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THE PRINCIPLE OF "DE MINIMIS NON CURAT PRAETOR" IN THE PROTECTION SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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A. THE ROLE OF THE COURT OF HUMAN RIGHTS IN STRASBOURG

I. Legal protection of individuals

The role of the Strasbourg Court is defined in Art. 19 ECHR: it has to ensure the observance of the engagements undertaken by the member states in the European Convention on Human Rights and the Protocols thereto. In doing so the Court may receive in particular individual petitions under Art. 34 ECHR and has to decide upon them whether there was a violation of the Convention. The Court confines itself as far as possible to examining the issues raised by the particular case before it, it does not see its task to review the relevant legislation in the abstract.[1] State applications are extremely rare and can be neglected in this context – they will never be considered as minima. The Court decides on an application by a judgment which is binding under public international law for the state which was a party in that case (Art. 46 I ECHR) and the execution of which is supervised by the Committee of Ministers of the Council of Europe (Art. 46 II ECHR).

The Court by its judgment protects individuals whose Convention rights were violated. The right to individual applications and to have a decision of the Court on it is the core of

[1] So the constant case-law, s. for instance judgment Taxquet v. Belgium, 16.11.2010, 926/05 § 83

the Convention system. It is true that the principle of subsidiarity underlying the Convention means that in the first line it is the duty of the authorities and in particular the courts of the member states to secure the rights guaranteed by the Convention (Art.1 ECHR). But it is also true that they often fail to do so. It follows that in many cases the Strasbourg Court is the only institution which assures protection of individual rights. That may be so in cases of grave violations of human rights by member states for instance in applications concerning the right to life or the prohibition of torture. And that is often so in less grave cases, in particular in cases where the right of acces to a national court was violated or where the courts do not decide within reasonable time so that Art. 6 I ECHR was violated.

II. Interpretation and development of the Convention

The Court has besides the role of individual protection and supervision as described above a constitutional mission[2], that is to say a more general role. Art. 32 ECHR gives it jurisdiction "to all matters concerning the interpretation and application of the Convention and the protocols thereto". The Court has repeatedly stated, "that its judgments in fact serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance of the States of the engagements undertaken by them as Contracting Parties"[3] In this function as an European Constitutional Court the Court gives common principles and standards and determines the minimum level of protection which have to be observed.[4] In pilot judgments[5] it goes beyond that and gives guidelines to help states which have to decide on measures of more general kind, in particular legislative measures, to solve the problems of other persons in the same situation as the applicant and thus to avoid further applications.

The double role of the Court is the same as we see in the functioning of national Constitutional Courts. They decide individual cases and develop the Constitution at the same time by creating judge made law. Law making by case law is a common phenomenon in all member states independant of whether they are common law states or states with a continental law tradition. It is particularly important with Constitutional Courts because constitutions as the Convention very often are worded in short terms which need clarification, but it is true also for other national courts.

The more general role has practical consequences in the case law. For instance is with regard to Art. 34 ECHR the existence of a victim of a violation normally indispensible. But

[2] See Report of the Group of Wise Persons to the Committee of Ministers of 10.11.2006, Sages (2006) 06 EN Def. § 24

[3] For instance judgment of 24.11.2005, Report of Judgments and Decisions (ECHR) 2005-XII § 79 – Capital Bank AD v. Bulgaria

[4] Report of Wise Persons Footnote 1

[5] See under B II below

when the applicant as a victim has ceased to exist during the proceedings the Court takes a more flexible view and does not strike the case out of its list, when the case raises issues of general importance "which transcend the person and the interests of the applicant" or when doing so would "undermine the very essence of the right of individual applications".[6] Similar considerations can be found in decisions on the question of whether to strike out an application under Art. 37 ECHR for instance after a declaration of the Government with an acknowledgment of a violation and the undertaking to remedy it[7]. In such cases the Court considers if respect for human rights requires to continue the examination of a case (Art. 37 I last sentence ECHR).

The Strasbourg Court has accepted its constitutional mission early by following from the beginning the concept of the Convention as "living instrument which must be interpreted in the light of present-day conditions"[8] and taking into account the "increasingly high standard being requested in the area of protection of human rights".[9] Exactly that is the reason why the Srasbourg case-law has such an outstanding importance for the understanding of the Convention and the obligations flowing from it. The same is true for the case-law of the national constitutional courts and its importance for the understanding of the national constitution.

III. Binding force of judge-made law

Art. 46 ECHR concerns the binding force of judgments in cases to which the states are parties. The problem we are dealing with is the impact of judgments for a state which was was not the respondent state. As mentioned above clarify judgments of the Strasbourg Court the Convention and develop it. That can only work when judgments against other member states have legal importance for them. The Convention has no provision like § 31 I of the German Federal Constitutional Court Act which stipulates that all German courts and authorities are bound by a final judgment of he constitutional court as far as it decides a specific matter in dispute (res iudicata).[10] But the Strasbourg case-law "reflects the the current state of development of the Convention and its protocols"[11] And since the Convention – "as interpreted by the ECHR – has the status of a formal... statute, it shares the primacy of statute law and must therefore be complied with by the judiciary"[12] which must "take

[6] Judgment of 24.11.2005, footnote 3, § 78; ECHR, 40016/98 § 125, ECHR 2003-IX – Karner v. Austria

[7] See inter alia ECHR, decision of 1.4.2008, 35000/05, Orlowski v. Germany; ECHR, decision of 15.5.2008, 58364/00 No. 32, Lück v. Germany; ECHR of 7.1.2010, 25965/04 § 197 – Rantzev v. Cyprus

[8] ECHR of 25.4.1978, Series A, No. 26, pp 15-16 § 31 – Tyrer v. United Kingdom

[9] ECHR, 28.7.1999, 25803/94, ECHR 1999-V § 101 – Selmouni v. France

[10] Order of the German Constitutional Court of 14.10.2004, 2 BvR 1481/04 § 39

[11] German Constitutional Court, footnote 10, § 38

[12] German Constitutional Court, footnote 10, § 53

into account the the guarantees of the Convention and the decisions of the ECHR as part of a methodologically justifiable interpretation of the law".[13] That follows not from Art. 46 but from Art. 1 ECHR which obliges Member States "to secure to everyone within their jurisdiction the rights and freedoms defined in … this Convention."

B. EXCEPTIONS FROM THE AIM OF LEGAL PROTECTION OF INDIVIDUALS

I. Workload of the Court

The high and increasing workload of the Court in Strasbourg has since many years given rise to concern. The danger that the Court suffocates in too many petty cases so that it has not sufficient time to deal with cases which merit it and are important under the general and constitutional aspect has been discussed since long. The Court in its case-law has made efforts to contribute to a solution. It stresses the importance of Art. 13 and the principle of subsidiarity flowing from that provision and from Art. 6 I ECHR.[14] With regard to Art. 46 I ECHR the Court states in its constant case-law that "the finding of a violation imposes on the respondent State a legal obligation not just to pay … the sums awarded … under Art. 41 ECHR but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects".[15] And the state is also obliged to take measures which ensure that there will be no similar violations of the Convention in the future. Since some years the Court applies pilot proceedings as a way to avoid as far as possible the need to decide numerous similar applications in the future.

II. Pilot Judgments

In its case law the Court has repeatedly stressed, that the obligation under Art. 46 ECHR to take general measures aims at securing the right of the applicant which the Court found to be violated. But it goes beyond that: "Such measures must also be taken in respect of other persons in the applicant's position, notably by solving the problems that have led

[13] Order of the German Constitutional Court, footnote 10, § 47

[14] In particular in the judgment of the Grand Chamber of 26.10.2000, 30210/96, ECHR 2000-XI – Kudla v. Poland

[15] Judgment of 8.6.2006, 75529/01 § 137, ECHR 2006-VII – Sürmeli v, Germany

to the Court's finding."[16] The Court adopts a pilot judgment procedure to clearly identify structural problems underlying the violation and to give specific indications for measures or actions to be taken including legislative measures. The aim of the procedure is to induce the respondent State to solve many similar cases concerning the same problem at the domestic level so that the Court has not to repeat the same finding again and again.[17] A procedure of that kind has many advantages. But it can only work when the respondent States are ready to cooperate and to enact the indicated measures. One cannot imagine how the Committee of Ministers can come to a solution in the supervisory procedure under Art. 46 II ECHR when difficulties come up, when for instance a national parliament is not ready to adopt indicated legislative measures.

When the Court choses to apply a pilot judgment procedure the result may be that the legal protection of indiviuals is reduced. The Court sometimes – not in all pilot cases – decides to adjourn the examination of a great number of similar cases to give the respondent State the opportunity to settle them on the domestic level.[18]That may in particular be a reasonable solution when the Court has fixed a time limit within which the State has to solve the structural problem by general measures, for instance to enact new legislation. The consequence for numerous individuals which have complained about similar violations of their Convention rights is that their applications are not examined during a certain time. It may take long until the structural problem is solved and it is even possible that the respondent State does not redress the situation at all and continues to violate the Convention. In that case the Court will resume the examination of similar pending aplications and take them to judgment,[19] but it will take long time until the other applicants get their legal protection by the Court.

III. Treatment of petty cases before entry into force of Prot. No. 14

The Convention gives procedural means quickly to do away with applications with no prospect of success and no importance. It is Art. 35 ECHR with its admissibility criteria which gives the main instrument namely in para 3 which states that "manifestly illfounded" applications shall be declared inadmissible by the Court. And under the Convention the Court does so by a committee of three judges when the decision can be taken unanimously and without further examination (Art. 28 ECHR). The decision can be taken by tacit agreement (Rule 23A of the Court), it is final, very often the respondent State is not even given notice of the application. There is no need to produce a written decision; the applicant can be informed of it by a letter (Rule 53 V of the Court).

[16] Judgment of 25.7.2009, 476/07 § 49 – Olaru and others v. Moldova

[17] Olaru judgment. footnote 16, §§ 50, 51

[18] Olaru judgment, footnote 16, § 51

[19] Olaru judgment, footnote 16, § 52

This filtering instrument is of great importance. More than 90 % of the applications are declared inadmissible. In 2009 the Court decided 35460 cases, by judgment 2395 and by decision 33065. The instrument has been reeinforced by Prot. No. 14 which has entered into force on 1.6.2010 (see IV 4 below).

IV. Cases of minor importance (minima)

1. The maxim of "de minimis non curat praetor" part of the Convention system?

The above mentioned filtering mechanism covers minima cases, but only such with no prospect of success. But there was a discussion also about the question how to deal with cases of minimal importance for the applicant and of no general significance, even if they are manifestly well founded.

The maxim "de minimis non curat praetor" is seldom expressly mentioned in reports of the former European Commission of Human Rights or in judgments and decisions of the Court.

The first example is that of the report of the Commission of 19.12.1979 in the case of X v. United Kingdom.[20]The applicant underwent an operation to straighten the toes of one foot while serving a prison sentence in the United Kingdom. One small toe had to be amputated later. The applicant petitioned for compensation and for permission to seek legal advice. Both requests were rejected. The Commission considered whether his complaint raised an issue under Art. 6 § 1 ECHR (fair trial, right to a court). It reasoned that even supposing that the refusal was not in conformity wih Art. 6 ECHR the application was manifestly ill-founded. The commission noted first that such a situation would not occur again because the British practice had been liberalised and secondly, that the applicant had not consulted a solicitor when he was later able to do so. It continues: "In this respect the Commision refers to the legal principle of "de minimis non curat lex". That was surprising in this context but it indicates that the Commission was convinced that such a principle existed.

Interesting in this connection is further the case of K.-H. v. Germany.[21] It concerned a complaint raised by a German citizen under Art. 5 § 1 ECHR. He had been arrested by the police and detained for checking his identity. Such a detention shall under German legislation not exceed a total of twelve hours. The detention of the applicant had exceeded that statutory maximum by 45 minutes.

[20] Decisions and Reports 47, 24

[21] ECHR, judgment of 27.11.1997, 144/1996/763/964, Reports 1997-VII

The Commission in its report[22]found that practical reasons may justify a modest delay of the release. The rather short delay of 45 minutes had not deprived the applicant his liberty in an arbitrary manner contrary to object and purpose of Art. 5 ECHR. For these reasons the Commission came to the result that there was no violation of Art. 5 § 1 ECHR. It is in the dissenting opinion of six members of the Commission that the maxim "de minimis" is mentioned. They argued that Art. 5 was violated. Even in a case of only short delay of release the importance of the right to liberty called for a scrupulous supervision by the Convention organs. Even such a short violation of domestic laws, so the dissenting members, could not be disregarded "by the application of some "de minimis principle". The maxim of de minimis non curat praetor, so they continued, "is not part of the legal framework of the Convention and certainly has no place in the context of unlawful deprivation of liberty." The Court in its judgment did not mention this question. It found that the maximum period of detention laid down by law was absolute and that Art. 5 § 1 (c) ECHR was violated[23].

This case makes clear that Commission and Court at that time and in this context did not want to expressly mention the principle "de minimis...". They found other ways to deal with it, when interpreting the Articles of the Convention (see 3 below) and in a recent decision by applying Art. 35 § 3 ECHR and declaring minima applications under certain conditions inadmissible for abuse of the right to individual application.

2. Abuse of the right of applications

Shortly before entry into force of Prot. No. 14 with its specific regulation in Art. 35 § 3 (b) ECHR the Court has applied former Art. 35 § 3 ECHR. In the case of Stephan Bock v. Germany[24] the applicant was a civil servant with a monthly salary of 4500 Euro. His physician had prescribed him magnesium tablets and he requested aid from the State which was his employer; he asked to be reembursed the costs of these tablets, namely 7,99 Euro. When this request was refused the applicant lodged an objection against the negative decision, which was rejected, after that he lodged appeals with the Administrative Court, the Administrative Court of Appeal and the Federal Constitutional Court. In his application to the Strasbourg Court he claimed that his rights under Art. 6 § 1 ECHR were violated because the proceedings had taken too long. The Court rejected the application as an abuse of the right of application (Art. 35 § 3 ECHR) as inadmissible. In its reasons it did not mention the principle of de minimis non curat praetor, but the decision is clearly based on it. The Court noted the disproportion between the triviality of the facts, the pettiness of the amount involved and the extensive use of court proceedings including the application to an international

[22] Of 10.9.1996, 25629/94, §§ 59, 65

[23] § 72 of the judgment footnote 21

[24] Decision of 19.1.2010, 22051/07

Court. It mentioned the overload of the Court and the fact that many applications pending are raising serious issues. The Court further noted that the application raised no questions of principle and that the issue of excessive lenght of court proceedings have been delt with in numerous judgments. It came to the following result: "Under these exceptional circumstances the Court considers that the application must be regarded as an abuse of the right to petition". Such a decision came late but it came at least. In the future the Court will apply Art. 35 § 3 (b) ECHR as amended by Prot. No. 14.

3. Filtering out minima by interpretation of material provisions of the ECHR

Without relying on the maxim of de minimis non curat praetor the Court has found many ways to reject applications which do not raise serious issues.

a) Margin of appreciation

One of the principles in the case-law is that national authorities have a margin of appreciation. This principle is of importance for the interpretation of paras 2 in Art. 8-11 ECHR, which inter alia provide that an interference must be necessary in a democratic society. The Court has often stressed that it is in the first place for the national authorities to assess whether there is a pressing social need and that they enjoy a certain margin of appreciation when doing so.[25] In such cases the supervisory role of the Court is restricted, it does not substitute itself for the competent national authority so that it can easily find a way to accept a decision taken by national authories when it does not violate the Convention in a significant way. The same is true for the criterion that there must be a reasonable relationship of proportionality between the legitimate aims pursued and the means employed.

b) Balance of interests

In many cases different interests have to be taken into account and the Court requires that a just balance between them must be achieved. That is for instance the case in applications concerning Art. 1 Prot. No 1 where the interference must strike a fair balance between the demands of public interest and the requirement of the protection of individual rigths.[26] A further example is the positive obligation to protect the rights guaranteed in the Convention. It requires that a fair balance is struck between the competing interests of the individual and the community.[27] Such a balance is in particular necessary in the many cases where an individual right of one person has to be balanced against that of another, for example the right to respect for private life under Art. 8 ECHR against the freedom of

[25] For instance regarding Art. 10 ECHR judgment in the case of Fressoz and Roire v. France, 22.1.1999, §§ 45,56, ECHR 2002-I

[26] Judgment Beyerler v. Italy, 5.1.2000, 33202/96 §§ 107, 114, ECHR 2000-I

[27] Case of von Hannover v. Germany, 24.6.2004, 59320/00 § 57, ECHR 2004-VI

expression under Art. 10 ECHR.[28] In such cases the Court makes an overall examination of all circumstances of the case and of the various interests at issue and it is clear that in doing so it can filter out unimportant cases where there is no significant disadvantage for the applicant.

c) Application of procedural provisions to do away with minima cases

It is certainly true that there are some procedural possibilities to apply the maxim de minimis non curat praetor and the Interlaken-Conference of the Member States has invited the Court to use them.[29] The criterion "manifestly ill-founded" enables the Court to react in a flexible way, but only with regard to applications without prospect of success. The criterion "abuse" may be used also for well-founded petitions and indeed it was – but in minima cases only late and rarely. The interpretation of the notion of "victim" in Art. 34 ECHR can take into account whether there is a disadvantage for the applicant (see 4 (a) below). The possibility under Art. 37 § 1 (b) and (c) ECHR to strike applications out of its list of cases when the matter has been resolved or when it is no longer justified to continue the examination could also be useful in this context.

d) Interpretation of material provisions

The Court requires for the applicability of many articles of the Convention a certain degree of severity so that cases with little or no significance are not covered by them. Here some examples:

Art. 3 ECHR: Following the case-law of the Court the ill-treatment must attain a **minimum level of severity** if it is to fall within the scope of this article.[30] The assesment of that is relative and depends on all circumstances of the case. When for example prison conditions are at stake certain shortcomings must not necessarily amount to inhuman or degrading treatment.[31]

Art. 6 § 1 ECHR: The Court has developed following criteria: The reasonability of the lenght of proceedings must be assessed in the light of **the particular circumstances of the case** in particular the complexity of the case, its importance for the applicant and the conduct of the applicant and the authorities before which the case was brought.[32] Whether a proceeding was fair is assessed taking into account **all circumstances of the case**. These criteria give the Court the necessary flexibility.

[28] Judgment von Hannover, footnote 27, § 58

[29] Action Plan adopted on 19.2.2010

[30] Case of Ivan Kuzmin v. Russia, 25.11.2010, 30271/03 § 71

[31] Judgment Farhad Aliyev v. Azerbaijan, 9.11.2010, 37138/06 §§ 114, 119

[32] Pedersen & Baadsgaard v. Denmark, 17.12.2004, 49017/99 § 45, ECHR 2004-XI1

Art. 6 § 3 ECHR: When an application concerns an alleged violation of the rights of the defence in Art. 6 § 3 d ECHR the Court examines whether these rights have been restricted **to an extend incompatible** with the guarantees in Art. 6 ECHR.[33]

Art. 8 ECHR: An interference with the right to repect of home and private life must reach **a minimum level of severity**.[34] In cases of environmental pollution the Court has to decide whether the State's positive obligations to protect persons come into play which may be the case when the pollution affects adversely and **to a sufficient extent** the enjoyent of his rights guaranteed in Art. 8 ECHR, it must be a "**severe environmental pollution**".[35]

Art. 14 ECHR: It has to be assessed whether 1. the applicant is in an analogous or relevantly similar position as other persons, 2. they are treated diffently, 3. there are objective and **reasonable reasons** which justify the difference in treatment, that is whether it pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to realize. And the States enjoy a **margin of appreciation**.[36]

Art. 1 Prot. No. 1: From the case-law of the Court follows that the concept of possessions has an autonomous meaning and is not limited to the ownership of physical goods but includes certain rights constituting assets protected by this provision. The Court examines whether the circumstances of the case conferred on the applicant title to an **substantive interest** protected by Art. 1.[37]

4. Prot. No. 14

a) History

The extreme and still growing workload of the Court triggered considerations how to effectively change the situation. The excessive workload is in particular caused by the high number of inadmissible applications (more than 90 %) and by repetive cases, that is cases which derive from the same cause, often a structural cause, as earlier aplications which have lead to a judgment finding a violation of the Convention (about 60 % of the judgments).[38]

[33] For instance decision in the case of Dzelili v. Germany, 29.9.2009, 15065/05

[34] Mileva a.o. v. Bulgaria, 25.11.2010, 43449/02 § 90

[35] Inter alia case of Ivan Atanasov v. Bulgaria, 2.12.2010, 12853/03 §§ 66, 67

[36] Pretty v. United Kingdom, 29.4.2002, 2346/02 § 87, ECHR 2002-III

[37] Beyeler v. Italien, 5.1.2000, 33202/200 § 100, ECHR 2000-I

[38] Prot. No. 14, Explanatory report § 7

There were proposals to relieve the Court of such applications,[39] in particular of applications with minor merit. The Working Party on Working Methods of the Court[40] recalled " that the admissibility criteria of Art. 35 ECHR did not include rejection of an application on the ground of its being of minor merit". It noted that the abuse criterion in Art. 35 § 3 ECHR had in so far been applied in a restrictive manner and felt that the notion of "victim" (Art. 34 ECHR) might be interpreted in a more restrictive way. The Court did not pick up that proposal.

Again and again the idea came up to strenghten the "constitutional mission" of the Court and that the only effective remedy for the situation would be to give the Court discretionary power whether or not to accept a case for examination and decision, a system like that in the United States for the Supreme Court (certiari procedure). That would certainly give the Court the means not to decide on minimis. But the idea never found much sympathy up to now. The right to individual petition is rightly regarded as a key component of the control mechanism of the Convention and should not be undermined.[41] So up to now all reform ideas took as basis the existence of this right to petition and to a judicial examination and decision by the Court. Prot. No. 14 makes no radical changes to the control system but gives the Court procedural means to process applications quicker.

b) Procedural provisions

The main new procedural provisions are Art. 27 and 28 §1 (b) ECHR. They do not aim specificly at minima cases (as the new Art. 35 § 3 (b) ECHR does) but they improve the Court's filtering capacity in respect of the many pending unmeritious applications and give the Court better means to process repetitive cases.[42] It is clear that they give the Court tools also to do away speedily with minima cases.

The new Art. 27 ECHR creates the competence of a single judge to declare applications inadmissible in clear-cut, evident cases "where the inadmissibility of the application is manifest from the outset".[43] § 28 § 1 (b) ECHR concerns committees of three judges which up to now could only give negative decisions, that is to say declare applications inadmissible. The new provision gives them the power to render positive decisions and judgments, that is to say to declare applications admissible und to decide on the merits in a judgment and that in a simplified and accelerated procedure.[44] They can do so when the question to consider in an application is covered by well established case-law which will be in particular so in repetitive cases. It is evident that this procedure can also be useful in minima cases, when they are not inadmissible under the new Art. 35 § 3 (b) ECHR.

[39] Report of the Group of Wise Persons to the Committee of Ministers, 10.11.2006 (Sages (2006) 06 EN, § 35

[40] Report January 2002 § 66

[41] Prot. 14, Explanatory report § 34; Report of Wise Persons, footnote 39, § 42

[42] Explanatory report § 36

[43] Explanantory report § 67

[44] Explanantory report §§ 68, 69

c) Indmissibility of minima cases (Art. 35 § 3 (b) ECHR)

The new Art. 35 § 3 (b) is the only provision of the Convention which expressly regulates the principle of de minimis non curat praetor and is insofar a corner stone of the reform. Here indeed the Convention gives the possibility to declare applications inadmissible which have prospect of succes[45] or are even manifestly well founded. That is a clear exception of he principle that the control mechanism aims at legally protecting individuals against violations of their rights and freedoms. The intention is to give the Court some flexibility in addition to that already provided by the existing admissibility criteria.[46] The Interlaken-Conference invited the Court to "give full effect to the new admissibility criterion"[47] and the Court seems to be determined to do that.[48] It is clear that the terms used in the new provision leave room for interpretation. The Explanatory report points out that the new provision requires the development of criteria in the case-law of the Court[49] and the Court has started to do so.[50]

The new provision can only be aplied when three conditions are met: aa) the applicant has not suffered a significant disadvantage, bb) the respect for human rights do not require the examination of the case and cc) the case has been duly considered by a domestic court.

aa) No serious disadvantage

The case-law gives some examples for applications in which that was the case. In the case of Korolev v Russia[51] the applicant complained violation of Art. 6 ECHR and Art. 1 Prot. No. 1 because of the Russion authorities' failure to pay him 22,50 Russian Roubles, an amount which Russian courts had awarded him. The Court noted

- The terms "significant disadvantage" are not susceptible to exhaustive definition.
- The general principle of de minimis non curat praetor means that a violation of rights must attain a minimum level of severity.
- When assessing the severity all circumstances of the case must be taken into account, including both the applicant's subjective perception and what is objectively at stake.
- Even modest pecuniary damages may be significant. But there is no doubt that an amount of 22,50 Russian Roubles is of minimal significance.

The result is that there will normally be no serious disadvantage in cases with minimal pecuniary damages. The economic situation of the applicant must be taken into account,

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[45] Explanatory report § 79

[46] Explanatory report § 78

[47] Action Plan of 19.2.2010

[48] s. ECHR, decision of 1.7.2010, 25551/05 – Korolev v. Russia

[49] § 80

[50] s. the decision footnote 48

[51] Footnote 48

but even then amounts of a few Euros will not be significant (less than 1 Euro in the Korolev case, 7,99 Euro in the above mentioned case Stephan Bock v. Germany,[52] 90 Euro in the case of Mihal Ionescu v Romania[53]).

On the other hand the Court has noted[54] that the pecuniary interest cannot be the only element to assess whether there was a significant disadvantage. Applications with minor pecuniry damages may attain the required level of severity when they concern important questions of principle. In such cases respect for human rights will often require further examination (see bb) below). That will often be the case with petitions concerning Art. 2 and 3, perhaps also Art. 5.[55] But that has to be considered in each particular matter. The case K.-H.v. Germany mentioned above[56] seems to be a violation which did not attain a minimum level of severety.

bb) Respect for human rights require examination

These terms are taken from Art. 37 § 1, Art. 38 § 1 (b) ECHR, now Art. 39. The case-law concerning these Articles and the Korolev decision of the Court concerning the new Art. 35 § 3 (b) ECHR[57] clarify under which conditions a further examination is necessary:

- When the application raises questions of general character affecting the observance of the Convention and the interpretation of its Articles.
- When there is a need to clarify State obligations under the Convention.
- When a State should be induced to resolve a structural problem.

Similar requirements can be found in Art. 30 ECHR and Art. 43 ECHR (the case "raises a serious question affecting the interpretation of the Convention", " a serious issue of general importance").

cc) Due consideration of the case by a domestic court

This requirement seems to be the most difficult. The Explanatory report[58] is not very helpful, it refers to the principle of subsidiarity and states that each case must have a judicial examination either by domestic courts or by the Strasbourg Court.

As a rule it will be necessary that a domestic court has examined the circumtances on which the application is grounded and has given a decision on them either on appeal of

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[52] Footnote 24

[53] Decision of 28.6.2010, 36659/04

[54] In the Korolev case, footnote 48

[55] See the dissenting members of the Commission, footnote 22, who expressed their opinion that in cases of Art. 5 is no room for the principle of de minimis non curat paetor

[56] Footnote 21

[57] Footnote 48

[58] § 82

the applicant or without. It is not necessary that the domestic court has examined whether Convention rights were violated, it is sufficient when it has examined whether correspondend national guarantees were respected.

In the Korolev decision[59] the Court has found that the main question is of whether there was a denial of justice at home. So its result was that the new provision can be applied when the domestic court refused to examine the case for non-compliance with domestic procedural requirements. The result was the same when the applicant claimed a violation of Convention rights by an instance court and there was no possibility to appeal under domestic law because the Convention does not grant a right to challenge domestic judgments in further domestic proceedings once a final decision has bee rendered.

The result can nevertheless not be the same for all cases where national law excludes an examination. In cases where there is contrary to Art. 6 and 13 ECHR no right to a court and no effective remedy or when the applicant was violated in his right under Art. 6 ECHR of access to a court the application of Art. 35 § 3 ECHR is excluded because the case was not duly examined by a national court.

Due examination: The Court will not understand its responsibility to examine whether the domestic courts's decision is correct or not, it has very often stressed that it is not a Court of 4th instance and that it is not its function to deal with errors of fact or law allegedly committed ba a national court[60] the only exception being that of an arbitrary decision. The decive question is whether there was an examination of the subject of the petition. When a domestic court has examined the case in a fair proceeding will that normally be a due examination for the purposes of Art. 35 § 3 (b) ECHR.

d) Minima in the case-law of the German Federal Constitutional Court

The German constitutional court is in a similar situation as the Court in Strasbourg as it rules inter alia "on constitutional complaints which may be filed by any person alleging that one of his basic rights … has been infringed by public authority." (Art. 93 § 1 (4a) Basic Law). As under Art. 35 ECHR a constitutional complaint to the constitutional court may not be lodged until all available remedies are exhausted (Art. 90 § 2 Federal Constitutional Court Act). The court decides by panels of eight judges or chambers of three judges. A constitutional complaint has to be accepted which requires that it has fundamental constitutional significance or that it is indicated to accept it in order to enforce the fundamental rights; this can also be the case when the complainant suffers "especially grave disadvantage as a result of the refusal to decide on the complaint." (Art. 93a of the Act). This article shows the same underlying philosophy as mentioned above for the Court in Strasbourg: both courts have a mission to legally protect individuals and a general constitutional mission. And the

[59] Footnote 48 under C

[60] Case of Garcia Ruiz v. Spain, 21.1.1999, 30544/96 § 28, ECHR 1999-I

wording is similar in Art. 93a of the German Act (grave disadvantage) and in Art. 35 § 3 (b) ECHR (significant disadvantage). A comparison shows nevertheless that the German Constitutional Court has wider possibilities not to accept a constitutional complaint.

It is normally the chamber of three judges which decides on the acceptance of the complaint. It can refuse acceptance unanimously, without oral hearing, without giving reasons and the decision is final (Art. 93b and d of the Act).

When a complaint is upheld the German constitutional court states which provision of the Basic Law was infringed as does the Strabourg Court with the Convention guarantees. But contrary to the limited possibilities of that Court the German constitutional court may quash a decision or a judgment of a German Court and refer the matter back to it (Art. 93c). Such a decision is rendered by a panel, in clear cases also by a chamber "if the constitutional issue determining the judgment of the complaint has already been decided upon by the Federal Constitutional Court" and if the complaint "is clearly justified" (Art. 93c). Here again we can see the similarity with Art. 28 § 2 (b) ECHR on the competence of Committees („if the underlying question in the case … is already the subject of well-established case-law of the Court"). When a constitutional complaint against a law has success, the constitutional court declares the law null and void (Art. 95 § 3 of the Act), a decision which can only be rendered by a panel (Art. 93c § 1). The Strasbourg Court has not such possibilities. But there are cases where it gives in pilot judgments time limits to amend or to enact legislation.

There is another difference between the control system of the two courts which should be mentioned in this context. As already mentioned above (under A III) Art. 31 of the Federal Constitutional Court Act stipulates that decisions of the constitutional court are binding on Federal and Land constitutional authorities and all courts and other authorities. The decision has the force of law and is published in the Federal Law Gazette when the court on a constitutional complaint declares a law to be compatible or incompatible with the Basic Law or to be null and vo*ld.* There is no provision of that kind in the Convention; Art. 46 § 1 limits the binding force of judgments to cases to which the States were parties. So the effectiveness of the control of the Strasbourg Court as an international Court is weaker. It has nevertheless to be taken into account that judgments of the Strasbourg have effect also for the Member States that were not partie to the case (see A III above). So the difference is in theorie greater than in praxis.

The maxime of de minimis non curat praetor is nowhere mentioned in German legislation. But it is evident that minima cases will not be accepted by the German Constitutional Court under Art. 93a of the Act. A three judges chamber will refuse to accept it and that decision must not be reasoned and is final.

CONCLUSION

The new admissibility criterion in Art. 35 § 3 (b) ECHR is an interesting approach and may open the door for a more general application of the principle de minimis non curat praetor in the Court's case-law. But there remain some doubts whether it can contribute to considerably improve the filtering activity of the Court and to allow it to devote more time to applications which merit examination.[61] It will be more realistic to expect that the new provision will be applied only in a limited number of petitions. The safeguards in its wording are strong and that is in particular true for the requirement of due consideration by a domestic court. So the new provision might be a first step hopefully followed by further in the case-law or in an amending Protocol. The discussion on the reform goes on and will certainly try in particular to find possibilities to improve the filtering mechanism.[62]

[61] Explanatory report § 77

[62] Report of the Group of Wise Persons, footnote 39, Action Plan Interlaken, footnote 47