CHIEF JUSTICE EMERITUS

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EXHAUSTION OF DOMESTIC REMEDIES

The plea in the Convention for the Protection of Human Rights and Fundamental Freedoms.

1.The European Convention for the Protection of Human Rights and Individual Freedoms was signed in Rome on the 4th.November 1950, but came into force only three years later, on 3rd. September 1953. It set out a procedure which could be made use of by those persons who alleged that they were the victims of violations of their fundamental rights and freedoms, by any one of the High Contracting Parties of the Convention.The procedure could be initiated by a petition addressed to the Secretary General of the Council of Europe and lodged with the European Commission of Human Rights. The Commission could then deal with the matter mentioned in the petition.

2. Before proceeding further with its examination however, the Commission had to establish, if so required by the respondent State, whether the applicant or petitioner, had exhausted the remedies which were available according to the domestic legal order:-

"The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken"

This was Article 26 which now, as from 1st. November 1998, appears as Article 35; the word 'Court' has now replaced the word 'Commission'.

What follows are some considerations on how, that part of the article which states:
" after all domestic remedies have been exhausted according to the gen-

eral recognized rules of international law"
has been interpreted and applied by the European Court of Human Rights.

Points of Procedure.

3. Before proceeding with the examination of the interpretation of the exhaustion rule arrived at by the Court, it is perhaps necessary to note three procedural points, connected with the application of the plea, which to any ordinary advocate who is also a practitioner in Courts of Law, would have been taken foregranted. Not so in the Strasbourg experience. In the initial cases debated before the Commission various doubts were raised and it took some time to arrive at the following usual settlement of the difficulties. These three points are [i] that it is up to the State to raise the plea that the applicant has not exhausted all the domestic remedies which were at his disposal according to that State's National Legal Structure; [ii] that once the plea is raised it is incumbent on that State to prove what it alleges; [iii] the applicant has, finally, the burden to prove otherwise, after the State has succeeded to prove its plea.

The scope of the rule.

4. It is clear that the best and ideal position which the Rule of Law tends to achieve, is that fundamental rights and freedoms are respected, protected and enforced in every State at the national, or as it is called, the domestic, level. It is only when this somehow fails that the need arises to have recourse to an international tribunal to correct the deficiency.

The Convention therefore, in conformity with this principle encourages its member States to settle all matters which may arise regarding fundamental rights and freedoms within the ambit of their own legal order and will only exercise its jurisdiction, if and when that national legal order does not come up with an adequate answer. Hence the importance of Article 35 for understanding the basic philosophy underlying the comprehensive and systematic thinking and practice on this aspect of the Rule of Law which has now, since the end of the Second World War [1939-1945], flourished and spread, at least, in most parts of the Western part of the World.
5. These aims of this important rule, which bring out the basic general thinking upon which it is based, have been expressed in various judgments of the Court. The following are some of the most salient expressions:-

" The rule of domestic remedies, which dispenses States from answering be-

fore an international body for their acts before an international body before they have an opportunity to put matters right through their own legal system, is also one of the generally recognized principles of international law to which Article 26 [now 35] makes specific reference"[1], and further down in the same judgment:-

"..the essential aim of which [i.e. the rule] is to protect the national legal order"[2]

6. The purpose of this short study is very limited. The rule has been considered by a substantial number of judgments of the Court. The conclusions arrived at vary considerably. It is difficult to state that there is in fact a definite jurisprudential line which can be said to have been really established by the Court; except perhaps to say that on the whole, an overview will come down to the proposition that 'the protection of the national legal order' does not seem to have had from the Court the expected and due recognition which was laid down by the Convention.

7. It is not often that the Court, has in fact, found in favour of a State's plea that domestic remedies had not been exhausted by the applicant before recourse was had to the Strasbourg Organs. It is therefore instructive to examine in some detail[3], one of the earliest examples of a judgment[4] which accepted the plea raised by a State of non-exhaustion of domestic legal remedies by the applicant. Few others followed it and it served as an opportunity for the Court in Plenary Session to explain how it understands the rule when it concludes in favour of the acceptance of the plea. It is instructive because it is exactly in this positive, in the sense of acceptance of the plea, judgment which demonstrates, more than any one of the numerous negative judgments, how the Court through its interpretation of the article has weakened it to such an extent that sometimes one gets the impression that, in truth, the Court has forgotten that it is also incumbent upon it to look favourably upon all those national domestic legal structures which do provide remedies when fundamental rights and liberties are violated. His weakening of the rule reaches very dangerous levels in certain cases as shall be commented upon in the second part of this short study.

8. Danielle Van Oosterwijck was born in Belgium and registered as a child of the female sex. Very early in life she became conscious of a dual personality; although physically female she felt herself psychologically of the male sex. Specialist doctors found symptoms which indicated trans-sexualism. Hormone therapy was accepted and applied which brought about changes in hair growth

and change of voice. From 1970 to 1973, in measured stages, surgical interventions- bilateral mammectomy, hysterectomy, bilateral ovariectomy and phalloplasty, - substituted a female to a male physique. Only the chromosomes of the female type remained.

9. On completion of this painful and stressing process, Van Oosterwijck filed a petition to have the birth certificate 'rectified' so that that certificate should henceforth read ' a child of the male sex with the forenames of Daniel, Julien...son of...'

Belgian Law, like ours, permitted an action for correcting a birth certificate if an error was detected and proved. Any other registered certificate, marriage, death etc. was similarly treated. In the instant case, the Brussels Court dismissed the action as no error was demonstrated. The Court of Appeal confirmed the first decision and Van Oosterwijck decided not to have recourse to the Court of Cassation. The decision of the Court of Appeal was delivered on 7 May 1974, and shortly afterwards, on 2 July 1974, a new law came into force which permitted a person to seek an authorization to have his forenames changed for the purposes of having them on his identity card together with a photograph of the person's actual physical appearance.

10. On 1 September 1976 Van Oosterwijck applied to the Commission alleging that the refusal of the Belgian State had brought about his 'civil death', an inhuman and degrading treatment [art.3]; was obliging him to use documents which did not reflect his true identity [art. 8 respect for private life]; perpetuating a distortion which eliminated the right to marry and to establish a family [art.12].

11. The Commission dismissed the Government's plea that the applicant had not exhausted all the domestic remedies available, but the plea was raised once again before the Chamber of the Court, which because of the importance of case relinquished jurisdiction in favour of the Plenary Court which on 27 February 1980 accepted the plea and thereby referred the applicant back to the domestic legal order.

12. The Government pleaded that a] no appeal on a point of law had been made to the Court of Cassation; b] the convention itself was not pleaded either in first or second instance; c] no application under the new law had been made for authorization to change forenames, and lastly, d] the applicant did not institute

an *'action d'etat'* which is a special action pertaining to personal status.

13. In reaching its decision, which is the first judgment in which the Court examined in some detail the implications of art. 35 [previous 26], the following points were considered and established:-

[A] "The only remedies which ... the Convention requires to be exercised are those that relate to the breaches alleged and at the same time are available and sufficient ."

{i} as to the first part of this statement 'In order to determine whether a remedy satisfies these various conditions and is on that account to be regarded as likely to provide redress..... the Court does not have to assess whether those complaints are well-founded: it must assume this to be so, but on a strictly provisional basis and purely as a working hypothesis';

{ii} as to the second part - remedies which are 'available and sufficient', the Court refereed back to *dicta* in previous judgments, beginning with that of the Stogmuller Case[5] of 1969. Reference to what was said in this latter case, began with the Vagrancy Cases of 18 June 1970,[6] already mentioned, and continued with the Airey Case of 9 Oct. 1979 [7] and the Deweer Case of Feb. 1980 [8], and it is therefore useful to quote it in full :-

"As to the point whether the proceedings instituted {*saisine*} may embrace complaints concerning facts which occurred after the lodging of the Application, international law, to which Article 26 refers explicitly, is far from conferring on the rule of exhaustion the inflexible character which the Government seem to attribute to it. International Law only imposes the use of the remedies which are not only available to the persons concerned but are also sufficient, that is to say capable of redressing their complaints."[9] [B]. the recourse to the Court of Cassation should have been made because that Court has jurisdiction ' to state the law and thereby set the course for subsequent judicial decisions. There is nothing to show that an appeal to the Court of Cassation on grounds of the national legislation *stricto sensu* would have been obviously futile.[10]'

[C] since the Convention forms part of the Belgian legal system, the applicant could have relied on Article 8 and this in his own country.[11]

[D] the *actions d'etat* deal with issues of substance as their purpose 'is to establish, modify or extinguish personal status [12]'; however in this context the

Court held that :-
" The rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the case."

Accordingly the Court concluded, on this point, that 'in the absence of any decided cases in Belgium' on actions of this type, the applicant was not expected to be at fault for omitting to institute such an action .

14. One can summarize therefore the points of interpretation given by the Court as follows:-

[a] the domestic remedies claimed by the defending State have to be available and sufficient.
This 'interpretation' borders on the obvious and the tautological. Manifestly a State cannot raise the plea without having within its own legal structure remedies which can not only potentially but also actually, resolve the violations alleged by the applicant if these are proved to have occurred. It is to be recalled that this 'available and sufficient' formulation, was used initially by the Court in the Stogmuller Case in answer to the preposterous pretension by the State that the applicant was obliged to make use of remedies provided by the State <u>after</u> he had recourse to the international organs. Obviously not; and therefore an obvious rejection by the Court. But as time went by the statement came to shed its 'textual' meaning, and became a sort of password which through sheer repetition, as a general ground-cover, sometimes being so 'obvious', to come dangerously close to disarming the rule. As shall latter be illustrated.

[b] The plea by the State will not succeed if the remedy which was supposedly at the applicant's disposition, <u>would have been obviously futile when attempted.</u>

[c] The rule is <u>neither absolute nor capable of being applied automatically;</u> and therefore <u>it is essential to have regard to the particular circumstances of each case.</u>

These three modes of interpretation have been followed uninterruptedly up to now [ie.the end of 1998] by the Court and in certain cases, as shall be seen, they have been applied in such a way that one can really consider that the

protection of the national legal order essentiality of the rule has suffered severe obfuscation.

15. The second part of this study will discuss some interesting and controversial cases in which the Court rejected the plea of exhaustion of domestic remedies.

REFERENCES

[1] De Wilde, Ooms and Versyp Cases {Vagrancy Cases}.18th. June 1971.Series A. Vol.12. p.29.para.*50.

[2]The phrasing is a bit loose, and the use of the word 'before' may give rise to a slight misunderstanding. One would have preferred the wording used by Judge A.Verdross in a Separate Opinion in a later judgment:' ...the limits of an international body's jurisdiction in the field in question are designed to protect the States from finding themselves arraigned at international level **before** they have had an opportunity to redress a violation which may possibly have been committed by an organ of lower rank. Consequently, every provision in this category must be interpreted strictly'.Ringeisen Case. 16th. July 1971. A.Vol.13. p. 50.*1.
Ibid.p.31.*55.

[3]. I am a strong believer in the connection Fact cum Law, i.e. the application of every rule or norm of Law if it is to be well understood, has to be examined and seen against the underlying background of fact. This always means that no proper understanding of a rule is really possible until and unless it is 'tested' by immersion in the ' facts ' of reality. In this sense I am a realist, modestly following the teachings of the great realists -Aristotle and Aquinas.

[4] Van Oosterwijck Case. 6.Nov.1980.SeriesA. Vol.40.

[5] Stogmuller Case, 10 November 1969.Series A, Vol.9.p. 42.*11.

[6] See note 1 above.

[7] Airey Case Series A, Vol.32. 1979.p. 11. *19.

[8] Deweer Case, Series A. Vol. 35. P.16. *29.

[9] Stogmuller p.42. *11.This paragraph had also received an 'unusual' reading and 'significance' by the Court in the Guzzardi Case of 6 Nov.1980, Series A Vol.39. when on page 26,* 72 it stated :'However, Article 26, which refers to 'the generally recognized rules of international law' should be applied with a certain degree of flexibility and without excessive regard for matters of form'. It is difficult to find a logical justification for this deduction. But it appears that this kind of 'connection' can be explained by the general diffidence which the Court reserves for Art.35.

[10] ibid.*32.

[11] ibid.*.33

[12] ibid.*35.