CHAPTER TWENTY-THREE

THE RIGHT TO AN EFFECTIVE REMEDY BEFORE A NATIONAL AUTHORITY: PROBLEMS OF INTERPRETATION (ART. 13 ECHR)

Encarna Carmona Cuenca
Constitutional Law Associate Professor with Tenure
University of Alcalá

   3.1. The national authority does not necessarily have to be judicial.
   3.2. The effectiveness of the remedy does not depend on the certainty of a favourable outcome.
   3.3. Art 13 does not require a domestic remedy against legislation but a remedy against norms.
   3.4. Art. 13 requirements can be met by an aggregate of remedies.
   3.5. The scope of the obligation under art. 13 varies in relation to the nature of the infringed right.
   4. Does Art. 13 Impose the Incorporation of the Convention in National Law?
   5. Relationship between Art 13 and Articles 35.1 and 46 ECHR.
   6. Relationship between Art. 13 and Articles 5.4 and 6.1 ECHR.
   8. The Right to an Effective Remedy in the Charter of Fundamental Rights of the European Union.

1. General Meaning of Article 13 ECHR

This art. originated during the preparatory work on the Convention, out of the reluctance of some States, to submit individual claims before the Commission and the creation of the European Court of Human Rights itself, hence the insistence on the importance of protecting these rights through domestic measures. It was the British delegation that proposed the final wording of art. 13.¹

As Gomien, Harris and Zwaak² have pointed out, this right flows logically from art. 1 which imposes the obligation to *recognise* (in the French version) and *secure* (in the English version) the rights and freedoms protected by the Convention.³ The possibility of accessing domestic remedies to defend these rights can be considered as forming part of that obligation. More than a right it is in fact a guarantee of the other rights recognised in the Convention.⁴ In addition to the recognition of rights as such, some national and international declarations also provide instrumental guarantees. These guarantees are usually provided with procedural instruments of protection similar to those contemplated to defend substantive rights, in contrast to what could be called procedural rights, thereby eliminating the difference between the rights themselves and their guarantees. This is what has happened with art. 13. Conceived as a guarantee of the other rights, it has itself become a right guaranteed by Convention instruments. But the two-fold nature of the right to an effective remedy has led to some problems of interpretation.

It must be remembered that recognition of this right presupposes two spheres of protection: domestic in each state and European established by the Convention.⁵ art. 13 requires national procedures to guarantee Convention rights in each State but does not predetermine what those procedures should be, nor does it require special procedures over ordinary procedures. Each State is competent to establish

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⁵ There are similar articles in other international declarations for example, art. 8 in the 1948 Universal Declaration of Human Rights, art. 2.3 in the 1966 International Covenant on Civil and Political Rights, art. 18 in the 1948 American Declaration of the Rights and Duties of Man and art. 25 of the American Convention of Human Rights, signed at San Jose, Costa Rica 22 November 1969. On the requirements of this remedy, the Inter-American Court of Human Rights has stated that contemplation of a fast, simple remedy is not sufficient, it must be appropriate for establishing whether there has been a human rights violation (Judgment of 30 May 1999 in Castillo Petruzzi); the existence of formal remedies is not sufficient, they must be effective ( Judgment of 28 February 2003 in Cinco Pensionistas) and if the remedy exists but the period before the decision is given is excessive and the requirements of impartiality are not respected there will be breach of Art. 25 of the Convention (Judgment of 31 January 2001, in Tribunal Constitucional).