first exhaust all domestic remedies before invoking the Convention institutions.

The exhaustion of domestic remedies rule is based on the generally recognised international law principle that the respondent state must first have an opportunity to correct, by its own means within the framework of its own domestic legal system, the wrong allegedly suffered by the individual.²⁹ Another comment is that the rule of exhaustion of domestic remedies expresses the

²⁸ Aksoy v. Turkey Judgement of 18 December 1996, para.98

²⁹ Nedjati Z.M, *Human Rights under the European Convention*, (North Holland Publishing, Amsterdam, New York, Oxford, 1978) p.16

P.van Dijk, G.J.H van Hoof, *Theory and Practice of the European Convention on Human Rights*, (Kluwer Law and Taxation Publishers, Deventer, Boston, 1990) p.81

Schouw Nielsen v. Denmark, Yearbook II, (1958-1959) p.412 (438) quoted from van Dijk, *Theory and practice of the European Convention...*

respect for the sovereignty of States.³⁰ Exhaustion of domestic remedies is not an absolute admissibility condition.³¹ The Commission applies the rule with flexibility. The Commission's point of departure for flexibility is that each case should be examined in the light of its particular facts'.³² In this connection, if domestic remedies are ineffective for some reasons then there will be no need to exhaust such remedies.³³ In a situation where there exists an administrative practice and official tolerance at highest level of the state the applicants will not be required to exhaust local remedies. Because, in that situation it is obvious that local remedies cannot provide redressing of violation effectively as required by the Art.13 of Convention.³⁴ According to the Commissions' assessment

³⁰ Et.al Encyclopaedia of Public International Law, Volume 3 (Oxford et.al, 1997) p.238

³¹ The Court clearly explains that exhaustion of domestic remedies rule is not an absolute rule. In it's the van Oosterwijck v. Belgium judgement of 6 November 1980 para.35 the expression of the Court reads; "The rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case."

Article 46 (2) of the American Convention on Human Rights expressly provides that the requirement of exhaustion of domestic remedies "shall not be applicable when:

- a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated.
- b) The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c) There has been unwarranted delay in rendering a final judgement under the aforementioned remedies

Supra n.8, Brownlie I, p.511, see further information in Advisory opinion of Inter-American Court of Human Rights on the exceptions to the exhaustion of domestic remedies, accessing from http://www1.umn.edu/humanrts/iachr/b_11_4k.htm visited 20.07.2001

³² Supra n.38, van Dijk, Theory and Practice... p.82

³³ Supra n.82, Akdivar v. Turkey para.67 . "However, there is, as indicated above, *no obligation to haverecourse to remedies which are inadequate or ineffective*. In addition, according to the "generally recognised rules of international law" there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal..."(emphasis added)

³⁴ Supra n.37, p. 620

administrative practice has two elements; (a) repetition of acts and (b) official tolerance.³⁵ The Commission explained these two elements as follows:

“By ‘repetition of acts’ is meant a substantial number of acts of torture or ill-treatment which are the expression of a general situation. The pattern of such acts may be either, on the one hand, that they occurred in the same place, that they were attributable to the agents of the same policy or military authority, or that the victims belonged to the same political category; or, on the other hand, that they occurred in several places or at the hands of distinct authorities, or were inflicted on persons of varying political affiliations. By ‘official tolerance’ is meant that, though acts of torture or ill treatment are plainly illegal, they are tolerated in the sense of that the superiors of those immediately responsible though cognisant of such acts, take no action *to punish them or prevent their repetition* (emphasis added); or that higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceeding, a fair hearing of such complaints is denied.”³⁶

The applicant is obliged, considering these arguments and established case law, by exhausting only effective domestic remedies. Where there is an administrative practice there is no doubt that domestic remedies cannot be effective. So, in such a situation the applicant can bring his / her case before Strasbourg without exhausting domestic remedies. This approach is compatible with the whole structure of Convention and the aim of Strasbourg protection machinery that rights should be protected primarily at home rather than at Strasbourg.

4. Article 13 as an Implementation Tool of the Convention

Article 13 can be regarded as the main tool of implementation of the Convention in the domestic level. This conclusion is found in the courts’ judgement; “The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to *enforce the substance of the Convention rights and freedoms* (emphasis added) in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision.”³⁷ As

³⁵ Supra n.54, p.57

³⁶ The Greek Case, Commission Report, 05.11.1969 paras.28-29

³⁷ Supra n.97, Avsar v. Turkey para.429, see for the same conclusion Kilic v. Turkey Judgement of 28 March 2000, para.91. Similarly the Court stated in

it was previously explained, the whole structure of the Convention naturally intends to secure the rights at domestic level. This aim can be reached mainly by providing remedies for violation of rights and freedoms guaranteed in the Convention as required by Article 13.

One of the main problems in the interpretation of Article 13 was determining whether the intention of the provision that required domestic remedies was to provide a facility for individuals in the domestic legal system to test if his/her Convention rights had been violated and if so to remedy them, or whether the provision requires establishing of domestic remedy to obtain the enforcement of a judgement that the individual won at the European Court of Human Rights. This problem results from the literal interpretation of words of provision ‘...whose rights and freedoms ...*are violated* shall have an effective remedy...’ (emphasis added).³⁸ If this literal interpretation has been accepted, no cases would reach the Court when the state party fully complied with the requirement of Article 13. Or, all cases before Strasbourg should have alleged violation of any other article of the Convention as well as Article 13, and a violation of Article 13 would be found only when violation of any other article has been found. This interpretation makes Article 13 meaningless.³⁹

Until its judgement in the *Klass* case in 1978, the Court had accepted the literal interpretation of Article 13. The Court had been finding the violation of Article 13, if it found the violation of any other Article at the same time. However, The Court in its *Klass v. FRG*⁴⁰ case changed this approach rejecting literal interpretation of Article 13 and so clarified this vagueness. The applicant

Soering v. UK Judgement of 7 July 1989 para.120 ‘Article 13 (art. 13) guarantees the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms...The effect of Article 13 (art. 13) is thus to require the provision of a domestic remedy allowing the competent "national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief...’

³⁸ *Supra* n.37, Harris D.J et al. p.444

³⁹ *Supra* n.37, Harris, D.J et al. p.446

⁴⁰ Judgement of 6 September 1978, para.64 The Court stated that; ‘...In the Court's view, Article 13 (art. 13) requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus Article 13 (art. 13) must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who *claims* that his rights and freedoms under the Convention have been violated. ‘ (emphasis added)

in that case claimed that tapping of his telephone violated his right guaranteed by Article 8 of the Convention and that he has not remedy to review his claim and obtain redress as a requirement of Article 13. The court rightly ruled that a finding of the violation of the convention on the domestic level cannot logically be a prerequisite of the application of the Article 13. The court stated this connection as follows:

Article 13 (art. 13) states that any individual whose Convention rights and freedoms "are violated" is to have an effective remedy before a national authority even where "the violation has been committed" by persons in an official capacity. This provision, read literally, seems to say that a person is entitled to a national remedy only if a "violation" has occurred. However, *a person cannot establish a "violation" before a national authority unless he is first able to lodge with such an authority a complaint to that effect.* Consequently, as the minority in the Commission stated, it cannot be a prerequisite for the application of Article 13 (art. 13) that the Convention be in fact violated... (emphasis added)⁴¹

Consequently the Court decided in this judgement that the intention of the provision is to provide domestic remedy for *alleged* violation. When individual claims that one of his Convention right has been violated, he should have a remedy before national authority to decide whether there is violation or not. If there is a violation, that domestic remedy should have capability to redress the breach at the domestic level before applying to Strasbourg.

5. Threshold for the Application of Article 13 the Concept of 'Arguable Claim'

The improvement that the Court made in the Klass case that an individual should have a remedy when he claims that his right guaranteed in the Convention has been violated, is an important achievement from the perspective of the individual. It is obvious that alleged violation should be in conjunction with any rights in the Convention but not any other right, for example right to social security. Until the Klass judgement, the Court ruled for a long time that basic understanding from the wording of the Article 13 means that individuals' right should have been violated in fact. Only when this is the case the individual will be able to benefit from domestic remedy as a requirement of Article 13. Obviously, such an interpretation of Article 13 would largely deprive of its meaning and would make it useless.⁴² However the improvement that was held

⁴¹ Supra n.63, Klass case, para. 64

⁴² The Court clarified this notion in its Plattform Arzte fur das Leben v. Austria Judgement of 21 June 1988 at. Para. 25 "The Government's main submission was that Article 13 (art. 13) applied only where a substantive provision of the

in Klass case gives valuable weight to Article 13 and makes it an independent right. According to the judgement of the Klass case, if there is no remedy in the domestic legal system for possible violations of Convention rights and freedoms, the Convention institutions will be able to find a violation of Article 13 even if they don't find violation of any those of substantive rights and freedoms. However the problem of threshold of application to Article 13 arises with this judgement. The question in this regard is that whether any claim gives the individual a right to an Article 13 remedy. The Court in this regard is of the opinion that Article 13 does not require a remedy in domestic law in respect of any supposed grievance under the Convention.⁴³

The Court in the Silver case took another important further step, which answers the question of threshold concerning application of Article 13. The Court held that applicant will have Article 13 remedy only when he has an 'arguable' claim that his Convention right has been violated. The court stated that "...where an individual has an *arguable claim* to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress..."⁴⁴ The Court has established a threshold of application to the Article 13. This threshold is that not any claim of individual but the arguable claim of individual entitles him/her with right to domestic remedy. The arguable claim notion requires to be clarified as it has possible interpretation of vagueness. The Court has avoided from giving an abstract definition of

Convention had been infringed. As evidence of this, they cited the French text, containing the words "ont été violés", which in their view were clearer than the corresponding English terms ("are violated").

The Court does not accept this submission. Under its case-law, Article 13 (art. 13) secures an effective remedy before a national "authority" to anyone claiming on arguable grounds to be the victim of a violation of his rights and freedoms as protected in the Convention; *any other interpretation would render it meaningless...* (emphasis added)

⁴³ The Court stated this notion in its Boyle and Rice v. UK Judgement of 27 April 1988 at para.52 "However, Article 13 (art. 13) cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention."

⁴⁴ Supra n.65, Silver case, para.113, Leander v. Sweden judgement of 26 March 1987, para.77

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arguability. The arguability of the claim is being tested by the particularities of the case concerned so it is defined on a case-by-case basis.⁴⁵

In the Leander case, applicant Mr. Leander complained that he had been prevented from obtaining a permanent employment and dismissed from a provisional employment on account of certain secret information, which allegedly made him a security risk; was an attack on his reputation and he ought to have had an opportunity to defend himself before a tribunal. He alleged that this was a breach of Article 8 and as there was not any domestic remedy to obtain redress for violation of his right to private life and reputation guaranteed in the Convention constituted a breach of article 13 as well. The Commission expressed the opinion that there had been no breach of Article 8 and that the case did not disclose any breach of Article 13. The Court with regard to Article 13 held that the applicant has the arguable claim concerning Article 8.⁴⁶ Although the Court found that applicants' claim regarding violation of Article 13 was over the threshold of arguability but considering particular circumstances of the case it decided by a narrow majority that aggregate national remedies satisfied the requirements of Article 13.⁴⁷ The Court applied this manner of interpretation when deciding arguable claim threshold concerning alleged violation of Article 13.

In *Plattform Artze fur das Leben case*, a group of individuals who were demonstrating protest against abortion complained that level of police protection was inadequate. They claimed that the Austrian Government had violated the right to peaceful assembly under Article 11. The applicants also claimed that as there was no effective domestic remedy, it constituted a breach of Article 13. The Court held that as the responding government had taken reasonable measures to protect the demonstrators the applicants did not have an arguable claim that Article 11 had been violated. Without such an arguable claim Article 13 could not be considered. The court decided that the responding

⁴⁵ Supra n.106, Boyle and Rice case para.55 states that "The Court does not think that it should give an abstract definition of the notion of arguability. Rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of violation forming the basis of a complaint under Article 13 (art. 13) was arguable and, if so, whether the requirements of Article 13 (art. 13) were met in relation thereto."

⁴⁶ Supra n.107 Leander case, para.79 stated that "There can be no doubt that the applicant's complaints have raised arguable claims under the Convention at least in so far as Article 8 (art. 8) is concerned and that, accordingly, he was entitled to an effective remedy in order to enforce his rights under that Article as they were protected under Swedish law."

⁴⁷ Supra n.107 Leander case, para.84

government had not been violated the Article 13.⁴⁸ The court in this case seems to return to the earlier view that without a finding of violation of any other right it cannot be Article 13 claim.⁴⁹

In the *Powell and Rayner* case, a different aspect of the concept that if there is no violation of substantive right there will be no violation of Article 13 was examined. In this case applicants complained about level of noise from operation of the Heathrow airport which they claimed that it violated their rights to respect for their private lives and homes (Article 8), the right to peaceful enjoyment of property (Article 1 of Protocol 1) and as there was no effective domestic remedy violation of Article 13. The Commission declared the case admissible under Article 13 but inadmissible for the rest claims. On the other hand, the Court decided that; as there is no arguable claim of violation of substantive claims there is no entitlement to a remedy under Article 13.⁵⁰ The problem that if an alleged violation of the Convention was found inadmissible on the ground that it is 'manifestly ill founded' whether it also can be arguable for the purpose of Article 13 has not been solved clearly in the case law of Strasbourg. In the *Boyle and Rice* case, "The Government maintained that a claim of violation of one of the substantive Articles of the Convention which has been declared by the Commission to be "manifestly ill-founded" cannot be regarded as "arguable" for the purposes of Article 13 (art. 13)."⁵¹ The Commission did not agree with governments' contention. The court held in that case that:

As the Court pointed out in its Airey judgment of 9 October 1979, rejection of a complaint as "manifestly ill-founded" amounts to a decision that "there is not even a prima facie case against the respondent State" (Series A no. 32, p. 10, § 18). On the ordinary meaning of the words, *it is difficult to conceive how a claim that is "manifestly ill-founded" can nevertheless be "arguable", and vice versa. This does not mean, however, that the Court must hold a claim to be excluded from the operation of Article 13 (art. 13) if the Commission has previously declared it manifestly ill-founded under the substantive Article. The Commission's decision declaring an application admissible determines the scope of the case brought before*

the Court (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 63, § 157). The Court is precluded from reviewing on their merits under the relevant Article the complaints rejected as

⁴⁸ Plattform Arzte fur das leben v. Austria judgement of 21 June 1988 para.39

⁴⁹ Supra n.54, p.338

⁵⁰ Powell and Rayner v. UK, Judgement of 21 February 1990, para.46

⁵¹ Supra n.106, Boyle and Rice case, para.53

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manifestly ill-founded, but empowered to entertain those complaints which the Commission has declared admissible and which have been duly referred to it. The Court is thus competent to take cognisance of all questions of fact and of law arising in the context of the complaints before it under Article 13 (art. 13) (ibid.), including the arguability or not of the claims of violation of the substantive provisions. In this connection, the Commission's decision on the admissibility of the underlying claims and the reasoning therein, whilst not being decisive, provide significant pointers as to the arguable character of the claims for the purposes of Article 13 (art. 13). (emphasis added)⁵²

It is understood from this judgement that the Court is of opinion that there is possibility of a claim to be 'arguable' for the purpose of article 13 which was found by the Commission 'manifestly ill founded' in terms of the main complaint. In the Plattform Arzte case the Commission declared the complaint under Article 11 inadmissible as being manifestly ill-founded but it considered the complaint arguable for the purposes of Article 13. However, the court ruled that no arguable claim that Article 11 was violated has thus been made out; Article 13 therefore does not apply in the instant case.⁵³ This view is contradictory with its earlier judgement in the Boyle and Rice case. The court in the Powell and Rayner case gave a such contradictory judgement regarding relation between 'manifestly ill founded' and 'arguability' concepts. The court in that case ruled that the Commission should establish same threshold when declaring claims 'manifestly ill founded' under Article 27.2(now Article 35.3) and in regard to notion of 'arguability' under Article 13.⁵⁴ Prof. Hampson is of

⁵² Supra n.106, Boyle and Rice case, para.54

⁵³ Supra n.105 Plattform Arzte fur das Leben case, para. 39

⁵⁴ The Court in Powell and Rayner v. UK, Judgement of 21 February 1990 para.33 examined the relationship between manifestly ill founded and arguability concepts : "Furthermore, Article 13 and

Article 27 § 2 (art. 13, art. 27-2) are concerned, within their respective spheres, with the availability of remedies for the enforcement of the same Convention rights and freedoms. The coherence of this dual system of enforcement is at risk of being undermined if Article 13 (art. 13) is interpreted as requiring national law to make available an "effective remedy" for a grievance classified under Article 27 § 2 (art. 27-2) as being so weak as not to warrant examination on its merits at international level. *Whatever threshold the Commission has set in its case-law for declaring claims "manifestly ill-founded" under Article 27 § 2 (art. 27-2), in principle it should set the same threshold in regard to the parallel notion of "arguability" under Article 13 (art. 13).* This does not mean, however, that in the present case the Court is bound to hold Article 13 (art. 13) inapplicable solely as a result of the Commission's decisions of 17 October

the opinion that by rejecting the Commissions' practice of holding certain claims to be 'arguable' for the purposes of Article 13, notwithstanding their 'manifestly ill founded' character under the principle complaint, the court either rejected or showed that it did not understand the concept of 'manifestly ill founded' as it has evolved in the Commission's jurisprudence.⁵⁵

6. Does the Convention Require States to Incorporate it into their Domestic Law?

Having looked at Articles 1 and 13 of the Convention at first sight it seems that these provisions require that the Convention should be internally applicable. Otherwise it is the question how can a State party secure the rights and freedoms guaranteed in the Convention without making these defined rights applicable in the domestic legal system? As for Article 13, a State party of the Convention cannot provide effective remedy without making it possible to claim the violation of defined rights in the Convention before the national authority. The scholars and practitioners in the field argued this question. Prof Thomas Buergenthal expressed his opinion that the Convention obliged the State party to make it internally applicable.⁵⁶

However the view that the Convention obliged State party to incorporate it into the domestic law has not been adopted by the case law of the

1985 and 16 July 1986 declaring the applicants' substantive claims under Articles 6 § 1 and 8 (art. 6-1, art. 8) to be manifestly ill-founded. Whilst those decisions as such are unreviewable, the Court is competent to take cognisance of all questions of fact and law arising in the context of the Article 13 (art. 13) complaints duly referred to it, including the "arguability" or not of each of the substantive claims (...) In order to determine the latter question, the particular facts and the nature of the legal issues raised must be examined, notably in the light of the Commission's admissibility decisions and the reasoning contained therein. In that connection, as the case of Boyle and Rice and the case of Plattform "Ärzte für das Leben" show, a claim is not necessarily rendered arguable because, before rejecting it as inadmissible, the Commission has devoted careful consideration to it and to its underlying facts." (emphasis added)

⁵⁵ Hampson J.F, *The Concept of an Arguable Claim under Article 13 of the European Convention on Human Rights*, in *International and Comparative Law Quarterly*, 39(1990) 891 at p.896

⁵⁶ Frowein J.A, *Incorporation of the Convention into Domestic Law*, in Gardner J.P (ed.), *Aspects of Incorporation of the European Convention on Human Rights into Domestic Law*, (The British Institute of International and Comparative Law, 1993) p.3 at p.4

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Convention organs. The Court in the Swedish Engine Drivers' Union case⁵⁷ stated that:

...In addition, neither Article 13 (art. 13) nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention.

The court repeatedly confirmed this principle. The Court in the Lithgow and Others⁵⁸ reaffirmed this principle and expressly stated that the State party is not obliged to incorporate the Convention into its domestic law. The Court stated in that case:

...However, 'neither Article 13 (art. 13) nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention'(...). Although *there is thus no obligation to incorporate the Convention into domestic law*, by virtue of Article 1 (art. 1) of the Convention the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States (...) Subject to the qualification explained in the following paragraph, Article 13 (art. 13) guarantees the availability within the national legal order of an effective remedy to enforce the Convention rights and freedoms in whatever form they may happen to be secured.(emphasis added)

The Court in Boyle and Rice⁵⁹ case confirmed that the State party is free to secure rights guaranteed in the Convention by its own manner. It stated that Article 13 guarantees the availability of a remedy at national level to enforce - and hence to allege non-compliance with - the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. It can be said that the 'doctrine of margin of appreciation' established by the Convention organs is the expression of the same principle. The Court expressed the opinion that because of their direct knowledge of their society and its needs and resources, the national authorities are in principle better placed than the international judge to appreciate what measures are appropriate in this area and consequently the margin of appreciation available to them should be a wide one.⁶⁰ Consequently, it is obvious from judgement of the

⁵⁷ Judgement of 6 February 1976, para.50

⁵⁸ Judgement of 8 July 1986, para.50

⁵⁹ Judgement of 27 April 1988, para.52

⁶⁰ Lithgow and Others v. UK Judgement of 7 July 1986 para.122

Court regarding interpretation of various provisions particularly Articles 1 and 13 that incorporation of the Convention into the domestic law is not required by the Convention. In this connection, the court has consistently held that a state is not obliged to adopt a particular method of ensuring the observance rights guaranteed by the Convention.⁶¹ However, as the Court expressed in the *Ireland v. UK*⁶² judgement incorporation is ‘a particularly faithful reflection’ of the idea that the Convention rights should be secured within the jurisdiction of the States Parties. Thune says that the best way to strengthen the national protection of human rights is to encourage incorporation of the Convention in the countries where this has not yet been done. Thune rightly argues that Article 13 is not a good tool to implement the convention suggesting that the best way is the incorporating the Convention into domestic law.⁶³

IV. THE PRINCIPLE OF SUBSIDIARITY

In this chapter the principle of Subsidiarity will be defined and it will be examined in the contexts of European Union and the ECHR. Examination of the principle in European Union context will help to understand the content and nature of the principle. This examination will give the chance to assess the application of the principle in both the European Union and the ECHR mechanisms.

1. Definition

The general understanding of the Principle of Subsidiarity is that in a community of societal ‘pluralism’ the larger social unit should assume responsibility for functions only insofar as the smaller social unit is unable to do so.⁶⁴ One commentator suggests that subsidiarity in a compound political system with several levels of decision-making means that policies should always be made at the lowest possible level, and that the higher level should only legislate when there is unanimous agreement that uniform regulation is necessary.⁶⁵ The principle requires that problems be solved where they occur, by those who understand them best, and by those who are most affected by them. Only when

⁶¹ Janis M, Kay R, Bradley A, *European Human Rights Law Text and Materials*, (Oxford University Press, 2000) p.472

⁶² *Supra* n.47, *Ireland v. UK* para. 239

⁶³ *Supra* n.1, p.92

⁶⁴ Petzold H, *The Convention and the Principle of Subsidiarity*, in Macdonald R. St. J at all (eds) *the European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, Dordrecht-Boston-london) 41 at p.41

⁶⁵ Hueglin T, *Federalism, Subsidiarity and the European Union Tradition*, article available at <http://www.ecsanet.org/conferences/1to.htm> visited on 10.07.2001

their efforts fail should the matter be placed before a higher authority.⁶⁶ Subsidiarity divides decision-making in society, considering values of efficiency, liberty and justice so it calls for non-interference with the activities of individuals or smaller groups when these are capable of the tasks appropriate to them, and assistance to individuals and lesser societies when these are not able to perform appropriate or necessary tasks.⁶⁷ The principle originated in Christian theological sources concerned with church governance.⁶⁸ It emerged as a principle of organisation in the law of the Calvinist church and was later taken up by the Catholic Church. It was endorsed in the Encyclical *Quadragesimo Anno* of 1931 as a principle to delimit the functions and responsibilities of the State on the one hand and of society and its members on the other.⁶⁹ Recently, the European Community re-discovered the principle. Now the principle is referred to in the Treaty on European Union.

2. The principle of Subsidiarity and The European Convention on Human Rights

Unlike the treaty on European Union there is not expressly mention of the principle of subsidiarity in the European Convention on Human Rights. This is not surprising as the Council of Europe that the ECHR belongs contrary to the European Union is an international organisation aiming intergovernmental cooperation. The European Union, on the other hand, is a political union organisation. It aims political integration of member states. However not being expressly mentioned of, it should not be understood that principle of subsidiarity has not any role in the organisation and operation of the ECHR. The principle is implicit from the protection system established by the Convention. The ECHR's task is to provide a supplementary remedy to those safeguards that domestic law of the States Parties offers to individuals. Therefore, as it was expressed in one of the judgements of Strasbourg, it is in no way the Court's task to take the place of the competent national courts but rather to review ... the decisions they

⁶⁶ Shelton D, *Subsidiarity, Democracy and Human Rights*, in Gomien D (ed), *Broadening the Frontiers of Human Rights; Essays in Honour of Asbjorn Eide*, 1993 43 at pp.43-44

⁶⁷ Utz A, *the Principle of Subsidiarity and Contemporary Natural Law*, *Natural Law forum*, vol.3 (1958), p.177 quoted from *ibid* Shelton D, p.47

⁶⁸ Vause W.G, *The Subsidiarity Principle in European Union Law -American Federalism Compared*, in *27 Case Western Reserve Journal of International Law* 61 at 63 (Winter 1995) accessing from lexis, see also *supra* n.129 at pp.43-44, *supra* note 127 at pp.41-42

⁶⁹ *Supra* n.127, p.42,

delivered in the exercise of their power of appreciation.⁷⁰ The role of the Convention institutions is to supervise the national protection of rights and freedoms guaranteed in the ECHR. In spite of the fact that, the ECHR does not mention expressly the principle the Court held that the protection of the ECHR is subsidiary to that of national law. It stated that;

The Court points out that the machinery of protection established by the Convention *is subsidiary to the national systems* safeguarding human rights ... The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26).⁷¹ (emphasis added)

In addition to the Courts' judgement on the issue, a careful examination of provisions of ECHR too gives us the possibility to see the implied subsidiary character of ECHR mechanism. As we broadly examined in chapter III, the combination of Articles 1, 13 and 26 (now 35) clearly reflects the subsidiary character of the ECHR. In this connection, the States Parties are obliged under Article 1 to secure the Convention rights and freedoms to everyone within their jurisdiction in any form that they freely chose. Article 13 clarifies the obligation of the State Party with regard to enforcement of the rights and freedoms. It requires the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Its effect is thus to require the provision of a domestic remedy allowing the competent "national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate

⁷⁰ Handyside v. UK Judgement of 7 December 1976 para.50

⁷¹ ibid para.48; The court reached the same conclusion in the *Belgian Linguistic Case* supra n.39 para, 10 stating "...In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the *subsidiary nature of the international machinery of collective enforcement established by the Convention*. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention."(emphasis added), Strasbourg reaffirmed this notion in its supra note 82, Akdivar v. Turkey case "...[I]t is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights."

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relief.⁷² Article 13 makes clear the States Parties' specific obligation as a requirement of general obligation under Article 1. As it was expressed in the Silver case the application of Article 13 in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 directly to secure to anyone within its jurisdiction the rights and freedoms set out in section I.⁷³ Article 26 completes the combination that reflects the subsidiary character of ECHR. Under this provision a potential applicant has to exhaust all available and sufficient domestic remedies, which are capable of providing the redress for the particular violation. Only when there is no remedy at all or on the condition that existing remedy is not effective, the applicant will be able to invoke the protection of the ECHR institutions. The requirements of Articles 1, 13 and 26 taken together significantly reflects the subsidiary character of the Strasbourg mechanism.

Another reflection in the structure of ECHR regarding subsidiarity is Article 60 (after amending by the protocol 11 Article 53). This provision reads;

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.⁷⁴

The aim of this provision is that the higher level and more favourable human rights guarantees in the national law of States Parties can not be weakened by reference to less effective provisions of the ECHR. Therefore, it is obvious that the ECHR does not have intention to replace the domestic guarantees and to provide safeguards for rights and fundamental freedoms by ECHR guarantees only. It respects the more effective and better protection mechanism of the national law. Article 50⁷⁵ (now 41) also reflects the principle of subsidiarity. This provision requires that if full reparation is not available

⁷² Vilvarajah and Others v. the United Kingdom, Judgement of 30 October 1991, para.122

⁷³ Supra n. 65 Silver case para.113

⁷⁴ Supra n.8, p.339

⁷⁵ "The Court's decisions do not necessarily have the force of law in the legal systems of contracting states. Article 50 provides for cases in which the Court's decisions are incompatible with decisions or measures taken by domestic judicial or other authorities and where the law of a state concerned allows only partial reparation to be made for the consequences of the decision or measure in question. The Court may, in such a situation, accord just compensation to the injured party." Drzemczewski A, *European Human Rights Convention in Domestic Law: A Comparative Study*, 1983 p.5

under national law of State Party, ‘just satisfaction’ can only be awarded by the Strasbourg machinery. The remedy and redress at international level in Strasbourg can come to play only when national legal system cannot provide full reparation. As a result, the protection system of the Strasbourg is secondary to that of national legal mechanism and the redress at Strasbourg is ‘just satisfaction’ which includes the applicants’ legal costs and compensation for pecuniary and non-pecuniary damage. In the framework of subsidiarity, as it was examined earlier, according to the established case law of Strasbourg, in the first place it is the national authorities’ duty to promote and protect human rights and fundamental freedoms of individuals.⁷⁶

The ‘margin of appreciation’⁷⁷ doctrine that established by the Strasbourg case-law stems directly from the principle of subsidiarity.⁷⁸ The Court stated in *Open Door and Dublin Well Woman v. Ireland*⁷⁹ regarding this doctrine that;

“...It acknowledges that the national authorities enjoy a *wide margin of appreciation* in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders

⁷⁶ In the *Winterwerp v. UK*, Judgement of 24 October 1979, para. 46 the Court held on this issue that: “...the logic of the system of safeguard established by the Convention sets limits upon the scope of this review. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention "incorporates" the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection.”

⁷⁷ Yourow H.C, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, (Martinus Nijhoff Publishers) at p. 13 the author makes definition of the ‘margin of appreciation doctrine’ “...as the freedom to act; maneuvering, breathing or “elbow” room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention’s substantive guarantees. It has been defined as the line at which international supervision should give way to a State Party’s discretion in enacting or enforcing its law.”

⁷⁸ Op.cit Handyside case, para.48,

⁷⁹ Judgement of 29 October 1992 para.68

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of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the "necessity" of a "restriction" or "penalty" intended to meet them." (emphasis added)

According to the 'margin of appreciation' doctrine which is natural product of the subsidiarity principle the Convention leaves each State Party in the first place the mandate of securing rights and freedoms guaranteed in the Convention within the domestic legal order.

Considering all these points we see that Subsidiarity is a basic principle of implementing the Convention. This principle is not only interpretative stance but also is reflected in the structure of the Convention.⁸⁰ It recognizes the primary competence and duty of the State to protect effectively within the domestic legal order the fundamental rights and freedoms enshrined in the Convention. In this respect Convention institutions contribute to securing the enjoyment of the rights and freedoms guaranteed, but their responsibilities are secondary to those of the competent national authorities.⁸¹

V. CONCLUSION

A right without remedy cannot be regarded as a real right. Without remedy, a right remain only on the paper. This argument is explained in latin words as; *ubi jus ibi remedium*: where there is a right there is remedy – or inversely, *ubi remedium ibi jus*: where there is a remedy there is a right. Thus rights and remedy can be considered as parts of a whole which we cannot have one without the other. Roughly remedy can be defined as when individuals' right infringed he/she should have possibility of reparation for that infringement. Another definition of remedy is that; an action taken by an authoritative body such as, a legislature, a court, or an administrative agency to enforce compliance with prescribed conduct or to impose a cost for failure to comply.

As it was widely examined in this study, the analytic examination of related provisions of Convention shows its subsidiary character. The examination of Articles 1, 13, 26, 50 and 60 make this notion clear. The requirement to exhaust domestic remedies under Art.26 establishes the primacy of national legal system. Article 13 strengthens this notion since it requires the State to provide an effective national remedy for individuals' whose rights are violated. Subsidiarity is then the basic principle in the implementation of the

⁸⁰ Warbrick C, "*Federal*" *Aspects of the European Convention on Human Rights*, in Michigan Journal of International Law (1989) 698 at 706

⁸¹ Supra note 127, Petzold H, p.60-61

Convention. It provides that, the State Party has the primary competence and duty to protect human rights within the national legal order. One of the features of the principle is that States Parties of the convention are free to provide better protection system. The responsibilities of Convention institutions are secondary to those of the national authorities. The duty of Convention institutions is necessarily to guide and to assist States Parties to secure the individuals' rights and fundamental freedoms.

Article 13 is a crucial provision in terms of subsidiarity principle and the Conventions' protection structure. The requirement of provision is important in securing cooperation between national legal systems and Convention procedure. This provision is a tool of implementing the Convention in domestic level. If States Parties in the light of developments of the case-law provide effective domestic remedies it is so likely that there will be quite a few cases at Strasbourg as they would already be redressed at domestic level. By obliging the State party to provide remedy Article 13 meets the requirement of 'rule of law', which is one of pillars of Council of Europe. In this connection, it is the remedy that makes the right meaningful. Because, just definition what constitutes fundamental rights cannot be considered as a sufficient manner to prevent violations of those rights. It is because of this importance of the remedy that universal and regional human rights mechanisms all include right to a remedy.

Although, the European Court of Human Rights held that Article 13 does not oblige the States Parties to incorporate the Convention into domestic law I agree with G.H Thune's suggestion that the best way to strengthen the national protection of human rights is to encourage incorporation of the Convention into domestic law.

BIBLIOGRAPHY

BOOKS, ARTICLES AND REPORTS

Amerasinghe C.F, *Local Remedies in International Law*, (Grotius Publications Limited, Cambridge, 1990)

Bermann G.A, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, in 94 Columbia Law Review, 332 (March 1994)

Breton A, Cassano A, Fraschini A, *Decentralization and Subsidiarity: Towardz a Theoretical Reconciliation*, in 19 University of Pennsylvania Journal of International Economic Law 21, (Spring,1998)

Brownlie I, *Basic Documents on Human Rights 3rd edition*, (Oxford University Press, 1999)

Cameron I, *An introduction to the European Convention on Human Rights*, (Iustug Forlag, Upsala, 1998),

The Subsidiary Protection of European Convention on Human Rights

Clements L, Mole N, Simmons A, *European Human Rights: Taking A Case Under The Convention*, Second Edition (Sweet & Maxwell, London , 1999)

Drzemczewski A, *European Human Rights Convention in Domestic Law: A Comparative Study*, 1983

Eide A, Alfredsson G, *The Universal Declaration of Human Rights: A commentary*, (Scandinavian University Press, Oslo, 1992)

Encyclopaedia of Public International Law, Volume 3 (Oxford et.al, 1997)

Frowein J.A, *Incorporation of the Convention into Domestic Law*, in Gardner J.P (ed.), *Aspects of Incorporation of the European Convention on Human Rights into Domestic Law*, (The British Institute of International and Comparative Law, 1993)

Gomien D, Harris, D, Zwaak L, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing

Hampson J.F, *The Concept of Arguable Claim under Article 13 of the European Convention on Human Rights*, in *International and Comparative Law Quarterly*, 39(1990) 891

Harris D.J, O'Boyle M, Warbrick C, *Law of the European Convention on Human Rights*, (Butterworths, London-Dublin-Edinburgh, 1995)

Hueglin T, *Federalism, Subsidiarity and the European Union Tradition*, article available at <http://www.ecsanet.org/conference/1to.htm> visited on 10.07.2001

Jacobs F.G, *The European Convention on Human Rights*, (Clarendon Press, Oxford, 1975)

Janis M, Kay R, Bradley A, *European Human Rights Law Text and Materials*, (Oxford University Press, 2000)

Kirchner C, *The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics*, in *Tulane Journal of International and Comparative Law* 291 (Spring 1998)

Lawson F.H, *Remedies of English Law*, (Butterworths, London, 1980)

Lenaerts K, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, in *17 Fordham International Law Journal* 846

Nedjati Z.M, *Human Rights under the European Convention*, (North Holland Publishing, Amsterdam, New York, Oxford, 1978)

Mann K, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, in *Yale Law Journal*(101)

Merrills J.G, *The Development of International Law by the European Court of Human Rights* (Manchester University Press)

Murphy D.T, *Subsidiarity and/or Human Rights*, in 1994 University of Richmond Law Review Association University of Richmond Law Review 67 (Winter 1994)

P.van Dijk, G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, (Kluwer Law and Taxation Publishers, Deventer-Boston, 1990)

Petzold H, *The Convention and the Principle of Subsidiarity*, in Macdonald R. St. J at all (eds) *the European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, Dordrecht-Boston-london) 41

Raymond J, *A contribution to the interpretation of the Article 13 of the European Convention on Human Rights*, in V HRR (1980)

Reid K, *A Practitioner Guide to the European Convention of Human Rights*, (Sweet & Maxwell, London, 1998)

Reidy A, Hampson F, Boyle K, *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the case of Turkey*, in Netherlands Quarterly of Human Rights Volume 15 No. 2 June 1997

Schwartz, R.E, *Chaos, Oppression, and Rebellion: the Use of Self-Help to Secure Individual Rights Under International Law*, in 12 Boston University International Law Journal 255

Shelton D, *Remedies in International Human Rights Law*, (Oxford University Press, 1999)

Shelton D, *Subsidiarity, Democracy and Human Rights*, in Gomien D (ed), *Broadening the Frontiers of Human Rights; Essays in Honour of Asjborn Eide*, (Scandinavian University Press, Oslo, 1993)

Shilling T, *Subsidiarity as a Rule and Principle, or: Taking Subsidiarity Seriously*, available http://www.jeanmonnetprogram.org/papers/95/9510ind.html#top_of_page visited on 02.09.2001

Swaine E.T, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, in 41 Harvard International Law Journal 1 (Winter, 2000)

Theo van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation For Victims of Gross Violations of Human Rights and Fundamental Freedoms*, E/CN.4/SUB.2/1993/8

Thune G.H, *The Right to an Effective Remedy in Domestic Law: Article 13 of the European Convention on Human Rights*, in Gomien D (ed.) *Broadening the Frontiers of Human Rights; Essays in Honour of Asjborn Eide* (Scandinavian University Press, Oslo, 1993)

Trindade C, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, (Cambridge University Press, 1983)

Vause W.G, *The Subsidiarity Principle in European Union Law -American Federalism Compared*, in 27 Case Western Reserve Journal of International Law 61

The Subsidiary Protection of European Convention on Human Rights

Yourow H.C, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, (Martinus Nijhoff Publishers)

Warbrick C, “Federal” *Aspects of the European Convention on Human Rights*, in *Michigan Journal of International Law* (1989) 698

Wolcher, L.E, *The Paradox of Remedies: The case of International Human Rights Law*, in *38 Columbia Journal of Transnational law*, 515.