Problematic issues in "Strasbourg Criminal Law": 2014

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The review selects and presents some of the most interesting judgments delivered by the European Court of Human Rights during the year. The cases and the Court's rulings are briefly described and framed within the relevant jurisprudence. Furthermore, critical insights into the most significant or problematic issues raised by the judgment are provided.

I. The Grand Chamber on a State's positive obligations to protect vulnerable individuals

1. The case and the Court's ruling

The important judgment delivered by the Grand Chamber in the case *O'Keeffe v. Ireland* (Grand Chamber, 28.1.2014) considerably broadens States' positive obligations to protect vulnerable individuals stemming from Article 3 of the Convention.

The facts can be summarized as follows. In the late 1990 s, following psychological advice, some people reported to Irish law enforcement authorities that, at the time they were pupils in the 1970 s, they were subjected to sexual abuse by a school teacher. The school attended by the victim was – just as 90 % of the National Irish Schools at that time – only financed by the State, but managed on a day-to-day basis by the Catholic Church, to whom the State had delegated primary education. The subsequent investigations lead to charge a teacher with 386 criminal offences involving 21 pupils. He pleaded guilty to some sample charges and was sentenced to a term of imprisonment. One of the victims, after having being awarded compensation and damages against the offender, brought another civil action against various State authorities, alleging their direct negligence for failing to prevent abuses in school, as well as their vicarious liability for the offender's deeds, and finally tort responsibility for the violation of her constitutional right to bodily integrity. All these claims were rejected on the grounds that any civil suit had to be brought against the institution which was running that school at the relevant times, i. e. the Catholic Church. The victim decided eventually to lodge an application against Ireland with the Strasbourg Court.

The Grand Chamber unanimously declares that there has not been a violation of the procedural aspect of Article 3, domestic authorities having effectively sentenced and imprisoned the offender (par. 170-174). On the other hand, and most interestingly, the majority of the Court rules that there has been a violation of Article 3 in its substantive aspect, due to the State's failure to put appropriate mechanisms in place to protect National School pupils from sexual abuses from teachers (par. 144-169), as well as a violation of Article 13 in conjunction with Article 3, because the

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applicant had not been entitled to an effective remedy establishing any liability of the State for the violation of the substantive limb of Article 3 (175-187).

As to State's failure to protect school pupils, it is worthwhile taking a closer look at the Court's arguments. The Grand Chamber first of all outlines the applicable positive obligations under Article 3 (par. 144-152), and secondly, explains why they had not been fulfilled in the instant case (par. 153-169). With regard to the former step, the judgment points out that State liability cannot be excluded by the circumstance that abuses were committed within a national school run by the Church, for «*a State cannot absolve itself from its obligations to minors in primary school by delegating those duties to private bodies or individuals*». The Court emphasizes that such a ruling must be understood not as challenging the maintenance itself of the non-State primary education and the ideological choices underlying it, but rather in the sense that «*the State cannot be released from its positive obligation to protect simply because a child selects one of the State-approved education options*» (par. 150-151). Turning to the latter step – i. e., why the obligation of protection was not fulfilled – the Court finds that the State could not be unaware of the high risk of sexual crimes against minors at the relevant time, due to the available statistical evidence showing an alarming rate of those offences in Ireland. Accordingly, when relinquishing control of the education of the vast majority of young children to non-State actors, the State should also have put in place an appropriate framework of protection, including, at a minimum, «*effective mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body, such procedures being fundamental to the enforcement of the criminal laws, to the prevention of such ill-treatment and, more generally therefore, to the fulfilment of the positive protective obligation of the State*» (par. 162). Those measures were instead totally absent at the time of the facts reported by the applicant, when most of the complaints about teachers were expressly channelled to the non-State denominational Manager, who was a local priest.

2. Commentary

The European Court's ruling in the *O'Keeffe* case stimulates some considerations with regard to the extent of States' positive obligations to protect vulnerable persons (arising both from Article 3 and Article 2 of the Convention).

So far, the Court has found those violations only in cases where it was possible to identify in advance the offender, or the targeted victim, or both of them. Such situations are those where either the offender has a previous history of violence (see *Maiorano and others v. Italy*, 2009, where the perpetrator of an earlier exceptionally brutal offence committed a double murder during day release from prison); or the victim belongs to a category notoriously exposed to a specific danger (see *Kilic v. Turkey*, 2000 and *Mahmut Kaya v. Turkey*, 2000, involving, respectively, the murders of a journalist who worked for a Kurdish newspaper and that of a doctor who had treated some members of the PKK: the Court found that the authorities were aware that people associated with the Kurdish separatism had been the object of a campaign of serious attacks and threats); or there have already been episodes of

abuses perpetrated by the same offender towards the same victim (see a number of cases of repeated family abuses: *A. v. UK*, 1998; *Z. and others v. UK*, 2001; *E. and others v. UK,* 2002; *Opuz v. Turkey*, 2009; *T.M. and C. M. v. the Republic of Moldova,* 2014).

The common denominator of the jurisprudence above seems to be an individualized assessment of foreseeability: indeed, the statement that authorities "knew or should have known" about the existing risk is based on the circumstances of the single case under consideration. On the contrary, in the *O'Keeffe* case, the foreseeability of the abuse is based, for the first time, on the sole statistics on that type of offences (i.e. child sexual abuse) within the whole national population. Therefore, the real novelty of the *O'Keeffe* ruling seems to be the extension of the factual ground which determines foreseeability and thus imposes the adoption of preventive measures: hereinafter, that ground will also encompass the statistical likelihood that a certain type of offence against vulnerable persons is committed.

Even though the *O'Keeffe* judgment is of course well intended, for it aims to grant stronger protection to vulnerable victims, it still lends itself to some criticism, both with regard to the solution given to the instant case, and with regard to its impact on the future case-law.

As to the case in hand, what is not entirely convincing is the evidence of foreseeability. Indeed, the Court's assessment is based, on the one hand, on a report on child abuses issued forty years before the relevant facts took place; and, on the other hand, on another report issued in 2009, which quotes conflicting opinions as to the exact time when authorities reached the awareness of the magnitude of the problem (see par. 69 – 84). Therefore, one could reasonably doubt that in the '70 s, the Irish State already knew or should have known about the risks to which children attending national schools were exposed.

As to the impact on future case-law, it is clear that the broadening of positive obligations introduced by the *O'Keeffe* judgment is in turn going to restrict a Member State's margin of appreciation in the field of public security policies. Indeed, it is conceivable that hereinafter the Court's assessment on the adequacy of national measures to contrast abuses against vulnerable persons will be much more deep and pervasive than before. Such evolution might progressively turn into some sort of strict liability for States, in that they might be held responsible for not preventing any crime that occurred under their jurisdiction insofar as it falls into a statistically relevant class of offences.

II. New frontiers for the right to freedom from double jeopardy (*ne bis in idem*)

1. The case and the Court's ruling

Principles relating to fair trial and freedom from double jeopardy are here applied in a case of market abuse (Sec. II, 4.3.2014, *Grande Stevens and others v. Italy*). The

applicants (two Italian companies, two of their representatives and their lawyer) put in place a market manipulation with the final aim of maintaining the share control on the car manufacturer company FIAT, which was instead about to be gained by some banks. The fraud had consisted in that the applicants, when asked by the Consob (the Italian administrative body charged with protecting investors and ensuring the transparency and development of stock markets) to provide information concerning the financial situation of FIAT, intentionally failed to mention their ongoing negotiations aimed at the maintenance of the majority share. The manipulation was eventually detected by the Consob, who imposed on the applicants administrative pecuniary sanctions and disqualifications. Later, the applicants were also subjected to criminal proceedings in relation to the same matter. This latter procedure was partially still pending at the time when they lodged an application before the European Court of Human Rights, alleging *inter alia* the violation of Article 6 of the Convention and Article 4 of the Seventh Protocol.

The Strasbourg Court holds that both violations took place. With regard to the former, the Court rules that, although the sanctions imposed by the Consob are described as "administrative" in Italian law, their *severity* meant that they were criminal in nature (see par. 97-98), and thus the guarantees set by Article 6 for the determination of criminal charges apply. In the merits, the procedure before the Consob did not satisfy the requirements of a fair trial, due to the inequality of arms between the prosecution and the defence, the absence of public hearing, the exercise of both the functions of investigation and judgment within a single institution and finally the absence of fair jurisdictional control over the administrative procedure.

The Court turns then to assess whether the further criminal proceedings brought against the applicants had violated the prohibition of double jeopardy laid down by Article 4 of the Seventh Protocol. Given the criminal nature of the "administrative" sanctions imposed by the Consob, and given that such sanctions were undisputedly considered final, the key issue here was whether the subsequent criminal trial had addressed the "same offence". In this regard, the Court recalls its leading case *Zolotukhin v. Russia* (2009), according to which, for the purpose of the Convention, the "same offence" does not refer to the legal characterization of the offence's essential elements, but on the material conducts underlying them. In other words, the Convention prohibits the prosecution an individual for a second offence insofar as it arose from identical facts or facts that were "substantially" the same as those underlying the first offence. That was precisely what happened in the present case, where the same market manipulation, perpetrated the same actors, was first sanctioned by the Consob and then subjected to criminal trial.

2. Commentary

The importance of this judgment seems to extend far beyond the immediate case. In fact, today, a number of EU Member States provide concurrent administrative and criminal enforcement powers in important areas such as, for instance, market

abuse, tax fraud and environmental law. Although labelled as "administrative" by domestic legislations, many of those sanctions are so severe that they have to be considered as criminal penalties under the jurisprudence of the ECHR, thus falling into the scope of Article 6 of the Convention and Article 4 of the 7th Protocol.

Therefore, Member States should firstly ensure that the administrative procedures aimed at the imposition of those sanctions comply with the requirements of Article 6. Such a goal could be achieved either by extending to them the scope of the guarantees of a fair trial, or – as emphasized by the ECHR in *Grande Stevens* judgment (see par. 139) – by providing a subsequent control before a judicial body that has full jurisdiction. Currently, this is not the case in many European legal systems, where the administrative procedures are «*inquisitorial, unequal and expeditious*», and the subsequent stages of jurisdictional control are no more than an illusory safeguard (see par. 32 of the partially dissenting opinion issued by Judges Karakas and Pinto de Albuquerque).

Secondly, with regard to Article 4 of the 7th Protocol, it is essential that hereinafter, and once substantially criminal sanctions become final, Member States put in place mechanisms in order to prevent further criminal proceedings against the same offenders being instituted. It is true that there are fields – such as, for instance, market abuse (see Regulation n. 596/2014 and Directive 2014/57/EU) – where the EU law itself envisages the possibility for Member States to introduce both criminal and administrative sanctions. Nevertheless, the jurisprudence of the ECJ with regard to the *ne bis in idem* principle (as provided for by Article 50 of the Charter of Fundamental Rights) seems to be perfectly in line with the jurisprudence of the ECHR. Indeed, the former court, has recently stated that the *ne bis idem* principle does not preclude a Member State from imposing successively, for the same acts, a tax penalty and a criminal penalty «*in so far as the first penalty is not criminal in nature*» (*Aklagaren v. Hans Akerberg Fransson*, C-617/10). Although the ECJ emphasized that the nature of the penalty is «*a matter which is for the national court to determine*», national courts are in turn bound to interpret their law in the light of the ECHR jurisprudence.

The relationship between ECHR case-law and the European Union law in the matter of *ne bis in idem* is also meaningful with regard to two further aspects. On the one hand, while Article 4 of the 7th Protocol of the Convention only refers to criminal proceedings pending under the jurisdiction of the "same State", Article 50 of the Charter broadens the scope of the freedom from double jeopardy to the entire European Union. Therefore, with regard to those fields where EU Member States are implementing the Union law, national jurisdictions cannot prosecute anybody twice, even if the first criminal sanction – i. e., a sanction which has to be considered criminal according to the ECHR jurisprudence – was imposed in another Member State. On the other hand, the Charter of Nizza is directly applicable by the jurisdictions of EU Member States: hence, even if domestic legislations do not expressly prohibit double jeopardy, national jurisdictions should apply the *ne*

bis in idem bar by not bringing (or by interrupting) further criminal proceedings for same offences.

III. Accidental deaths and conduct endangering life: when is a response in terms of criminal prosecution necessary?

1. The case and the Court's ruling

The case of *Oruk v. Turkey* (Sec. II, 4.2.2014) concerns the accidental explosion of a military rocket which caused the death of six children, including the applicant's son. The ordnance was kept within the army's firing range, which was not surrounded by fences or barbed wire, nor indicated by warning signs. Due to the absence of any of those preventive measures, and in addition to the fact that the civilians living nearby had not been otherwise informed of the dangers posed by those unattended devices, the Court finds that the State did not comply with its positive substantive obligations to protect life. Furthermore, the Court notes that domestic authorities did not conduct any criminal investigation aimed at the punishment of those responsible for the accident, thus finding a violation also of the procedural limb of Article 2. Such a conclusion is supported by recalling the principle stated in the Grand Chamber judgment *Öneryildiz v. Turkey* of 2004: «*where it is established that the negligence attributable to State officials or bodies…goes beyond an error of judgment or carelessness, in that the authorities in question, fully realizing the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative*» (par. 93).

The same conclusion – i. e., an infringement of procedural obligations consisting in the lack of a criminal investigation – is reached in *Gorelov v. Russia* (Sec. I, 9.1.2014) judgment, even though on the different ground that only a criminal-law inquiry might have thrown light on the accident and on the responsibilities thereof. The parties' submissions, in fact, created a situation of uncertainty, so that it was not possible for the Court to assess whether a substantive violation of Article 2 had taken place: on the one hand, the applicant's complaint – that he had been infected with HIV as a consequence of negligent actions by the medical staff of the detention facility where he had been held – was vague, unreliable and inconsistent; on the other hand, the Government's thesis – according to which the applicant fell sick as a consequence of self-mutilation or "homemade" tattooing – was not corroborated by any evidence. Yet, in the Court's opinion, such impossibility to draw any conclusion as to the cause of the applicant's infection was due to the authorities' failure to investigate what happened. In this regard, the Court highlights that the administrative inquiry conducted by the penitentiary health service «*could not be a substitute for a full criminal-law inquiry into allegations of transmission of a life-threatening*

infection, such as HIV, resulting from negligent or willful actions on the part of State agents». In fact, «*a criminal-law inquiry could have allowed the assembling of evidence necessary to corroborate the applicant's allegation of negligence on the part of prison medical staff leading to his contracting the virus. The investigating authorities would have had broad legal powers to visit the detention facility, interview detainees, study documents including medical records, obtain statements from prison officials collect forensic evidence, commission expert reports, and take all other essential steps for the purpose of ascertaining the veracity of the applicant's account*» (par. 54).

A slightly more complicated situation is addressed in *Valeriy Fuklev v. Ukraine* (Sec. V, 16.1.2014) judgment, a case of medical malpractice where a woman died of post-operative peritonitis complicated by sepsis. Here, domestic authorities did conduct a criminal investigation, as well as an administrative inquiry, neither of which, however, had clarified the circumstances of the accident. In his application to the Strasbourg Court, the victim's husband complained that domestic investigations were ineffective, whilst the Government objected that he had not lodged a separate civil claim, and thus had failed to exhaust domestic remedies. The Court decides to join the objection to the merits.

After having found that both the official inquiries (criminal and administrative) fell short of thoroughness and promptness, the Court turns to examine whether the applicant had the duty to raise the matter before civil courts. In this regard, the judgment states that an applicant who has exhausted a remedy that is «*reasonably expected*» to be effective and sufficient, cannot also be required to have tried other remedies that were available but probably no more likely to be successful (see par. 79-81). In support of the reasonability of the applicant's choice in this case, the Court stresses the following three circumstances: that «*the criminal proceedings pursued by the applicant afforded a joint examination of criminal responsibility and civil liability arising from the same culpable conduct, thus facilitating the overall procedural protection of the rights at stake*»; that «*the introduction of the civil claim in the criminal case may well have been preferable for the applicant from the stand point of court fees and other costs and expenses*»; and finally, that «*the investigative authorities were under an obligation to collect evidence*» and that such evidence «*would have been essential for the determination of the applicant's civil claim*» (par. 80). Therefore – even if the judgment reiterates that «*in the specific sphere of medical negligence, the* [procedural] *obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts*» (par. 66) – the conclusion with regard to the instant case is that domestic authorities violated Article 2 by failing to show the requisite diligence in dealing with the criminal prosecution, regardless of any chance of success that the victim would have had through a civil claim.

2. Commentary

According to Strasbourg case-law, the context of negligent deaths and conduct endangering life is one where – even if the Convention does not as such guarantee a right to have a criminal proceeding instituted against third parties – «*the effective judicial system required by Article 2 may, and under certain circumstances must, include*

recourse to criminal law». Although that statement had been repeated in several judgments, so far the Court has never provided a comprehensive list of those additional circumstances under which, in cases of unintentional killings or endangerments of lives, the recourse to criminal enforcement powers becomes mandatory. Therefore, such a list has to be rebuilt by taking into consideration the different features of the judgments issued by the Court in this field.

From this perspective, the three judgments above make a useful contribution to the current debate. For each one of them, in fact, the Court has derived the necessity of a response in terms of criminal prosecution from a different circumstance: the gross negligence on national authorities' part (*Oruk v. Turkey*); the need of an in-depth investigation, which would have only been possible through the powerful means of a criminal prosecution (*Gorelov v. Russia*); the reasonable choice made by the applicant in favour of the criminal justice system, which determined in turn the State's duty to carry out effectively the procedure thereof (*Valeriy Fuklev v. Ukraine*).

Each of these circumstances, indeed, seems to reflect a general principle of the ECHR jurisprudence, whose identification might be useful for the future assessment of similar cases. As to the first circumstance, it is clear that the rationale of the ruling rests primarily on the severity of the authorities conducts. Therefore, it seems that the relevant principle which underlines the judgment is proportionality between facts and sanctions. The second circumstance is based on the long lasting principle (developed in the already mentioned case *Öneryildiz v. Turkey* of 2004) according to which «*where lives have been lost or seriously endangered in circumstances potentially engaging the responsibility of the State, Article 2 entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are terminated and punished*». It follows that, when administrative inquiries are not sufficient for gathering the necessary evidence, then a full criminal law investigation becomes mandatory. Finally, the third circumstance aims at the protection of the legitimate expectations of those who had reasonably relied on the criminal justice system (in the instant case, the Court attached the reasonability of such reliance to three further circumstances: procedural economy, containment of costs, and easier gathering of evidence).