Chapter 4  The principle of primarity (formal aspect)

4.1  Introduction

The Court has always focused on its own role in the enforcement machinery and viewed the national systems of implementation from the perspective of Strasbourg. The Court’s self-centred perspective transpires e.g. from the link drawn between Article 1 and Article 13 in Kudla and Al-Nashif:

Giving direct expression to the States’ obligation to protect human rights first and foremost within their own legal system, Article 13 establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights.¹

The reverse is, however, really the case; the Court provides an additional guarantee to the primary domestic obligation to implement the ECHR in accordance with the requirements in Articles 1 and 13. Article 13 provides the primary guarantee, and Article 34 affords the subsidiary guarantee.

The domestic systems of review of the conformity of various legislative, administrative, and judicial measures with the standards of the ECHR vary greatly from country to country.² Uniformity never existed in this field.³ It is no surprise, therefore, that the ECHR leaves a wide implementation freedom to the Contracting States. It


is problematic, nonetheless, that the implementation of the ECHR in domestic law is not guided by a general principle focusing on the obligations of the Contracting Parties.

At the present stage of development of the ECHR, no overall theoretical or practical vision of the obligations of the Contracting Parties emerges from the Court’s caselaw. The Court’s former president, Prof. Luzius Wildhaber, has addressed the need for a new framework within which the interaction between national and international law can be addressed. But we do not need a new framework as a lot of work can be done within the framework of international law.

The single most important issue under the ECHR is the effectiveness of the ECHR in the domestic laws of the Contracting Parties. Therefore, the primary point of interest should not be the implementation freedom, but the implementation obligation of the Contracting Parties. The point of interest is not the discretion of Contracting Parties, but the legal limits to the discretion. The focus should be turned to the primary responsibility of the Contracting Parties. Yet, no one seems to have attempted to develop a general principle addressing the implementing obligations of the States.

The Court occasionally refers to the “primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1)”, but the purpose has ironically been to point out the implementation freedom in the execution of judgments. The Court has recently talked of “a primary duty on the State” to secure the ECHR in domestic law e.g. in the form of an obligation to secure the right to life by putting in place an appropriate legal and administrative framework, or in the form of an obligation to allow and facilitate displaced individuals to return to their homes. Yet it is questionable whether much weight can be attached to this language as the primary duty does not appear to be distinguishable from the general obligation on the Contracting Parties to respect the ECHR.

Just as the principle of subsidiarity is concerned with the Court’s review of the Contracting Parties’ observance of their obligations under the ECHR (Article 19), the principle of primarity is concerned with the obligations incumbent on domestic authorities in the implementation of the ECHR (Articles 1 and 13). This is simple. Yet, it is not so simple to determine the legal consequences of the binding effect. We have to describe in detail the exact consequences of the obligation to implement the ECHR; what exactly does it mean to be obliged to implement the ECHR in domestic law?

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5 The leading case is Papamichalopoulos and Others v. Greece (Article 50) (31 October 1995, Series A no. 330-B) § 34, but see also e.g. Katsoulis and Others v. Greece (Just satisfaction) (24 November 2005, Appl. no. 66742/01) and Novoselov v. Russia (2 June 2005, Appl. no. 66460/01) § 15.
7 Dogan and Others v. Turkey (29 June 2004, ECHR 2004-VI) § 153.
8 See McCann and Others v. the United Kingdom [GC] (27 September 1995, Series A no. 324) § 161 (a “general duty” to investigate) and Osman v. the United Kingdom [GC] (28 October 1998, Reports 1998-VIII) § 115 (a “primary duty” to protect).