

**EFFECTIVE DOMESTIC REMEDIES AND THE
EUROPEAN COURT OF HUMAN RIGHTS**

In *Malone v. UK* (Plenary 1984), the right to an effective domestic remedy in the European Convention on Human Rights Article 13 was famously described as one of the most obscure clauses in the Convention. Since then, the European Court of Human Rights has reinforced the scope and application of the right. Through an analysis of virtually all of the Court's judgments concerning Article 13, the book exhaustively accounts for the development and current scope and content of the right. The book also provides normative recommendations on how the Court could further develop the right, most notably how it could be a tool to regulate the relationship between domestic and international protection of human rights. In doing so, the book situates itself within larger debates on the enforcement of the entire Convention such as the principle of subsidiarity and the procedural turn in the Court's case law.

Michael Reiertsen is judge in Borgarting Court of Appeals, Oslo, Norway. He is a former researcher and lecturer at the Faculty of Law, University of Oslo, and adviser in the Legislation department of the Norwegian Ministry of Justice. He served as expert in the Council of Europe Committee of Experts for the improvement of procedures of the protection of human rights (DH-PR) (2008 to 2012).

Effective Domestic Remedies and the European Court of Human Rights

APPLICATIONS OF THE EUROPEAN CONVENTION
ON HUMAN RIGHTS ARTICLE 13

MICHAEL REIERTSEN



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Michael Reiertsen

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Preface

The idea and inspiration for writing this book came to me when I was working in the Legislation Department of the Norwegian Ministry of Justice (2008–2012). I was the Norwegian expert in the Council of Europe Committee of Experts for the improvement of procedures of the protection of human rights (DH-PR) and participated actively in the process of the reform of the European Court of Human Rights and the system for protection of human rights under the European Convention on Human Rights. It struck me that everyone talked about how the key to saving the Court and reforming the system was the improvement of domestic remedies. Yet, no one really knew what was required by the one Article in the Convention that explicitly deals with domestic remedies – Article 13. This was, at least partly, due to the fact that the Court's case law was abundant, but, at the same time, not very illuminating. However, we also knew that something could be in the offing. The Court had slowly started to reinforce the scope of application of Article 13, most notably through the Grand Chamber judgment *Kudla v. Poland* (2000), and the calls for achieving a more subsidiary protection of human rights seemed to be unequivocal and growing steadily. At the same time, we were acutely aware of the fact that whenever there is court-made development in law, questions on limits and legitimacy arise. Was this mysterious provision a sleeping beauty about to awake, or was it better tucked back into sleep?

The Faculty of Law at the University of Oslo granted me the opportunity to write a Ph.D. on this subject matter. This book is a thoroughly updated and revised version of my thesis for the degree of Ph.D., defended at the Faculty of Law, University of Oslo, in March 2017. The book is up to date with case law and literature as of November 1, 2021.

The fundament of the book is an analysis of the Court's judgments in Grand Chamber and Chambers in which the keyword search function of the Hudoc database identifies Article 13 as a keyword. As of November 1, 2021, this

amounts to 2,534 judgments (approximately 13 percent of all the Court's judgments rendered in Chambers and Grand Chamber). The analysis shows that, in particular, as from the year 2000, there has been a certain development in the case law. Most notably, the Court, now, actually considers whether Article 13 has been violated in addition to substantive Articles. The Court, also, performs a stricter assessment of many requirements arising under Article 13, for example, how an aggregate of remedies may be effective and how the domestic remedial authority must deal with the substance of the Convention complaint. The Court, also, increasingly specifies the relief required in concrete situations, most notably, compensation for nonpecuniary damages in more and more scenarios. However, although Article 13 is starting to come into age, there is still considerable uncertainty both regarding the role that Article 13 has in the system of protection of human rights under the Convention and the content and scope of specific obligations.

The book concludes by providing normative advice with regard to how the Court's case law could further develop, most notably by illustrating the role that Article 13 could have in regulating the relationship between international and national protection of human rights. In doing so, the book situates Article 13 within larger debates of the Convention system, such as the procedural turn in the Court's case law, the enforcement of the entire Convention, and the interpretation and application of the principle of subsidiarity.

Acknowledgments

This book builds on my thesis for the degree of Ph.D., defended at the Faculty of Law, University of Oslo, in March 2017. I am grateful to the adjudication committee, consisting of Professor Malcolm Langford (University of Oslo), Professor Janneke Gerards (Utrecht University), and Professor Patricia Popelier (University of Antwerp), for their thoughtful and insightful comments and critique, which this book has benefited from. Matti Pellonpää, former Justice at the Supreme Administrative Court of Finland, the ECtHR and the Commission in Strasbourg, commented extensively on a draft at the mid-way evaluation of the project and firmly installed the belief that I was on the right track. My supervisors, Justice dr. juris Arnfinn Bårdsen, now judge in the European Court of Human Rights, then judge in the Norwegian Supreme Court, Professor Inger-Johanne Sand (University of Oslo), and Professor Andreas Føllesdal (University of Oslo), were a constant and necessary support and safely steered me toward the goal line. During the publication process, three anonymous peer reviewers and my editor, Tom Randall, have provided additional and much appreciated advice. The book has, in addition, profited from numerous discussions, advice, and critique from many others. I hope that you know who you are and that I am grateful. Above all, I am thankful to my wife Bärbel and three sons Peter, Johannes, and Emil. You have made this possible and make it all worthwhile.

Citations of Case Law

The book does not distinguish between case law from the original Court and the current (unique) Court introduced by Protocol 11. In text and footnotes, Chamber judgments are referenced by the name and the year, for example, *Silver a.o. v. the UK* (1983). Other judgments and decisions are marked with Plenary, Grand Chamber, Committee, or decision to identify deviations from judgments in Chamber, for example, *Nada v. Switzerland* (Grand Chamber 2012) and *Mifsud v. France* (Grand Chamber decision 2002). Commission reports and Commission decisions are referenced in a similar manner, but adding that it is a Commission report or decision, for example, *Aydin v. Turkey* (Commission report 1996) and *Luberti v. Italy* (Plenary Commission decision 1981).

Abbreviations

ACHR	American Convention on Human Rights
a.o.	and others
Bogotá Declaration	American Declaration of the Rights and Duties of Man
Brighton Declaration	High-level Conference on the Future of the European Court of Human Rights, Brighton Declaration, April 20, 2012
Brussels Declaration	High-level Conference on the Implementation of the European Convention on Human Rights, our shared responsibility, Brussels Declaration, March 27, 2015
CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDDH	Steering Committee for Human Rights, Council of Europe
CETP	Collected Editions of the “ <i>Travaux Préparatoires</i> ” Volumes I–VIII, published by Martinus Nijhoff between 1975 and 1985
Commission	European Commission on Human Rights
Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
Copenhagen Declaration	High-level Conference on Reform of the Convention System, Copenhagen Declaration, April 12 and 13, 2018
Court	European Court of Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR	European Court of Human Rights
<i>et al.</i>	<i>et alia</i> /and others
HRC	UN Human Rights Committee
IACtHR	Inter-American Court of Human Rights
<i>ibid.</i>	<i>ibidem</i> /in the same place
ICCPR	UN International Covenant on Civil and Political Rights
ICJ	International Court of Justice
<i>i.e.</i>	<i>id est</i> /that is
ILC	International Law Commission
Interlaken Declaration	High-level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, February 19, 2010
Izmir Declaration	High-level Conference on the Future of the European Court of Human Rights, Izmir Declaration, April 27, 2011
P	Protocol
para.	paragraph
TEU	Treaty of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume