An analysis of the exclusion of evidence obtained in violation of human rights in light of the jurisprudence of the European Court of Human Rights

Ana María Torres Chedraui (*)

I. Introduction

1.1. The research problem

The purpose of this study is to analyse the way in which the European Court of Human Rights (herein referred to as 'the Court') has dealt with evidence obtained in violation of the rights of the Convention for the Protection of Human Rights and Fundamental Freedoms (herein referred to as 'the Convention'). In particular, this study will focus on the circumstances in which the Court maintained that evidence should be excluded from the proceedings in order to secure a fair trial.

This study will demonstrate that the Court has not always ordered the exclusion of all evidence obtained in violation of a Convention right. What is even more surprising, some types of evidence obtained in violation of a Convention right were not considered to affect the fairness of the proceedings. This study will present the considerations taken into account by the Court when deciding whether the fairness of the proceedings would be affected and whether there was a need for the exclusion of evidence from the trial.

When presented with a claim that evidence was obtained in violation of a Convention right, the Court splits the analysis into three thresholds. The first threshold refers to the determination of the violation of a Convention right; the second one refers to the violation of fair trial; and the third one

* Ana María Torres Chedraui is a pre-doctoral researcher at Departamento Dereito Público Especial at the Law Faculty of Universidad de Coruña, Spain. The author would like to thank Professor Pedro Serna Bermúdez, Amy DiBella, Gustavo Arosemena and the anonymous editor of Tilburg Law Review for their comments made on previous versions of this article. Any mistakes or imprecisions remain my own.
– to the exclusion of the evidence as a form of procedural reparation. This article will examine critically the rationality of the considerations taken into account by the Court, mainly with a focus on the second and third thresholds.

1.2. Delimitation and justification of this study

The Court’s jurisdiction is governed by, amongst others, the principle of primarity and the principle of subsidiarity. This means that the Court and national courts share the task of dealing with human rights claims, and that this task is procedurally and substantively delimited. The exhaustion of domestic proceedings delimits procedurally the jurisdiction of the Court, whereas the rights set forth in the Convention represent the framework that delimits it substantively. From this delimitation follows that the Court does not have jurisdiction to deal with claims against national law so long as there are no repercussions for Convention rights. It also follows that the Court is not to be considered a fourth instance tribunal. It can only deal with violations of Convention rights and cannot reassess facts or reopen the evidence stage.

The issue of evidence and its assessment seem to be a grey area with respect to which States exercise their margin of appreciation; the Court, however, retains its jurisdiction to supervise that the States’ discretion is exercised in accordance with the rights of the Convention. This discre-

---

1 The definition of these principles is well articulated by Jonas Christoffersen. According to Christoffersen, the principle of primarity refers to the obligations of national authorities to implement the Convention, i.e. the existence of domestic remedies to enforce the Convention rights. The principle of subsidiarity refers to the review functions the Court has over national judgments, i.e. the need to exhaust domestic remedies to trigger the jurisdiction of the Court. The interaction of these two principles leads to the result that the Court and national jurisdictions have a shared task in the enforcement of Convention rights. See J. Christoffersen, Fair balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights (MartinusNijhoff Publishers, The Hague 2009) 227 et seq.

2 I. Esparza & J.F. Erxebarria, ‘Artículo 6. Derecho a un proceso equitativo’ in Íñaki Lasagabaster Herrarte (dir) Convenio Europeo de Derechos Humanos. Comentario sistemático (2nd edn Thomson Reuters, Navarra 2009) 239-240. The authors hold that the Court cannot determine what illegal evidence is because this falls under the margin of appreciation of each State, but it is up to the Court to determine when the admission of said evidence affects the fairness of the proceedings. See also: B. Gasper, ‘Examining the use of evidence obtained under torture: the case of the British detainees may test the resolve of the European Convention in the era of terrorism’ (2005) 21 Am. U. Int’l L. Rev. 277, 284-285. While confirming that evidence falls on the margin of appreciation, B. Gasper states that the ECtHR exercises exceptional jurisdiction on issues of evidence in cases when it impacts fair trial rights. In particular, this happens when the right to oppose the use of tainted evidence is at stake, when evidence obtained in violation of a Convention right impacts the conviction of the accused, or when the quality of the evidence goes against the right against self-incrimination.