ARGUABLE BUT SUPERFLUOUS? – JUDICIAL POLICIES OF THE EUROPEAN COURT OF HUMAN RIGHTS IN RELATION TO THE RIGHT TO AN EFFECTIVE REMEDY BEFORE A NATIONAL AUTHORITY UNDER ARTICLE 13 ECHR

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INTRODUCTION

Article 13 of the European Convention on Human Rights (the "ECHR") provides that '[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. This provision recognises that any individual or juridical person who claims to be a victim of a violation of any of the Convention rights has a procedural right of 'effective remedy' by which to contest such a violation before a national authority.[1]

When confronted with issues of remedial and other procedural deficiencies both under any of the substantive-right provision of the ECHR (or its Protocols) and under Article 13 of the ECHR, the practice of the European Court of Human Rights (the "Court" or the "ECtHR") provides an inconsistent picture. Three patterns or approaches emerge from the jurisprudence. In some situations, the Court has jettisoned any separate review under Article 13 after having examined those procedural issues under the substantive provision. In other situations, in a diametrically opposite manner, the Court has 'absorbed' the procedural issues raised under the heading of a substantive right provision in the context of Article 13 alone. In

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[1] The literature on Article 13 is limited: *see* F. Hampson, "The Concept of an 'Arguable Claim' under Article 13 of the European Convention on Human Rights", 39 *Int'l & Comp. L. Q* 891 (1990); P. Cumper, "Article 13: The Right to an Effective National Remedy", in *The Law of the European Convention on Human Rights*, ch. 17, 764 (D. J. Harris, M. O'Boyle, E. Bates & C. Buckley eds., 4th ed., 2018); A. Lee, "Focus on Article 13 ECHR", 20(1) *Jud. Rev.* 33-41 (2015). For the commentaries to the ECHR, *see* W. Schabas, "Article 13: Right to an effective remedy", *Commentary to the ECHR*, 546 (2015); J. Frowein & W. Peukert, *MenschenRechtsKonvention*, 391-400 (2009); A. Drzemczewski & C. Giakoumopoulos, "Article 13", in L. E. Pettiti, E. Decaux, & P. H. Imbert, *La* convention européenne des droits de l'homme *; commentaire article par article*, 455-74 (1999).

yet other situations, the Court engages in separate examinations under Article 13, even after having considered identical or affiliated issues of remedies or other procedures under the heading of a substantive right. This paper aims to identify judicial policies of the ECtHR and the ex-European Commission of Human Rights (the "Commission" or the "ECmHR") in assessing the interplay between a substantive right and Article 13. It also seeks to extrapolate from the 'raw materials' of the case-law some rationales that may have contributed to deciding which of the above described approaches should be chosen.

The structure of this paper is as follows. To gain deeper insight into the operational mechanism of Article 13, Sections I and II address two preliminary questions: (1) the legal nature of this provision evaluated within the 'constitutional' framework of the ECHR;[2] and (2) how the notion of 'arguable' has developed to serve as the threshold criterion for its application, and how this may be compared to its cognate notion of 'manifestly ill-founded,' which serves to filter frivolous cases at admissibility stage. Once those preliminary issues are clarified, in the following sections the paper engages in an in-depth review of the relationship between the substantive provisions of the ECHR and Article 13. In the penultimate section, inquiries will be made into one hypothesis that may possibly account for the Court's decision to abstain from a separate review under Article 13.

I. ANCILLARY CHARACTER OF THE RIGHT TO AN EFFECTIVE REMEDY AND THE PRINCIPLE OF SUBSIDIARITY

One special feature of Article 13 is that it can be invoked only in conjunction with (or in the light of) one or more of substantive rights and freedoms set forth in the Convention (Articles 2-12, or Article 14)[3] or its Protocols.[4] In view of this, it is often argued that as with the freedom from discrimination under Article 14 (save in cases where the States have ratified Protocol No. 12 and recognized it as a free-standing right),[5] the right to an

2 For the characterization of the ECHR as a 'constitutional' legal order, *see Loizidou v. Turkey* (preliminary objections) [GC] no. 15318/89, para. 75 ECHR (1995); *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, [GC] no. 45036/98, para. 156 ECHR (2005).

3 Though rejected in the specific facts of the case, the Court examined the possibility of a violation of two 'ancillary' provisions of Articles 13 and 14 in *Boyle and Rice v. UK*, no. 9659/82, 9658/82 (plenary judgment), paras. 85-86 ECHR (1988).

4 *Rotaru v. Romania*, [GC] no. 28341/95, para. 67 ECHR (2000).

5 *Sejdić and Finci v. Bosnia and Herzegovina*, [GC] no. 27996/06 ECHR (2009).

effective remedy under Article 13 is a 'subsidiary right'.[6] As will be analysed below, once complainants bring an 'arguable' claim of a breach of any of the substantive rights of the ECHR (or of its Protocols), the Court's scrutiny under this provision is supposed to intervene irrespective of its finding that there is no violation of that substantive provision. In that sense, its nature and operational modality can be better characterized as 'qualified independence' from a substantive provision in conjunction with (or in the light of) which it is invoked.

One special 'constitutional' dimension of Article 13 is that this provision, together with Article 35 on the admissibility condition, is considered to express the principle of subsidiarity.[7] The thrust of this principle is that the ECHR mechanism is supplementary to the primary responsibility of national constitutional systems for safeguarding fundamental rights.[8] Following the amendment by Protocol No. 15,[9] this principle now finds itself in the newly added recital of the Preamble to the ECHR.[10]

II. THE ARGUABILITY TEST (*LE CARACTÈRE 'DÉFENDABLE'*) AS THE THRESHOLD

A. General Overview

As regards the threshold for application of Article 13, clearly it is too far-fetched to argue that any claim by applicants that their rights guaranteed in the ECHR are alleged to be breached would invite the examinations of Article 13 claims.[11] Not every claimed violation of the Convention rights automatically galvanizes the examinations under Article 13.[12] Since the

6 Schabas, *supra* note1, at 552. *But see Cobzaru v. Romania*, no. 48254/99, paras. 100-101 ECHR (2007) (a violation of Article 14 in tandem with the procedural limb of Article 3 and Article 13).

7 *Kudla v. Poland*, [GC] 30210/96, para. 152 ECHR (2000). *See also* the 'classic': *Case relating to certain aspects of the laws on the use of languages in education in Belgium (Belgian Linguistic Case)*, Merits, no. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, para. 10 ECHR (1968).

8 *Rachevi v. Bulgaria*, no. 47877/99, para. 61 ECHR (2004); *Nemtsov v. Russia*, no. 1774/11, para. 112 ECHR (2014).

9 This was adopted following the Interlaken, Izmir and Brighton Declarations. *See* Brighton Declaration (2012), at para. 12(b).

10 The pilot judgments scheme under Article 13 facilitates the Court's policy of 'repatriating' cases to domestic procedures for settling disputes pursuant to the notion of subsidiarity. This is akin to the ICTY's referral of cases to the War Crimes Chamber in Bosnia and Herzegovina according to Rule 11b is of the ICTY Rules of Procedure and Evidence.

11 Hampson, *supra* note 1, at 893. *See also Boyle and Rice v. UK*, *supra* note 3, at para. 52.

12 Hampson, *supra* note 1.

Silver case,[13] the Court has developed the notion of 'arguability' as the threshold test or condition for triggering the activation of its examinations under Article 13.[14] The thrust of this condition is that only where an individual has an 'arguable claim' ('*grief défendable'*) to being a victim of a breach of the Convention rights, do national authorities have to provide them with a remedy that is capable of determining their claim and, if appropriate, of securing redress.[15]

The meanings of the notion 'arguable' has not been fully elaborated in the case law. The approach of the Strasbourg organs is to avoid an 'abstract definition' of the notion of 'arguability'.[16] Instead the Court's preferred methodology is to examine this notion on a case-by-case basis, with special reference to the particular facts, the nature of legal or non-legal issues raised in the specific case,[17] and the gravity of alleged infringements on substantive rights.[18]

B. 'Arguability' as a Low-Threshold Test

The threshold of the 'arguable' test is set low. The ex-Commission once averred that this test can be evaluated by inquiries into the question if 'the claim should give rise to a *prima facie* issue'.[19] The eased standard for this test can be rationalized by the idea underlying the text of Article 13. It can be suggested that it should give as broad a scope of procedural protection as

13 *Silver and Others v. UK*, no. 5947/72 et al. , para. 114 ECHR (1983). A rudimentary form of this test was recognised in the earlier case of *Klass and Others v. Germany*, no. 5029/71, para. 64 ECHR (1978).

14 *Boyle and Rice v. UK*, *supra* note 3, at para. 52.

15 *See, e.g., Silver and Others v. UK*, *supra* note 13, at para. 113; *Leander v. Sweden*, no. 9248/81, para. 77 ECHR (1987); *Kaya v Turkey*, no. 22729/93, para. 106 ECHR (1998); *Panju v. Belgium*, no. 18393/09, para. 52 ECHR (2014).

16 *Boyle and Rice v. UK*, *supra* note 3, at para. 55; *Plattform 'Ärzte Für das Leben' v. Austria*, no. 10126/82, para. 27 ECHR (1988).

17 *Boyle and Rice v. UK*, *supra* note 3, at para. 55.

18 The threshold for arguability may be eased with a view to activating a separate examination under Article 13 in case non-derogable rights are alleged to be infringed at the hands of state authorities: *Kaya v. Turkey*, *supra* note 15, at para. 107; *Yaşa v. Turkey*, no. 22495/93, para. 114 ECHR (1998); *Z and Others v. UK*, [GC] no. 29392/95, para. 109 ECHR (2001); *Keenan v. UK*, no. 27229/95, para. 129 ECHR (2001); *D.M. v. Greece*, no. 44559/15, para. 43 ECHR (2017).

19 *Boyle and Rice v. UK*, Commission's Report, no. 9659/82, 9658/82, at para. 74 ECHR (1986); *Söylemez v. Turkey*, no. 46661/99 para. 112 ECHR (2006).

possible to complainants[20] who intend to challenge deficiency of remedies by which to complain of substantive rights violations.

It should be appreciated that the threshold for arguability is lower than that for determining an actual violation, which may be subject to a high evidentiary standard. Hence, the Court's finding in the merit phase that there is no violation of a substantive provision (despite the complaint having been declared admissible) provides no justification to dismissing out of hand the complaint under Article 13. This holds true even though in the end the Court does not identify a violation of Article 13.[21]

C. The Coordination Between the Notion of 'Arguable' and the 'Manifestly Ill-Founded' Nature of a Complaint - Overview

The arguability test has a 'close affinity' with the 'manifest ill-founded' test contained in Article 35 (ex-Article 27). Both tests can be underpinned by the notion of subsidiarity as the institutional foundation. This notion suggests that the States parties are to be given the opportunity to have any alleged violations of the rights of the ECHR addressed, and if necessary, rectified, pursuant to their domestic procedures.[22] The analyses in the following will elucidate how the Court's policy toward the threshold for the notion 'arguable' has evolved in its intertwined coordination with the notion 'manifestly ill-founded', shifting from the divergence in the earlier case-law to the general convergence in the more recent jurisprudence.

D. From Divergence to Convergence – Evolution of the Thresholds for the Tests of Arguability and 'Manifestly Ill-Founded'

The earlier understanding of both the ex-Commission and the Court was that the thresholds for those two notions were set at different levels. They contemplated that the threshold for judging a grievance as not 'manifestly ill-founded' was higher than that for evaluating if a claim of a violation of a substantive right is arguable.

In *Boyle and Rice*, the respondent State argued that a grievance relating to a substantive right of the ECHR that has been declared 'manifestly ill-founded' cannot be 'arguable' for the purpose of Article 13.[23] In response,

20 In *Boyle and Rice* the former Commission understood the arguability test as requiring that a claim "only needs to raise a Convention issue which merits further examination"; *see Boyle and Rice v. UK*, judgment, *supra* note 3, at para. 53.

21 *Çaçan v. Turkey*, 26 Oct. 2004, at para. 80.

22 *Kudla v. Poland*, *supra* note 7, at para. 152.

23 *Boyle and Rice v. UK*, *supra* note 3, at para. 53.

the Commission's delegate before the Court countered that when deciding if a complaint is 'manifestly ill-founded' under ex-Article 27(2), there was 'a spectrum of standards that encompassed but ranged beyond absence of arguability'.[24] The rationale for such different standards is that whether or not grievances were regarded as 'manifestly ill-founded' would call for a greater degree of (supposedly preliminary) examinations. He added that 'to be arguable a claim "only needs to raise a Convention issue which merits further examination", whereas a conclusion that a complaint is manifestly ill-founded may be reached *after considerable written and oral argument'*.[25] His view clearly highlighted differentiated thresholds for the two tests and the less rigorous standard for the 'arguability' test. As briefly discussed above, in its report, the Commission averred that the benchmark for the 'arguability' test could be set as low as merely asking if 'the claim should give rise to a *prima facie* issue'.[26] However, incongruently, such a low threshold based on a prima facie standard was precisely the one that the Court highlighted for assessing the notion 'manifestly ill-founded' in the *Airey* case.[27]

The Court in *Boyle and Rice*, endorsing the Commission's opinion, recognized that the 'arguable' test may be differentiated from the 'manifestly ill-founded' test. This finding was reached even though the Court conceded difficulty regarding any grievances that are manifestly ill-founded as concurrently 'arguable', and *vice versa*.[28] It held that "…the Commission's decision on the admissibility of the underlying claims and the reasoning therein, whilst *not being decisive*, provide *significant pointers* as to the arguable character of the claims for the purposes of Article 13".[29] Overall, the judicial reasoning in *Boyle and Rice* suggests that despite the significant overlap between them, the scope of the 'arguable' test is wider than that of the 'manifestly ill-founded' test. As a corollary, the Court recognized the possibility that a complaint of a violation of a substantive right declared manifestly ill-founded in the admissibility decision could still be considered 'arguable' for the purpose of Article 13.[30]

24 *Ibid*.
25 *Ibid*, emphasis added.
26 *Boyle and Rice* Commission's Report, *supra* note 19, at para. 74.
27 *Airey v. Ireland*, no. 6289/73, para. 18 ECHR (1979).
28 *Boyle and Rice v. UK*, *supra* note 3, at para. 54. The Court went on to hold that "[t]he Court is competent to take cognisance of all question of fact and of law arising in the context of the complaints before it under Article 13…, including the arguability or not of the claims of violation of the substantive provisions", *ibid*. *See also Airey v. Ireland*, *supra* note27, at para. 18; *Plattform 'Ärtze für das Leben' v. Austria*, *supra* note 16, at para. 26 (the respondent State's submission).
29 *Boyle and Rice v. UK*, *supra* note 3, at para. 54, emphasis added.
30 Hampson, *supra* n.1, at 895.

In the subsequent case of *Powell and Rayner*, the majority of the Commission, following its approach in *Boyle and Rice,* endorsed the possibility that the threshold of the notion of 'manifestly ill-founded' could be higher than that of the notion of 'arguable'. Nevertheless, the Court in that case signalled a cautious departure from its judgment in *Boyle and Rice* and a move in the direction of converging the standard for the two tests. The Court adduced three reasons for 'harmonizing the standard for those two tests.[31] These reasons are: (1) the 'ordinary meaning' of those two notions; (2) the understanding that both Article 13 and Article 27(2) (now Article 35(3)) embody the same legal interest in ensuring the availability of remedies for enforcing the Convention rights and freedoms; and (3) the risk that the fragmentation of the thresholds may undermine the coherence of the national-international dual system of enforcement of international human rights law ("IHRL"). As regards the third rationale, the Court sensed the risk that a bar for arguability under Article 13 might be set too low. This means that national laws might be required to furnish an 'effective remedy' even for such grievance that is considered 'as being so weak as not to warrant examination on its merits at international level' under Article 27(2) (now Article 35(3)).[32]

The Court in *Powell and Rayner* came to be convinced of the need for the harmonized thresholds of the two concepts. After adverting to its previous judgment in *Boyle and Rice*,[33] the Court held that '[w]hatever threshold the Commission has set in its case-law for declaring claims "manifestly ill-founded" under Article 27(2), *in principle* it *should* set the same threshold in regard to the parallel notion of "arguability" under Article 13'.[34] The Court thus marked a departure from its approach in *Boyle and Rice*. It rejected the Commission's pattern of holding claims to be arguable under Article 13,[35] despite their 'manifestly ill-founded' character under the principal complaint.

Since the *Powell and Rayner* judgment, the Court has endorsed the harmonized standard for the two notions 'manifestly ill-founded' and 'arguable' as the 'default' position. When a complaint under a substantive right is declared manifestly ill-founded, the Court tends to deny the

31 *Powell and Rayner v. UK,* no. 9310/81, para. 33 ECHR (1990).
32 *Ibid*.
33 *Boyle and Rice v. UK, supra* note 3, at para. 54.
34 *Powell and Rayner v. UK, supra* note 31, at para. 33, emphasis added.
35 For the analysis of the case law of the erstwhile Commission, *see* Hampson, *supra* note1, at 895.

arguability of that complaint under Article 13 on the same reasoning.[36] The finding that issues are declared inadmissible due to being 'manifestly ill-founded' has often been invoked as the only rationale for refuting arguable nature of the grievance under Article 13.[37] Conversely, the admissibility decision that a complaint is not 'manifestly ill-founded' signals a robust presumption for its 'arguable' nature.[38]

E. Exceptional Divergences between the 'Manifestly Ill-Founded' Test and the 'Arguability' Test

Notwithstanding the Court's general inclination towards harmonization between the two tests, a closer inspection of the Court's nuanced reasoning suggests that there may be some exceptional divergences. In *Powell and Rayner*, the Court implicitly recognized that such an exceptional course is warranted only on an applicant-friendly ground. This point can be inferred from its suggestion that it was not obliged to consider inapplicable any complaint relating to Article 13 solely on the ground that the ex-Commission had declared grievances over a violation of the substantive provisions as 'manifestly ill-founded'. The Court highlighted the need to take into account "all questions of fact and law arising in the context of the Article 13…complaints duly referred to it, including the 'arguability' or not of each of the substantive claims".[39]

Indeed, despite the Court's strong penchant for a more 'harmonized approach' to the correlation between the two notions of 'manifestly ill-founded' and 'arguable' in the recent case-law, there may be some 'misfit' [40]

36 *See, e.g., Plattform 'Ärtze für das Leben' v. Austria*, *supra* note 16, at paras.34-39; *Anne-Marie Andersson v. Sweden*, no. 20022/92, paras. 41-42 ECHR (1997); *Vrabec v. Slovakia*, (decision) no. 64033/00 ECHR (2004); *Koray Düzgören v. Turkey*, (decision), no. 56827/00 ECHR (2004). It may be suggested that by comparison to the Court, the erstwhile ECtHR at the admissibility stage applied a relatively more stringent standard of the 'manifestly ill-founded' test; Hampson, *supra* note 1, at 897-898.

37 In *Čonka v. Belgium*, no. 51564/99, para. 76 ECHR (2002), the Court held that: "…for Article 13 to be applicable, the complaint must also be arguable…. In the instant case, the complaints of a violation of Article 3 which the Court declared manifestly ill-founded on 13 March 2001 were not arguable. *Accordingly*, there has been no violation of Article 13 of the Convention taken in conjunction with Article 3". Emphasis added.

38 *Hatton and Others. v UK*, no. 36022/97, para. 137 ECHR (2003); and *Ivan Atanasov v. Bulgaria*, no. 12853/03, para. 101 ECHR (2009).

39 *Powell and Rayner v. UK, supra* note 31, at para. 33.

40 Apart from *Ivan Atanasov* discussed here, *see also* the Commission's and Court's finding of no arguable claim regarding interception of a home telephone (as opposed to the interception of office telephone) in *Halford v. the United Kingdom*, Commission's Report, no. 20605/92, paras. 84-85 ECHR (1996), and related Judgment , at paras. 51, 60, 65, 69-70 (1997). The Commission and Court reached the same conclusions despite the

that does not match the applicant-friendly rationale suggested in *Powell and Rayner*. In *Ivan Atanasov*, where the environmental impact of the land reclamation of a tailings pond was alleged to be in contravention, and above all Article 8 of the ECHR, Article 1 of the First Protocol and Article 13 of the ECHR, the Court duly acknowledged the general approach followed in *Hatton and Others*.[41] It held that "[*A*]*s a rule*, the fact that a complaint has been declared admissible is a strong indication that it can be regarded as arguable for the purposes of Article 13, even if the Court ultimately finds no breach of the substantive provision in issue".[42] Nevertheless, the Court diverted from such a general course, ruling that no "arguable claim' that both Article 8 ECHR and Article 1 of the First Protocol had been violated was made out. Its rationale for differentiating the 'manifestly ill-founded' test and 'arguability' test was that 'the determination whether a claim is arguable does not depend so much on the case's procedural posture as on the particular facts and the nature of the legal issues raised".[43] The Court's conclusion that rejected the Article 13 claim was predicated on its controversial finding that there was even no appearance of an interference within the meaning of Article 8(1).[44] Accordingly, despite the admissibility decision that had found the *prima facie* case in favour of the applicant based on the 'manifestly ill-founded' test,[45] this provision was considered inapplicable, and hence the complaint under Article 8 was held to be not arguable for the purpose of Article 13.[46]

admissibility decision that the complaint under Article 8 was not manifestly ill-founded (Commission's Decision, 2 Mar. 1995). Compare *Russian Conservative Party of Entrepreneurs and Others v. Russia*, (decision) no. 55066/00, *et al.*, ECHR (2004), Judgment (2007), at para. 90 (concerning the right to vote of the third applicant).

41 *Hatton and Others v. UK*, *supra* note 38, at para. 137.

42 *Ivan Atanasov v. Bulgaria*, *supra* note 38, at para. 101, emphasis added.

43 *Ibid*., where the Court ruled that it "departed from its usual approach and found that complaints which had been declared admissible were nonetheless not arguable in terms of Article 13".

44 *Id.*, at paras. 67-79. The Court found no actual data showing any increase in adverse effect on the applicant's Article 8 rights. His complaints, which focused on long-term and speculative health impact, was considered to fall outside the scope of this provision. *Id.*, at paras. 76-79. Compare *Athanassoglou and Others v. Switzerland*, [GC] no. 27644/95, para. 59 ECHR (2000).

45 *Ivan Atanasov v. Bulgaria*, *supra* note 38, Decision, 10 Nov. 2009.

46 The Article 13 complaint in this case was invoked also in tandem with Article 1 of Protocol No. 1. On this matter, while finding this provision applicable, the Court brusquely set aside the complaint by holding that the evidence was insufficient to substantiate the claim. *Id.*, at paras. 83-84.

III. THE RELATIONSHIP BETWEEN ARTICLE 13 AND SUBSTANTIVE RIGHTS - GENERAL REMARKS

In order to shed light on the relationship between Article 13 as an ancillary right and any of the substantive-rights provisions (Articles 2-12 and 14 of the Convention, as well as provisions of the Protocols), the following analyses proceed by categorizing the nature of the substantive rights relative to which remedial issues have been raised: (1) the procedural obligations of the non-derogable rights under Articles 2 and 3; (2) 'due process rights' under Articles 5 and 6; (3) the right to private and family life under Article 8; (4) the other 'personal freedom rights' guaranteed under Articles 9-12; and (5) the rights additionally secured in the Protocols. It might be objected why issues of remedies under Article 13 taken together with (or in light of) Article 8 are set apart from analyses of Articles 9-11. The provisions on personal freedom rights under Articles 8-11 share the similar textual structure, notably the express limitation clauses that contain the same evaluative criteria. Issues relating to the interplay between Articles 8 and 13 are singled out because of the sheer volume of the relevant cases as contrasted to a handful of cases that have relied on the combination between any of the rights under Articles 9-11 and Articles 13. Further, it should be noted that among the substantive-rights provisions of the ECHR, the number of the cases relating to Article 13 taken in tandem with (or in light of) Article 7,[47] 12,[48] or 14[49] is too limited to allow for any general inference with the Court's policy.

IV. THE COORDINATION BETWEEN ARTICLE 13 AND THE PROCEDURAL LIMB OF ARTICLE 2

A. Article 13 together with the Procedural Obligation under Article 2

The Court has consistently underscored that the procedural limb of Article 2 constitutes *lex specialis* in relation to Article 13. This suggests that the parameters of the procedural requirements of Article 13 are 'broader' than the equivalent procedural duties under Article 2.[50]

47 *Gouarré Patte v. Andorra*, no. 33427/10, paras. 32-36, 41-43 ECHR (2016) (the 'concurrent-examination approach' with a finding of a breach of both Articles 7 and 13 in relation to the absence of any remedy by which to challenge the non-applicability of more favourable criminal laws to offences that do not involve a deprivation of liberty).

48 *See Frasik v. Poland*, no. 22933/02, para. 100, 104 ECHR (2010); *Jaremowicz v. Poland*, no. 24023/03, paras. 64 and 71 ECHR (2010).

49 *See Cobzaru v. Romania*, *supra* note 6, at paras. 86-89.

50 *Kaya v. Turkey*, *supra* note 15, at para. 107 (Articles 2 and 13); *Kiliç v. Turkey*, no. 22492/93, paras. 83, 93 ECHR (2000); *Salman v. Turkey*, [GC] no. 21986/93, paras. 104-109, 123 ECHR (2000); *Orhan v. Turkey*, no. 25656/94, paras.384, 387 ECHR (2002);

It should be appreciated that some procedural principles which the Court's bolder policy has hammered out under Article 13 since the late 1990s are not mere duplicates of the equivalent counterparts under Article 2 (or 3). Instead, they can be considered to partake of a distinct and 'autonomous' character under Article 13. Admittedly much of the investigatory principles developed under Article 2 has been 'transplanted' *verbatim* into the context of Article 13 (read together with or in light of Article 2 or 3).[51] Yet, once operationalized under Article 13, the duty to undertake 'a thorough and effective investigation' into circumstances of death (or ill-treatment), which must be capable of leading to the identification and punishment of those responsible, should be viewed as the intrinsic part of this provision. Further, the Court's greater readiness to elaborate the meaning of 'effective remedies' has helped to flesh out a distinct principle that the national authorities must ensure families and relatives of the deceased to have 'effective access' to the investigatory procedure.[52]

B. Categorizing the Court's Methods in Relation to Procedural Issues Raised under the Procedural Limbs of Article 2 and Article 13

The survey of the case-law reveals two patterns to the Court's approach to grievances that are raised on the basis of the parallel invocation of the procedural limb of Article 2 and Article 13:

(1) the '(*lex-specialis*) absorption method' by which examinations of the procedural duties under Article 2 make it superfluous to engage in a further review under Article 13; and

(2) the 'concurrent-examination method', which shows that the Court undertakes examinations both under the procedural limb of Article 2 and under Article 13 (which is in turn taken in conjunction with or in light of Article 2).

Unlike in situations where both the procedural duty of Article 3 and Article 13 are invoked, the case-law relative to the interplay between Articles 2 and

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Ağdaş, judgment, 27 Jul. 2004, at para. 111; *Şirin Yilmaz*, no. 35875/97, para. 94 ECHR (2004). *See also Kiliç v. Turkey*, *supra*, at para. 93; *İpek v. Turkey*, no. 25760/94, para. 198 ECHR (2004); *Nuray Şen v Turkey* (No. 2), no. 25354/94, para. 193 ECHR (2004); *Tagayeva and Others v. Russia*, no. 26562/07 *et al.*, para. 619 ECHR (2017).

51 This renders the need to explain their coordination all the keener; *Khashiyev and Akayeva v. Russia*, no. 57942/00, et al., ECHR (2005), partly dissenting opinion of Judge Zagrebelsky.

52 *Kaya v. Turkey*, *supra* note 15, at para. 107. *See also Yaşa v. Turkey*, *supra* note 18, at para. 115.

13 does not disclose any 'absorption approach' that tilts toward reviewing procedural issues exclusively within the purview of the perceived *lex generalis* contained in Article 13. Instead, the Court's policy suggests that the analyses of the procedural aspects of Article 2 are indispensable and always the lynchpin. This seems to be true even though the importance of a further review of the identical or related procedural issues under Article 13 is increasingly recognized.

C. The '(lex-specialis) Absorption Method' in Relation to the Coordination between the Procedural Limbs of Article 2 and Article 13

In some situations, the Court has followed the *lex specialis* assumption, holding that once issues of the procedural limb of Article 2 (the duty of effective investigations into circumstances of death) are examined, this would make a separate assessment of the identical or similar procedural issues under Article 13 superfluous.[53] The crux of this approach is that any remedial or other procedural issues are 'absorbed' into the context of appraising the procedural duty of Article 2.[54]

As will be examined in the next section, this method is prevalent in the context of the procedural limb of Article 3 and Article 13. However, when ascertaining the co-application of Articles 2 and 13, it turns out that this method is considerably eclipsed by the Court's more robust tendency toward the 'concurrent-examination approach'.[55]

53 *Nachova and Others v. Bulgaria*, [GC] no. 43577/98 para. 123 ECHR (2004) (*cf.* the Chamber's judgment that took a concurrent-examination approach); *Makaratzis v. Greece*, [GC] no. 50385/99, paras. 72-79, 86 ECHR (2004); *Ramsahai and Others v. Netherlands*, [GC] no. 52391/99, paras. 355, 363 ECHR (2007); *Budayeva and Others v. Russia*, no. 15339/02, 11673/02, 15343/02, 20058/02, 21166/02, para. 195 ECHR (2008); *Karandja v. Bulgaria*, no. 69180/01, para. 72 ECHR (2010); *Janowiec and Others v. Russia*, (decision) no. 55508/07, 29520/09, para. 124 ECHR (2013); *Maskhadova and Others v. Russia*, no. 18071/05, para. 193 ECHR (2013); *Tagayeva and Others v. Russia*, *supra* note 50, at para. 622. *See also Hugh Jordan v. UK*, no. 24746/94, paras. 164-65 ECHR (2001); *Hemsworth v. UK*, no. 58559/09, para. 74 ECHR (2013); *McCaughey and Others v. UK*, no. 43098/09, para. 140 ECHR (2013); *McDonnell v. UK*, no. 19563/11, para. 90 ECHR (2013).

54 This can be saliently exemplified, for instance, in *Makaratzis v. Greece*, *supra* note 53, at paras. 71-72, 78-79, 86; *Ramsahai and Others v. Netherlands*, *supra* note 53, at paras. 407-408, 430-431, 437-438.

55 Contrariwise, on a rare occasion, the procedural matters relative to Article 2 may be subsumed into the more overarching procedural duty under Article 13. Yet, this peculiar method owes to particular facts of the case: *Reynolds v. UK*, 13 Mar. 2012, at paras. 68-69 (remedies relating to the suicide of a schizophrenic patient).

D. The 'Concurrent-Examination Method' in relation to the Coordination between the Procedural Limbs of Article 2 and Article 13

In most cases involving the co-application of Articles 2 and 13, the Court's stance is characterized by the 'concurrent-appraisal method'. The thrust of this method is that even after having carried out detailed appraisals under the heading of the procedural limb of Article 2, the Court does not outright reject a further review under Article 13. This approach often results in the identification of concurrent violations of both the procedural limbs of Article 2 and Article 13.[56] In the context of the interplay between Articles 2 and 13, the Court has defended this approach, suggesting that the scope of positive duties under Article 13 and its decision to proceed with further review under this provision depend on the nature and gravity of the interference, coupled with the fundamental nature of the rights.[57] It should be noted that even the *lex specialis* rule is not irreconcilable with the further review under Article 13. It is generally understood that the *lex specialis* rule is not purported to preclude *en bloc* the application of the *lex generalis*.[58]

[56] For the finding of the concurrent violations of Articles 2 and 13, *see Kaya v. Turkey*, *supra* note 15, at paras. 92, 106-107; *Yaşa v. Turkey*, *supra* note 18, at paras. 107-108, 115; *Çakici v. Turkey*, [GC] no. 23657/94, paras. 87, 114 ECHR (1999); *Salman v. Turkey*, *supra* note 50, at paras. 109, 121, 123; *Orhan v. Turkey*, *supra* note 50, at paras. 348 and 396; *İpek v. Turkey*, *supra* note 50, at paras. 177 and 198; *Tekdağ v. Turkey*, (Judgment) no. 27699/95, paras. 82, 99 ECHR (2004); *Nachova and Others v. Bulgaria*, *supra* note 53, at paras. 115-141 and 146; *Nuray Şen v. Turkey* (No. 2), *supra* note 50, at para. 179 & 194; *Özalp and Others v. Turkey*, no. 32457/96, paras. 46-47, 60 ECHR (2004); *İkincisoy v. Turkey*, no. 26144/95, paras. 76-80, 119-126 ECHR (2004); *Buldan v. Turkey*, no. 28298/95, paras. 90, 103 ECHR (2004); *Ağdaş v. Turkey*, 27 Jul. 2004, at paras. 105, 109, 111; *Şirin Yilmaz v. Turkey*, *supra* note 50, at paras. 80-87, 94-95; *Mahmut Kaya v. Turkey*, no. 22535/93 paras. 108-109, 126 ECHR(2014); *Makaratzis v. Greece*, *supra* note 53, at paras. 71-72, 78-79, 86; *Süheyla Aydin v. Turkey*, Judgment, [GC] no. 23178/94, para. 186 ECHR (1997), 210; *Ramsahai and Others v. Netherlands*, *supra* note 53, at paras. 407-408, 430-431, 437-438; *Musayev and Others v. Russia*, no. 57941/00 et al., paras. 165, 175 ECHR (2007). *See also Nachova and Others v. Bulgaria*, Chamber, *supra* note 53, at paras. 115-141, 146 (procedural limbs of Article 2 and Article 13), paras. 115-141, 146 (contrary to the Grand Chamber, which followed the *lex specialis* approach).

[57] *See Kaya v. Turkey*, *supra* note 15, at para. 89; *Tekdag v. Turkey*, *supra* note 56, at para. 95; *Ozalp and Others v. Turkey*, *supra* note 56, at para. 60. For the similar suggestion in the context of the coordination between the substantive limb of Article 3 and Article 13, *see Chahal v. UK*, [GC] no. 22414/93, paras. 150-151 ECHR (1996); and *Aydin v. Turkey*, *supra* note 56, at para. 103.

[58] International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006, at para. 251(9). *See also* A. Mowbray, *The development of Positive Obligations under the European Convention on Human Rights*, 212-213 (2004).

The tendency is that where the Court, after finding a breach of the procedural duty of Article 2, proceeds with a further review under Article 13, this has always given rise to a concurrent violation of the latter provision. This seems to be explained by the perceived understanding that Article 13 constitutes the *lex generealis* in relation to the procedural duty derived from Article 2. On the other hand, the finding that there is no violation of the procedural limb of Article 2 does not necessarily absolve the respondent State of responsibility under Article 13. [59] This can be readily comprehensible in view of the broader ambit of the procedural duties contemplated under Article 13. Some procedural issues are considered to fall outside the ambit of the *lex specialis* contemplated by the procedural limb of Article 2. This is true of a compensatory regime for non-pecuniary damages.[60] The conclusion that Article 13 is contravened, notwithstanding that a violation of the procedural limb of Article 2 is not found, is also conceivable in view of the lower threshold for the 'arguability test'. The threshold for the latter test should be compared with the onerous threshold for the standard of evidence 'beyond reasonable doubt', the one invoked in criminal proceedings in respect of alleged killing by a State agent.[61]

E. Circumstances in which the Judicial Policy Leans toward the Concurrent-Examinations Method

On the basis of the surveys of the case-law, it is possible to identify two main circumstances in which the Court's judicial policy tends toward undertaking examinations both under the procedural duty of Article 2 and under Article 13. This often coincides with the conclusion that there is a concurrent violation of Article 13 and of the procedural limb of Article 2.

First, the Court's impulse for separate examinations under Article 2 strengthens in situations where criminal inquiries conducted by national authorities appear to be so ineffective as to undermine other available remedies (such as civil damages). [62] It may well be that the procedural

59 *Bubbins v. UK*, no. 50196/99, paras. 165, 173 ECHR (2005). *Contra Buldan v. Turkey*, *supra* note 56, at paras. 94, 106 (no violation of both the procedural limb of Article 2 and Article 13).

60 *Bubbins v. UK*, *supra* note 59, at para. 172.

61 Conversely, once such alleged breaches of the procedural limb of Article 2 are found, the threshold for the 'arguable' nature of grievances under Article 13 is almost irreversibly presumed.

62 *See, e.g.*, the paradigmatic case concerning the armed conflict in Chechnya: *Isayeva v. Russia*, no. 57950/00 paras. 224, 229-230 ECHR (2005). *See also* other Chechnyan cases that involved measures under Article 46, such as *Abuyeva and Others v. Russia*, no. 27065/05, paras. 216, 233-234, 235-243, ECHR (2010); *Abakarova v. Russia*, no. 16664/07, at paras. 98-99, 104-105, 109-114 ECHR (2015).

avenues overall suffer from systemic or even endemic problems.[63] A further review under the right to effective remedy is instrumental where deficiencies in criminal investigations are seen to prevent deceased persons' families from having access to administrative or other remedies for the purpose of identifying state liability and obtaining reparations.[64]

Second, it can be suggested that the Court's proclivity to engage in separate reviews under Article 13 is heavily influenced by the nature of duties inherent in Article 2 (and Article 3). In essence, the two non-derogable rights under Articles 2-3 are understood as being comprised of three *genres* of duties: (1) the substantive duty of a negative nature (the duty imposed on State authorities not to kill or ill-treat persons); (2) the substantive duty of a positive nature (the duty to prevent and protect persons who are faced with real risk of death or ill-treatment/inhumane conditions caused by other third persons) in horizontal circumstances; and (3) the procedural duty to carry out effective investigations into cause and circumstances of death or injuries. It may be suggested that the Court's willingness to engage in a further review under Article 13, even after it has examined the related procedural issues in the light of the procedural duty of Article 2 (or 3), may vary, depending on whether the death or injury concerned is the result of the action or omission of the national authorities or of private persons. On one hand, in the case where a State agent or authority is suspected of being responsible for the disappearance and/or death of individual persons, it is crystal clear that the Court's vigorous review under Article 13 must intervene. The merit of a separate review under Article 13 is instrumental in enabling the Court not only to re-emphasize the consolidated duty of effective inquiries into circumstances of death but also to underscore the 'auxiliary' duty to allow families of the deceased or injured to gain access to the remedial procedure. Unsurprisingly, the Court's vigorous review can be reinforced where the death of vulnerable persons such as those with a mental disability within an institutional framework is at issue.[65] On

63 *Musayev and Others v. Russia*, *supra* note 56, at para. 175.

64 *Salman v. Turkey, supra* note 50, at paras. 109, 123; *Öneryildiz v. Turkey,* [GC] no. 48939/99, para. 148 ECHR (2004); *Budayeva and Others v. Russia*, *supra* note 53, at para. 191. For sure, this tendency can be warranted in view of dependency of the availability of the civil remedies upon the outcome of criminal investigations: *Kaya v. Turkey*, *supra* note 15, at para.107; *Ergı v. Turkey*, 28 Jul. 1998, at para. 98; *Salman v. Turkey*, *supra* note 50, at para.123. *Compare Shanaghan v. UK*, no. 37715/97, paras. 136-140 ECHR (2001).

65 *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*, [GC] no. 47848/08, paras. 145-147 ECHR (2014), 150-153. For the case-law finding a parallel breach of Article 13 and Article 3 or 5 in relation to the lack of adequate remedies for people with disabilities, *see C.B. v. Romania,* no. 21207/03, paras. 65-67 ECHR

the other hand, in situations where the duty to protect arises in relation to a death that is not attributable to the State but to a private third person, the Court's procedural duty under Article 13 may be more limited. In such circumstances, the Court has stressed that the scope of the positive duty under Article 13 is 'not always' stretched to include the duty of investigations.[66]

F. The Length of the Court's 'Separate' Review under Article 13 Subsequent to its Examinations under the Procedural Limb of Article 2

It should be noted that even when engaged in the 'concurrent-examination method', the Court is not necessarily disposed to display in-depth assessments of the related procedural issues under Article 13. Instead, its typical method is to rely on, or even merely reiterate, its findings concerning the lack of effective investigations under Article 2 with a view to justifying its separate finding of a breach of Article 13.[67] Frequently, an express *renvoi* is made to the grounds for a breach of the procedural duty under Article 2. These include the lack of sufficient objectivity and thoroughness in criminal investigation into suspicious deaths,[68] the absence of independence of the body responsible for inquiries, the lack of due diligence in investigations, and the failure to seek evidence from eye-witnesses, or combination of any of them. [69] Such findings have been, without any further separate examinations, recapitulated in the context of Article 13 to warrant the conclusion that there has lacked a 'thorough and effective investigation' in breach of Article 13.[70]

V. ARTICLE 13 TOGETHER WITH THE PROCEDURAL OBLIGATION UNDER ARTICLE 3

A. Overview - The Court's Three Main Methods in Relation to the Coordination between the Procedural Limbs of Article 3 and Article 13

As in the relationship between Articles 2, 5 and 6, on one hand, and Article 13, on the other hand, the point of departure for the Court's analyses is to

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(2010); *Parascineti v. Romania,* no. 32060/05, paras. 34-38 ECHR (2012); and *B. v. Romania,* no. 42390/90, para. 97 ECHR (2012).

66 *Z and Others v. UK, supra* note 18, at para. 109 (concerning the substantive duty of Article 3 and Article 13).

67 *See, e.g., Kaya v Turkey, supra* note 15, at paras. 89-92, 108; *Şirin Yilmaz v. Turkey, supra* note 50, at paras. 80-87, 94.

68 *Kahashiyev and Akayeva v. Russia*, 24 Feb. 2005, at paras. 156-166, 185-186.

69 *İpek v. Turkey, supra* note 50, at paras. 173-177.

70 *Id.,* at paras. 200-201. *See also Nuray Şen v. Turkey (No. 2), supra* note 50, at paras. 174-179, 193-194; *Özalp and Others v. Turkey, supra* note 56, at paras. 43-47, 62-65.

start with holding that the procedural limb of Article 3, which requires a State to carry out a 'thorough and effective investigations' into alleged incidents of torture,[71] constitutes *lex specialis* in relation to Article 13. This means that the requirement under the latter provision is 'broader' than the ambit of the former.[72]

The analyses of the case-law yields the following three patterns of coordination that may be contemplated between the procedural duty under Article 3 and the remedial duty under Article 13:

(1) the '(*lex-generalis*) absorption method' by which the Court abstains from examining issues of the procedural limb of Article 3 by integrating them exclusively under the heading of Article 13;[73]
(2) the 'concurrent-examination method' whereby the Court undertakes examinations both under the procedural limb of Article 3 and under Article 13 (taken in conjunction with or in light of Article 3);[74]
(3) the '*lex-specialis* absorption method', according to which the Court, once having examined the procedural duties under Article 3, considers it superfluous to engage in a further review under Article 13.[75]

Apart from those three bourgeoning approaches or methods,[76] there may be another path chosen by complainants. It may well be that their grievances relate to a breach of a *substantive* limb of Article 3[77] while the question of

71 While Article 3 ECHR, unlike Article 12 of the 1984 UN Convention against Torture ('prompt and impartial' investigations), does not expressly provide such a rule, this is established in the case law. *See, e.g.*, *Aksoy v. Turkey*, (judgment) no. 21987/93, para. 98 ECHR (1996); *Aydin v. Turkey*, *supra* note 56, at para. 103.

72 *Orhan v. Turkey*, *supra* note 50, at para. 384; *Khashiyev and Akayeva v. Russia*, *supra* note 51, at para. 183; *El Masri v. the Former Yugoslav Republic of Macedonia*, *supra* note 74, at para. 256; *Nasr and Ghali v. Italy*, no. 44883/09, para. 332 ECHR (2016).

73 *Mehmet Emin Yüksel v. Turkey*, no. 40154/98, paras. 32, 42 ECHR (2004); *Çelik and İmret v. Turkey*, no. 44093/98, paras. 50, 59-60 ECHR (2004).

74 *See, e.g.*, *Aksoy v. Turkey*, *supra* note 71, at para. 98; *Aydin v Turkey*, *supra* note 56, at para. 103. *See also* the paradigmatic cases involving extraordinary rendition: *El Masri v. the Former Yugoslav Republic of Macedonia*, [GC] no. 39630/09, paras. 194, 262 ECHR (2012); *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, paras. 493, 545 ECHR (2014).

75 *See Khashiyev and Akayeva v. Russia, supra* note 51, partly dissenting opinion of Judge Zagrebelsky.

76 In yet other exception cases, applicants may focus their complaints of a breach Article 3 exclusively on its substantive limb (namely, the duty not to ill-treat persons or to protect persons from maltreatment) without invoking the duty of effective inquiries. *See Iorgov v. Bulgaria*, no. 40653/98, para. 90 ECHR (2004).

77 Namely, the negative duty of a State authority or agent not to ill-treat; and the positive duty of the national authorities to protect persons from il-treatment caused by a third person or even from inhumane condition generated by natural disaster, epidemics or other risk of non-human origin.

procedures (the lack or ineffectiveness of remedies to address such an issue of the substantive duty) is submitted only under the heading of Article 13, but not under that of the procedural limb of Article 3. In such situations, there is no overlap of issues of the procedural duty. Accordingly, there is no reason to eliminate examinations under Article 13.[78]

Needless to say, the relationship between the requirement of an effective investigation under Article 3 and the corresponding requirement under Article 13 bears close resemblance to the relationship between the equivalent procedural limbs of Article 2 and Article 13. Yet, as briefly mentioned above, in the situations where the same or related procedural issues are invoked under both Articles 3 and 13, the Court's approach to the question whether or not to undertake further review under the latter provision is inconsistent. The judicial policy in this context leans toward either of the 'absorption methods' (1) and (3) discussed above. In contrast, as discussed in the previous section, when ascertaining ineffectiveness in investigating circumstances of death under Article 2 and 13, the Court's methodology is predicated decisively more on the 'concurrent-examination approach'. The trouble is that the Court has yet to adduce any convincing explanation why such an asymmetric posture may emerge in respect of the two similar procedural duties derived from the two non-derogable rights. It may be asked how the investigative duties under Article 3 can be said to be so distinct from the equivalent obligations under Article 2.[79] Any rationale provided in the case-law is nigh non-existent.[80]

78 *See, e.g.*, the cases involving the violations of both substantive limb of Article 3 and Article 13: *Lorsé and Others v Netherlands*, no. 52750/99, paras. 74, 87-96 ECHR (2003); and *E. and Others, v. UK*, no. 33218/96, paras. 101, 106-116 ECHR (2002); *Balogh v. Hungary*, no. 47940/99, paras. 60, 68 ECHR (2004) (while finding a violation of the substantive limb of Article 3, the Court was satisfied that the applicant had an effective remedy under Article 13); *Söylemez v. Turkey*, *supra* note 19, at paras. 108, 117. *See also Ostrovar v. Moldova*, no. 35207/03, paras. 90, 112 ECHR (2005); *Dizman v. Turkey*, no. 27309/95, paras. 85-86, 99-100 ECHR (2005); *Iovchev v. Bulgaria*, no. 41211/98, paras. 135-138, 146-148 ECHR (2006); *Doğanay v Turkey*, no. 50125/99, paras. 33, 41-42 ECHR (2006).

79 Evidently, when a grievance relates solely to the substantive duty not to commit ill-treatment, it is incumbent on the Court to carry out a separate appraisal under Article 13. *See, e.g.*, *Lorsé and Others v Netherlands*, *supra* note 78, at paras. 74, 87-96.

80 *Mehmet Emin Yüksel v. Turkey*, *supra* note 73, at para. 32. There is no reason why the procedural requirement to provide victims and their families with an effective access to the investigatory procedure cannot be read as an intrinsic part of the duty of effective inquiries under the procedural limb of both Articles 2 and 3. *See Aksoy v. Turkey*, *supra* note 71, at paras. 95, 98; *Assenov and Others v. Bulgaria*, no. 24760/94, para. 117 ECHR (1998).

B. The Two 'Absorption Methods' in the Coordination between the Procedural Limbs of Article 3 and Article 13

As succinctly noted above, the majority of the relevant case-law suggests that the Court's preferred policy seems to be divided between the two 'absorption approaches. The procedural issues are prone to be examined exclusively either under the heading of the procedural limb of Article 3 or in the context of Article 13. In contrast to the cases where grievances are submitted under two separate headings of the procedural duty of Article 2 and of Article 13, only a handful of cases exhibit the 'concurrent-examination approach'.

Intuitively, it may be tempting to suggest that cases relating to (if not necessarily arising from) the 'extraordinary situations' beset with armed conflict, occupation or terrorism should invite the Court to follow the 'concurrent-examination method' (and if appropriate, with the identification of violations of both Articles 3 and 13). Yet, the Court's approaches even in more recent jurisprudence hardly corroborates this point. Among the limited number of cases where the Court has been engaged in further review under Article 13, there is mixture of cases involving alleged torture in 'extraordinary' situations and those in 'unextraordinary' situations.

When determining the choice between the 'absorption' under the *lex specialis* (the procedural limb of Article 3) and that under the *lex generalis* (Article 13), some crude indicia come to light from the analyses of the case law. On one hand, it appears that the 'absorption approach' in favour of the exclusive assessment under the procedural limb of Article 3 has been applied solely in cases involving allegations of torture in 'unextraordinary' situations. There, the *lex specialis* rationale holds sway. Any further examination under Article 13 is prone to be eliminated out of hand once inadequacy in investigations into circumstances of injuries under the procedural limb of Article 3 has been ascertained.[81]

On the other hand, it can be seen that the cases where the Court has ascertained the procedural issues exclusively under the heading of Article 13

[81] *Jeronovičs v. Latvia*, [GC] no. 44898/10, paras. 119, 122-123, 125 ECHR (2016). *See also Gömi and Others v. Turkey*, no. 35962/97, paras. 78-80 ECHR (2006), 83; *Šećić v. Croatia*, no. 40116/02, paras. 55-61 ECHR (2007); *Zelilof v. Greece*, no. 17060/03, paras. 63-64 ECHR (2007); *Rizvanov v Azerbaijan*, no. 31805/06, paras. 61, 66 ECHR (2012); *Aleksandr Andreyev v. Russia*, no. 2281/06, paras. 65, 71 ECHR (2016); *Olisov and Others v. Russia*, no. 10825/09, *et al.*, paras. 82, 92 ECHR (2017).

cover both 'extraordinary' situations[82] and 'unextraordinary' scenarios.[83] Many recent cases are confirmatory of the 'absorption approach', which relies solely on the supposedly broader ambit of the *lex generalis* of the right to an effective remedy. In such circumstances, under Article 3 the Court examines only its *substantive* limb (whether the negative or positive duty).[84] This policy, which was defended by the Grand Chamber in the *Ilhan* case,[85] seems to be tenaciously adhered to.[86] Indeed, this approach is discernible even in instances involving serious allegations against the vulnerable persons such as child sexual abuse.[87] The *Ilhan* case concerned lack of criminal investigations into the cause of injuries which the applicant alleged to be inflicted by the State security forces in the conflict-ridden region of Kurdistan. The Grand Chamber failed to provide any reason why this method was preferred. It only held that '[w]hether it is appropriate or necessary to find a procedural breach of Article 3 will…depend on *the circumstances of the particular case'*.[88] Yet, obviously the case-specific nature is a non-starter when one is on a quest of any coherent guideline. The subsequent case law falls equally short of any guideline for necessitating or excluding separate appraisals of the procedural/investigative limb of Article 3.[89]

82 *Ilhan v. Turkey*, [GC] no. 22277/93, ECHR (2000); *Mahmut Kaya v. Turkey*, *supra* note 56; *Mehmet Emin Yüksel v. Turkey*, 20 Jul. 2004, *supra* note 73; *Çelik and İmret v. Turkey*, *supra* note 73.

83 *M.S. v. Russia*, no. 8589/08, ECHR (2014); *Tomov and Others v. Russia*, no. 18255/10 *et al.* ECHR (2019) (conditions of prisoners' transport); *O'Keeffe v. Ireland,* [GC] no. 35810/09 ECHR (2014).

84 *See, e.g.*, *Ilhan v. Turkey*, *supra* note 82, at paras. 92-93; *M.S. v. Russia*, *supra* note 83, at para. 86; *Tomov and Others v. Russia*, *supra* note 83, at paras. 141-142, 156, 172-200.

85 *Ilhan v. Turkey*, *supra* note 82, at paras. 92-93.

86 *Mahmut Kaya v. Turkey*, *supra* note 56, at para. 120; *Mehmet Emin Yüksel v. Turkey*, supra note 73, at para. 32; *Çelik and İmret v. Turkey*, *supra* note 73, at para. 50.

87 *O'Keeffe v. Ireland, supra* note 83, at paras. 173, 183-187.

88 *Ilhan v. Turkey*, GC, 27 Jun. 2000, at para. 92, emphasis added.

89 This question may be compared to the Court's incongruence in deciding if the finding of a breach of the substantive duty suffices to exclude a separate examination of a breach of the procedural duty of effective investigations under Article 3. On this matter, compare the Grand Chamber's refusal of a separate finding of the procedural limb under Article 3 in *Ilhan*, with inconsistent approaches disclosed by Chambers in *Assenov and Others v. Bulgaria*, *supra* note 80*; Sevtap Veznedaroğlu v. Turkey,* no. 32357/96 ECHR (2000); *Satik and Others v. Turkey*, no. 31866/96 ECHR (2000) (finding violation of Article 3 in both substantive and procedural limbs); and *Denizci and Others v. Cyprus*, no. 25316/94, 25317/94, 25319/94, 25320/94, 25321/94, 27207/95, ECHR (2001) (finding inhuman treatment but no separate examination of effective inquiries under Article 3).

C. The Case for the 'Concurrent-Examination Method' in the Coordination between Articles 3 and 13

The survey of the case law suggests that so far only a small number of cases have displayed the 'concurrent-examination method', which draws on both the procedural limb of Article 3 and on Article 13.[90] The Court has yet to provide any guidance on circumstances that would prompt its decision to follow this method. As discussed above, the fact that cases of alleged torture have arisen against the background of conflict-ridden or other extraordinary situations does not *a priori* precipitate the Court to endorse this method. In the *Assenov* case, which concerned allegations of torture during police custody in Bulgaria, the Court applied this method, affirming that "[w]here an individual has an arguable claim that he has been ill-treated in breach of Article 3, the notion of an effective remedy [under Article 13] entails, in addition to a thorough and effective investigation of the kind also required by Article 3… effective access for the complainant to the investigatory procedure and the payment of compensation where appropriate". [91] Nevertheless, the Court failed to provide any explanation why this method should be favoured. Its conclusion summarily reiterated its findings made in the context of the procedural limb of Article 3.[92]

It is submitted that the 'concurrent-examination' method should be positioned as the 'default' model in the context of coordination between Articles 3 and 13. It is reasonable that the Court's policy-drive for a concurrent examination of Article 13 be strengthened by the cumulative effect of exceptional factors, such as the applicants' relative vulnerability due to their gender, sexual orientation and age, and the outright deficiencies of procedures (such as the absence of criminal inquiries for many years, which undermine the prospect of civil or tort proceedings for damages).[93]

The premise that the scope of the procedural duties under Article 13 is broader than that of Article 3 suggests that there remain some 'residual' aspects of remedies that justify a separate examination under Article 13. As in the interplay between Articles 2 and 13, the search for principally (if not exclusively) 'Article 13 issues' should go beyond the technical matter of

90 *See, e.g.*, *Assenov and Others v. Bulgaria*, *supra* note 80, at paras. 106, 117. *See also* the cases where Court found a violation of Article 13, after having discarded the complaint relating to the investigatory duty of Article 3 owing to the identification of a violation of the equivalent procedural duty under Article 2: *Mahmut Kaya v. Turkey*,*supra* note 56, at paras. 109, 120, 126; *Anguelova v. Bulgaria*, no. 38361/97, paras. 146, 150, 161-162 ECHR (2002).

91 *Assenov v. Bulgaria*, *supra* note80, at para. 117.

92 *Id.*, at para. 118, emphasis added.

93 *Menesheva v. Russia*, no. 59261/00, paras. 68, 74, 76 ECHR (2006).

compensation for non-pecuniary damages.[94] On the substantive front, finding the dual violations of both the procedural limbs of Article 3 and Article 13 helps to highlight the axiomatic importance of the duty of effective investigations not least in the context of exceptional nature such as (claimed) enforced disappearance of persons and extraordinary rendition.[95] The same rationale can apply to issues relating to vulnerable categories of persons.[96] These include the detention condition of a mentally handicapped person in social care homes;[97] a bereaved parent of a mentally-ill person that committed suicide at a prison[98] or at a psychiatric hospital;[99] a person physically disabled due to abuse in the military;[100] children suffering sexual and physical abuse;[101] or a female prisoner suffering from heroin withdrawal.[102]

VI. ARTICLE 13 AND THE FREEDOM FROM ARBITRARY DEPRIVATION OF LIBERTY

A. Article 13 together with Article 5(1)

When it comes to the lack of effective investigations into disappearance of persons raised under Article 13 taken together with (or in light of) Article 5(1), the case law reveals the two competing methods: the '*lex specialis* method'; and a 'concurrent-examination method'. In some situations, the Court has considered the finding of a violation of Article 5(1) sufficient to abstain from a separate examination under Article 13.[103]

Yet, in other situations, separate examinations under Article 13 have been carried out at sufficient depth. The 'concurrent-examination method' was

94 *Assenov and Others v. Bulgaria*, *supra* note 80, at para. 117. *See* also *Aksoy v. Turkey*, *supra* note 71, at paras. 95 and 98.

95 *El-Masri v. the Former Yugoslav Republic of Macedonia*, *supra* note 74, at para. 256; and *Nasr and Ghali v. Italy*, *supra* note 72, at para. 332.

96 Apart from the cases discussed here, *see* also *Poghosyan and Baghdasaryan v. Armenia*, no. 22999/06, paras. 44-48 ECHR (2012) (confession of unfounded perpetrations of rape and murder extracted by ill-treatment).

97 *Stanev v. Bulgaria*, [GC] no. 36760/06, paras. 212-213, 219-221 ECHR (2012).

98 *Keenan v. UK*, *supra* note 18, at paras. 130-133.

99 *Reynolds v. UK*, 13 Mar. 2012, at paras. 61-69 (no prospect of obtaining adequate compensation for the non-pecuniary damage for the death of her adult son, which had negative impact on the application for legal aid to pursue civil proceedings).

100 *Chember v. Russia*, no. 7188/03, paras. 71-73 ECHR (2008) (long-term disability caused while in compulsory military service).

101 *E. and Others v. UK*, *supra* note 78, at paras. 111-116.

102 *McGlinchey and Others v. UK*, no. 50390/99, paras. 64-67 ECHR (2003).

103 *Bazorkina v. Russia*, no. 69481/01, para. 165 ECHR (2006); *Imakayeva v. Russia*, no. 7615/02, para. 197 ECHR (2006).

applied in the cases involving disappearances of family members in which there was good reason to believe that national security forces were implicated in 'extraordinary situations' beset with armed conflict or terrorism. In such circumstances, the Court has conducted separate inquiries under Article 13 with vigour and hammered out some important procedural principles inherent in the notion of '*effective* remedies'. The Court has enunciated that the national authorities are bound (1) to carry out 'a thorough and effective investigation' that can lead to identification and punishment of those responsible for disappearance of persons; (2) to enable relatives of the persons who have disappeared to have access to the investigatory procedure, and (3) to pay compensation, as necessary.[104] Requirement (1) is originally derived from the contexts of the procedural limbs of Articles 2-3 while duty (3) is perhaps distinctively an 'Article 13 duty' and rather too obvious. What is of special significance is requirement (2) relating to access of family members to investigatory process. Clearly, the need for those procedural duties is heightened in case where issues implicating the combination between Articles 5 and 13 are compounded by alleged infringement of the procedural limb of the non-derogable provision of Article 2 or/and Article 3.[105]

B. Article 13 and the Right to Proceedings before a Court under Article 5(4) and Article 5(5)

The need to explain a coordination between Article 13 and Article 5 may be most keenly felt with respect to several cases concerning the *habeas corpus* guarantees under Article 5(4) and to a smaller number of cases involving the right to compensation for damages relative to arbitrary arrest under Article 5(5). Again, in this context, the Court's strategy starts with asserting that in the case of deprivation of liberty and compensation for unlawful detention, paragraphs 4 and 5 of Article 5 constitute *lex specialis* in relation to the more general requirements of Article 13.[106]The perceived

104 *Kurt v. Turkey*, no. 24276/94, para. 140 ECHR (1998).

105 *Id.*, at paras. 129, 134. *See also El Masri v. the Former Yugoslav Republic of Macedonia, supra* note 74, at paras. 186-94, 242, 258-262.

106 As for the absorption of Article 13 examinations under Article 5(4), *see De Wilde, Ooms and Versyp v. Belgium*, (Plenary) no. 2832/66, 2835/66, 2899/66, para. 95 ECHR (1971); *Nikolova v. Bulgaria*, [GC] no. 31195/96, para. 69 ECHR (1999); *M.A. and M.M. v. France*, (decision) no. 39671/98, ECHR (1999); *Khadisov and Tsechoyev v. Russia,* no. 21519/02, para. 162 ECHR (2009). *See also Dimitrov v. Bulgaria*, Decision, no. 55861/00, ECHR (2006); *Stoichkov v. Bulgaria*, (decision) no. 9808/02, para. 5 ECHR (2004). For the exclusion of a separate examination under Article 13 due to a finding of a breach of Article 5(5), *see Tsirlis and Kouloumpas v. Greece,* no. 19233/91 *et al*., para. 73 ECHR (1997).

assumption is that the requirements of the latter provision are considered 'less strict' than those under Articles 5(4) or (5).[107]

When the facts buttressing the complaints under Article 13 are identical to those already examined under Article 5(4), the Court's tendency is to invoke the *lex specialis* rationale to endorse the 'absorption approach' of the kind that favours the assessments of the procedural issues exclusively under the latter provision. This suggests the obliteration of any separate inquiry into the identical or related procedural issues raised under Article 13.[108] The judicial policy based on this method has been pursued since the earlier case law. In the '*Vagrancy Case'*, where the procedural guarantees available before the police court were challenged as being inferior to those of the criminal proceedings, a violation of Article 5(4) was found. When it came to issues of Article 13, the Court simply relied on this finding to brush aside any separate examination under this provision.[109] This method is consistently followed even in the recent case-law.[110]

The need to distinguish the question of the lack of a prompt judicial review from that of the effectiveness of any judicial or other remedy was highlighted in the English legal system prior to the incorporation of the Human Rights Act. At that time, the availability of the *habeas corpus* remedies was made conditional upon a high standard: showing a breach of national laws. Despite the finding in *Brogan* that legitimized such a high standard,[111] it is patently clear that this condition was incompatible with the low-threshold test of arguability under Article 13.[112] In that sense, the majority judges in *Brannigan and McBride* should be criticized for their

[107] *Chahal v. the United Kingdom*, *supra* note 57, at para. 126; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* no. 13178/03 para. 110 ECHR (2006) (both concerning Article 5(4)).

[108] *See, e.g., De Jong, Baljet and van den Brink v. Netherlands,* no. 8805/79, 8806/79, 9242/81, para. 60 ECHR (1984); *Chahal v. UK, supra* note 57, at para. 126; *Nikolova v. Bulgaria, supra* note 106, at para. 69; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, supra* note 107, at paras. 110-114*; A.B. ad Others v. France,* no. 11593/12, paras. 133-138, 158 ECHR (2016).

[109] *De Wilde, Ooms and Versyp v. Belgium (Vagrancy Cases), supra* note 106, at paras. 74-80, 95. *See also De Jong, Baljet and Van den Brink v. Netherlands,* Commission's Report, no. 8805/79, 8806/79, 9242/81, para. 32, and Judgment, 22 May 1984, at para. 60 ECHR (1984); *Bouamar v. Belgium*, no. 9106/80, at para. 65 ECHR (1988).

[110] *See, e.g., Pavletić v Slovakia,* no. 39359/98, para. 100 ECHR (2004); *Kolanis v. UK*, no. 517/02, paras. 82, 86 ECHR (2005); and *Gorshkov v. Ukraine,* no. 67531/01, paras. 46-47 ECHR (2005).

[111] *Brogan and Others v. UK*, no. 11209/84, 11234/84, 11266/84 (Plenary), at paras. 63-65 ECHR (1988).

[112] *Brannigan* and *McBride v. UK*, no. 14553/89, 14554/89, para. 76 ECHR (1993), and dissenting opinion of Judge Walsh, at paras. 12-15.

laconic decision to dispense with examinations under Article 13 on the basis of the perceived *lex specialis* rationale.[113]

VII. ARTICLE 13 AND THE RIGHT TO A FAIR TRIAL UNDER ARTICLE 6

A. General Overview

The vast majority of the cases where Article 13 is invoked in relation to Article 6 concerns the 'reasonable time' requirement. Apart from this, only a few communications have been brought with respect to other paragraphs of Article 6.[114] It is in relation to the question of 'reasonable length of proceedings' that the Court's policy has shown a remarkable shift in assessing the coordination between Articles 6 and 13.

As in the context of Articles 2, 3 and 5, the Court has consistently made plain its two-fold assumptions that Article 6 constitutes *lex specialis* in relation to Article 13 and that the requirements of the latter provision are 'less strict than', and 'absorbed by', the requirements of the former.[115] The *lex specialis* rationale deployed in this context can be borne out by 'the full panoply of a judicial procedure' and safeguards that are already sufficiently furnished by the fair trial guarantees under Article 6.

Due to such a rationale which is purported to grapple with the perceived conceptual overlap of the two rules, wherever issues of remedies and other procedures arise in the context of judicial proceedings, the Court's *general* policy, with the marked exception of the length of proceedings (as examined immediately below), is to endorse the '*lex-specialis* absorption method'. This means that the assessment of issues under Article 6 is deemed sufficient to eliminate any separate query under Article 13 (which is, in turn, taken

[113] *Id.*, at para. 76.

[114] One such example is in *Konstas*, where the Court found a breach of Article 13 in tandem the right to be presumed innocent under Article 6(2): *Konstas v. Greece*, no. 53466/07, paras. 56-57 ECHR (2011). *Compare Januškevičienė v. Lithuania*, no. 69717/14, paras. 60-63, 69 ECHR (2019).

[115] *Airey v. Ireland*, 9 Oct. 1979, at para. 35; *Golder v. UK*, no. 4451/70 (Plenary), para. 33 ECHR (1975); *Sporrong and Lönnroth v. Sweden*, no. 7151/75, 7152/75, para. 88 ECHR (1982); *W v. UK*, (Plenary) no. 9749/82, para. 86 ECHR (1987); *Pudas v. Sweden*, no. 10426/83, para. 43 ECHR (1987); *Tre Traktörer Aktiebolag v. Sweden*, no. 10873/84 ECHR (1989), at para. 51; *Allan Jacobsson v. Sweden (No. 1)*, no. 10842/84, para. 78 ECHR (1989); *Kamasinski v. Austria*, no. 9783/82, para. 110 ECHR (1989). *See also Ahlskog and Oy Maple House AB v. Finland*, (decision) no. 75619/01, ECHR (2004); *Ziliberberg v. Moldova*, (decision) no. 61821/00 ECHR (2004); *Krokstäde v. Sweden*, (decision) no. 63916/00 ECHR (2000).

together with, or in the light of, Article 6).[116] For the application of such a method based on the *lex specialis* rationale, it is immaterial if the issues under Article 6 arise from the civil litigations or criminal proceedings relative to the adequacy of an appellate or cassation procedure.[117]

Nevertheless, two salient patterns of divergence from the 'absorption method' in favour of the assessment solely under Article 6 have surfaced since around the turn of the present century. This coincided with the more general trend of the Court's renewed vigour with which to undertake examinations under Article 13 in relation to any of the substantive provisions. First, as briefly suggested above, since the judgment in the *Kudla* case (2000), issues of the lengthy proceedings provide the most notable exception to this general propensity by presenting the policy of undertaking further review under Article 13 (the 'concurrent-examination method'). Second, since late 1990s when confronted with almost endemic issues of deaths, disappearances or injuries arising in relation to the 'extraordinary situations' in Kurdistan, there has emerged yet another judicial inclination: the approach of 'subsuming' issues of access to a court or other due process issues that applicants raised under Article 6 in the overall context of Article 13. The ensuing three subsections analyse the evolution of the Court's policy surrounding the 'breakthrough' in *Kudla*. This is followed by the subsection dealing with ramifications of the second method.

B. Article 13 and the right to a trial within a reasonable time under Article 6(1) - the Kudla Judgment as a Watershed

When it comes to challenging issues of the excessive length of proceedings, which include criminal investigations or proceedings,[118] and any civil[119]or administrative proceedings[120] under Articles 6(1) and 13, the Grand Chamber's judgment in *Kudla*[121] provides a watershed. Before that judgment, the practice of the Court followed the *lex specialis* approach. This

116 *Sporrong and Lönnroth v. Sweden*, *supra* note 115, at para. 88; *Silver and Others v. UK*, *supra* note 13, at para. 110; *Campbell and Fell v. UK*, no. 7819/77, 7878/77, para. 123 ECHR (1984); *Pizzetti v. Italy*, no. 12444/86, para. 41 ECHR (1993); *Brualla Gómez de la Torre v. Spain*, no. 26737/95, para. 41 ECHR (1997); *Menesheva v. Russia*, *supra* note 93, at para. 105; *Ferre Gisbert v. Spain*, no. 35590/05, para. 39 ECHR (2009).

117 *Kamasinski v. Austria*, *supra* note 115, at paras. 102-103, 110; *Kadubec v. Slovakia*, no. 27061/95, paras. 57-58, 64 ECHR (1998).

118 *Panju v. Belgium*, *supra* note 15, at para. 52; *Brudan v. Romania*, no. 75717/14, para. 70 ECHR (2018).

119 *Surmeli v. Germany*, [GC] no. 75529/01, para. 102 ECHR (2006); *Valada Matos das Neves v. Portugal*, no. 73798/13, para. 74 ECHR (2015).

120 *Olivieri and Others v. Italy*, no. 17708/12, para. 48 ECHR (2016).

121 *Kudla v. Poland*, *supra* note 7, at paras. 147, 149, 152.

meant that the Court was focused entirely under the heading of Article 6(1) on the exclusion of a separate appraisal under Article 13. The thrust of this approach was that once a violation of the 'reasonable time' requirement under Article 6(1)[122] was found, the Court saw no need to engage in a separate examination of Article 13.[123] Again, the rationale was that the requirements of Article 13 were sufficiently addressed by more stringent obligations of the *lex specialis* contained in Article 6.[124] In the pre-*Kudla* case law, the '*lex specialis* approach' that eliminated additional examinations under Article 13 was consistently pursued. In this respect, it did not matter whether the point of contention under Article 6(1) concerned a 'civil right'[125] or the adequacy of an appellate or cassation 'criminal' procedure.[126] Still, it ought to be noted that this prevailing stance was already challenged by some minority judges of a pre-*Kudla* case.[127] They underscored the importance of finding an additional violation of Article 13 in relation to excessively lengthy proceedings contrary to Article 6(1).[128]

[122] *See, e.g., Pizzetti v. Italy, supra* note 116, at para. 21; *Bouilly v. France*, no. 38952/97, at para. 27 ECHR (1999); and *Giuseppe Tripodi v. Italy*, no. 40946/98, para. 15 ECHR (2000).

[123] *See, e.g., Pizzetti v. Italy, supra* note 116, at para. 21; *Bouilly v. France*, supra note 122, at para. 27; and *Giuseppe Tripodi v. Italy, supra* note 122, at para. 15. *See also Kamasinski v. Austria, supra* note 115, at para. 110

[124] *See, inter alia, Sporrong and Lönnroth v. Sweden, supra* note 115, at para. 88; *Silver and Others v. UK, supra* note 13, at para. 110; *Campbell and Fell v. UK, supra* note 116, at para. 123; *O v. UK*, Plenary, no. 9276/81, para. 69 ECHR (1987); *Pudas v. Sweden, supra* note 115, at para. 43; *Hokkanen v. Finland*, no. 19823/92, para. 74 ECHR (1994); *De Geouffre de la Pradelle v. France*, no. 12964/87, para. 37 ECHR (1992).

[125] *Sporrong and Lönnroth v. Sweden, supra* note 115 (in contrast, the Commission found a separate violation of Article 13); *W. v. UK*, 8 July 1987, at para. 86; *Pudas v. Sweden, supra* note 115; *Tre Traktörer Aktiebolag v. Sweden, supra* note 115, at para. 51; *Allan Jacobsson v. Sweden (No. 1), supra* note 115, at para. 78; *Brualla Gómez de la Torre v. Spain, supra* note 116, at para. 41.

[126] *Kamasinski v. Austria, supra* note 115, at para. 110.

[127] *W. v. UK*, 8 Jul. 1987, Joint separate opinion of Judges Pinheiro Farinha and De Meyer, at para. III; partly dissenting opinion of Mr Schermers, joined by Mr. Jörundsson, annexed to the report of the Commission in this case, Series A. 121, at 55-56.

[128] *Company X. v. Austria*, no. 7987/77, Commission's Decision, Plenary, 18 *Decisions and Reports* 31, 46 ECHR (1980). *See also* the individual opinion of Commissioner Trechsel in *Kaplan v. UK*, Commission's Report, no. 7598/76, ECHR (1981), 21 *Decisions and Reports* 5, 37.

C. The Post-Kudla Approach to the Relationship between the Right to an Effective Remedy and the Right to a Trial within a Reasonable Time under Article 6(1)

The Grand Chamber's judgment in *Kudla*[129] marked a crucial turning point in considering the coordination between Article 13 and the requirement of holding a trial within a reasonable time under Article 6(1).[130] The reason why this judgment occupies salient importance in the analyses of the relevant case law is that the Court's reasoning clearly rejected the premise of the '*lex specialis* approach' that there is (considerable) overlap between the claims under Article 6(1) and those under Article 13. Most importantly, the judicial policy in the post-*Kudla* case law[131] has gravitated toward the consistent application of the 'concurrent-examination method' in the merit phase[132] when addressing complaints of excessive length of proceedings.[133] This suggests that separate examinations of procedural issues under Article 13 prove hardly superfluous but instead necessary in addition to the related assessment already conducted under Article 6. Such a veritable shift in the policy is built firmly on the revised assumption that the nature of issues raised under Article 13 is sufficiently distinct from, and 'autonomous' from, the question of the length of proceedings addressed under Article 6.

It should be noted that this approach has been followed not only in relation to the right to a 'hearing within a reasonable time'.[134] The importance of separate review under Article 13 is duly recognized likewise in relation to

129 *Kudla v. Poland*, *supra* note 7, at paras. 147, 149, 152.

130 European Commission for Democracy Through Law (Venice Commission), Study No. 316/2004, *Report on the Effectiveness of National Remedies in Respect of Excessive length of Proceedings*, 15-16 Dec. 2006, at paras.42-47.

131 Note *Krasuski v. Poland*, no. 61444/00, paras. 69-73 ECHR (2005) (addressing the civil code amended as a consequence of *Kudla*).

132 At admissibility, when complaints of the absence of access to a remedy for addressing undue delay in proceedings under Article 6(1) are declared admissible, the Court readily adopts the same conclusion under Article 13 without any need for elaborate reasoning. *See, inter alia*, Romashov, *infra* note 135, at paras. 29-35; and *Sukhorubchenko v. Russia,* (decision) no. 69315/01 ECHR (2004); *Jonasson v Sweden*, (decision) no. 59403/00, ECHR (2004); *Grubišić v. Croatia*, decision, no. 15112/02, ECHR (2004).

133 Beyond the dichotomy between the '*lex-specialis* approach' and the 'concurrent-examination method', there have been minority of cases focusing only on procedural issues under Article 6(1). In those cases, the applicants contesting the length of proceedings have raised the claims only under Article 6(1) alone without alleging a breach of Article 13. *See*, for instance, *Scordino v. Italy (No. 1)*, [GC] no. 36813/97, paras. 173-227 ECHR (2006) (concerning the Pinto law).

134 *See, e.g., Zynger v. Poland*, no. 66096/01, paras. 58 and 65 ECHR (2004).

the right to secure the execution of a judgment given by a court, which is a congenial right recognized under Article 6(1).[135]

In *Kudla*, the issue that the applicant asked to be determined before a 'tribunal' under Article 6 was the criminal charges of fraud while his complaint to be decided before 'national authorities' under Article 13 concerned a different issue of unreasonable length of the proceedings. As the Court rightly held, "[t]he question of whether the applicant in a given case did benefit from trial within a reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from that of whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground".[136] Accordingly, the rationale for rejecting the *lex specialis* approach is that there is no conceptual overlap between a complaint of an unreasonably dilatory nature of proceedings for determining a civil right or criminal charge under Article 6(1) and a grievance concerning the lack of an effective remedy to file a complaint of such undue delays under Article 13.[137]

Clearly, as in other contexts, there are robust substantial rationales for the 'concurrent-examination method'. The complementary examinations under Article 13 (and even the identification of a breach thereof) are crucial for enhancing the fair trial guarantees under Article 6(1).[138] There was another policy-oriented rationale. An inexorable deluge of cases contesting the lengthy nature of domestic proceedings had outpoured into the Strasbourg system.[139] Such excessive delays in the administration of justice[140] had been perceived as jeopardizing the foundational principle of rule of law in the national systems. It can be reasonably surmised that the salient change in the Court's policy in *Kudla* was motivated by its conviction that it was only by marshalling the overall normative framework of Article 13 that the root cause (namely, the dysfunctional state of national procedures) of such an 'endemic' problem could be systematically resolved.

135 *Romashov v. Ukraine*, no. 67534/01, paras. 42-47 ECHR (2004) and *"Amat-G" Ltd and Mebaghishvili v. Georgia*, no. 2507/03, paras. 49-50, ECHR (2005). For the right to have a final and binding judicial decision executed, *see Hornsby v. Greece*, no. 18357/91, para. 40 ECHR (1997); and *Romashov v. Ukraine, supra*, at para. 42.

136 *Kudla v. Poland*, *supra* note 7, at para. 147.

137 *Ibid*.

138 *Id.*, at para. 152.

139 *Id.*, at paras.148, 152, 155.

140 *See, e.g.*, *Bottazzi v. Italy*, no. 34884/97, para. 22 ECHR (1999); *Di Mauro v. Italy*, no. 34256/96, para. 23 ECHR (1999); *A.P. v. Italy*, [GC] no. 35265/97, para. 18 ECHR (1999); *Ferrari v. Italy*, [GC] no. 3340/96 para. 21 ECHR (1999). *See also* the Committee of Ministers of the Council of Europe's Resolution DH (97) 336 of 11 Jul. 1997.

D. The Modality of 'Separate' Examinations under Article 13 in Cases Concerning the Reasonable-Length of Proceedings

While the Court has unmistakably set the general course for undertaking separate appraisals under Article 13 as its 'default-mode' in ascertaining the reasonableness requirement of fair trials, one crucial caveat ought to be entered: the modality and extent of the judicial examinations undertaken under this provision vary significantly. In some cases, relatively elaborate scrutiny is observable even with rigour. The Court may scrutinize at depth if the national judiciaries have addressed grievances over remedies 'with special diligence and attention' as required under Article 6(1).[141] Yet, in many other cases, the Court's approach, as in the context of other substantive provisions invoked concurrently with Article 13, is characterized by lack of any in-depth 'separate' appraisals. The Court may be contended merely to recapitulate the findings under Article 6(1) with little distinct assessment under Article 13[142] or to refer to the relevant passage(s) of such findings.

E. The 'Lex-Generalis Absorption' Method' in Cases Relative to 'Extraordinary Situations'

The survey of the case law reveals yet another approach that seems to be reserved in exceptional situations. In several cases alleging the inadequacy of investigations into action by Turkish security forces in Kurdistan, the Court suggested that the complaints of a violation of Article 6 be absorbed into the examinations of the broader and more general obligations under Article 13, obliterating any separate assessment under Article 6. This method is diametrically opposite to the 'absorption approach' based on the *lex specialis* rationale as had been preponderant in the pre-*Kudla* decisions. One perceived rationale for that diverging approach favouring an Article 13 review may be that the *lex generalis* embodied in this provision is considered more fitting in view of its broader range of procedural matters that have to be addressed. The cases where this method was applied shows that procedural issues raised under Article 6(1) were not limited to the length of proceedings. Rather, they are often gravitated to the access to court and to the overall inadequacy of fair trial guarantees.

[141] *Krasuski v. Poland*, *supra* note 131, at para. 71.

[142] *See, e.g.*, *Kormacheva v. Russia*, no. 53084/99, paras. 60-64 ECHR (2004); *E.O. and V.P. v. Slovakia*, no. 56193/00, 57581/00, paras.83-86, 97-98 ECHR (2004); *Plaksin v. Russia*, 29 Apr. 2004, at paras. 37-44, 49-50. *Compare Zynger v. Poland*, 13 Jul. 2004, at paras. 62-65.

In the *Aksoy* case, where there was a denial of access to a court to enable the victims of torture to sue for damages, the ex-Commission took the 'absorption approach' based on the *lex specialis* reasoning, averring that the finding of a violation of Article 6(1) in view of the denial of any effective access to a tribunal for determining the applicant's civil right to damages made it superfluous to examine the same issue under Article 13.[143] In contrast, the Court's review marked a totally opposite course favouring the examinations of the pertinent procedural issues entirely under the heading of Article 13. It suggested that the gist of the applicant's complaint raised under Article 6(1) related to the more overarching procedural issue of inadequacy of effective investigations, so that this would be better addressed under the *lex generalis* contained in Article 13.[144]

The Court's distinct approach in *Aksoy* was confirmed subsequently by the Grand Chamber in several cases relating to the same conflict-afflicted region, which involved concurrent claims of non-derogable rights (the right to life and/or the freedom from torture).[145] In *Aydin*, the Kurdish applicant complained of denial of access to a court that would have enabled her to seek damages in relation to rape and other brutalities while in detention when she was still seventeen. The Court's rationale for transferring part of her complaint under Article 6(1) to the context of Article 13 was that the essence of her complaint lay in the public prosecutor's failure to conduct effective investigations, which rendered futile her chance of claiming compensation.[146] In *Kaya*, the applicant complained that the inadequacy of criminal investigations into the death of his brother (whom he alleged to be killed by the security forces) prevented him as a next-of-kin of the deceased to gain access to a tribunal with a view to suing for compensation.[147] With

[143] *Aksoy v. Turkey*, Commission's Report, no. 21987/93, para. 191, ECHR (1995).

[144] *Aksoy v. Turkey, supra* note 71, at para. 93 (referring also to another rationale that the civil proceedings were *de facto* unavailable due to the conflict-ridden special circumstances).

[145] For access to a court in relation to the failure of national authorities to mount an effective criminal investigation into the death of family members, see: *ibid*., paras.93-94; *Aydin v. Turkey, supra* note 56, at paras. 100-103; *Kaya v. Turkey, supra* note 15, at para. 106; *Özalp and Others v. Turkey, supra* note 56, at paras.54-55; *Ağdaş v. Turkey*, 27 Jul. 2004, at para. 108; *İkincisoy v. Turkey, supra* note 56, at paras. 114, 119-126. For the absence of the right of access to a court disputed together with the failure to investigate into the destruction of home and possessions, *see Altun v. Turkey*, no. 24561/94, paras. 66-67, ECHR (2004); *Çaçan v. Turkey*, no. 33646/96, para. 75 ECHR (2004).

[146] *Aydin v. Turkey, supra* note 56, at paras.101-102. *See also Menteş and Others v. Turkey*, [GC] no. 23186/94, para. 88-92 ECHR (1997).

[147] While there was no 'proof beyond reasonable doubt' that the applicant's brother was killed by the security forces in violation of Article 2, the Court found a violation of the procedural limb of this provision due to inadequacy of investigations: *Kaya v. Turkey, supra* note 15, at paras. 78, 92.

respect to the complaint under Article 6(1), again in the diametrical contrast to the Commission,[148] the Court in that case followed the method enunciated in its *Aksoy* judgment, favouring the *lex generalis* framework of Article 13 as the only avenue in which the impugned procedural issues would be examined. It explained that:

> the applicant's grievance under Article 6(1) of the Convention *is inextricably bound up with* his more general complaints concerning the manner in which the investigating authorities treated the death of his brother and the repercussions which this had on access to effective remedies which would help redress the grievances which he and the deceased's family harboured as a result of the killing. It is *accordingly* appropriate to examine the applicant's Article 6 complaint in relation to the more general obligation on Contracting States under Article 13 of the Convention to provide an effective remedy in respect of violations of the Convention including Article 2 thereof, which, it is to be noted, cannot be remedied exclusively through an award of compensation to the relatives of the victim.[149]

In *Kaya*, the Court's decision to 'absorb' the procedural issues raised under Article 6(1) into the broader context of Article 13 was surely swung by the appearance of serious deficiencies in discharging the investigatory duties under Article 2. Doubtless, the Court was convinced of the need to address head-on the defect of the procedural system overall by deploying the revitalized normative force of Article 13.

VIII. ARTICLE 13 AND THE RIGHTS UNDER ARTICLE 8

A. General Overview

The evolution of the case-law concerning remedial or other procedural issues raised under both Articles 8 and 13 barely reveals indicia for the Court's policy stances. The earlier case law showed the Court's preference for the 'absorption approach'. The Court tended to undertake the examinations entirely in the context of Article 8 while dismissing any need

[148] Cited in *Kaya v. Turkey*, *supra* note 15, at paras. 102-103. The Commission's finding in that case was made before *Aksoy* judgment. *See also* the same approach taken by the ex-Commission in *Aksoy v. Turkey*, *supra* note 71, at para. 91.

[149] *Kaya v. Turkey*, *supra* note 15, at para. 105, emphasis added. *See also Doğan and Others v. Turkey* no. 8803/02 *et al.*, para. 123 ECHR (2004).

for a further review under Article 13. In contrast, the analyses of the more recent case law suggest that the judicial policy has exhibited a readiness for separate examinations under Article 13 even after the same procedural issues have been addressed under Article 8.[150] While in this context there was no *Kudla*-like breakthrough as happened in the context of Articles 6(1) and 13, it seems that the policy shift toward such a 'concurrent-examination method' coincided with the period in which the 'new' Court came to set in motion after the entry into force of the 11th Protocol. Still, the trajectory of such a shift has been patchy and uneven. Even in the earlier case law, the Court engaged in relatively lengthy assessments of issues of remedies. Such a diligent review under Article 13 was discernible in situations where remedies were outright missing (as acknowledged by the government concerned). This was true for two British cases concerning remedies to contest restrictions on prisoners' correspondence.[151]

The following sub-section starts with examining the Court's earlier tendency based on the 'absorption' approach that excluded any assessment under Article 13. The analyses then turn to the 'concurrent-examination method' with a focus on its operational modality and rationales in the coordination between Articles 8 and 13.

B. The 'Absorption Approach' under Article 8 in the Earlier Case Law

In the case law prior to the amendment by Protocol No. 11, remedial issues connected to the Article 8 rights tended to be examined exclusively under the heading of this provision, with the Court dismissing grievances over Article 13. It can be argued that the Court's stance was built on the tacit assumption that those issues were sufficiently covered by the procedural limb of Article 8. One may suggest that such an assumption is sustained by the reasoning approximate to the *lex specialis* rule. It may well be that the procedural aspect inherent under Article 8 is deemed as a sort of 'pseudo-*lex-specialis*' in relation to the more general rule contained in Article 13.[152]

[150] *Kurić and Others v. Slovenia*, [GC] no. 26828/06 paras. 314-372 ECHR (2012). *But compare* a case where the complaints focus on one heading of Article 13 taken together with Article 8, rather than on two separate headings of Articles 8 and 13. *See, e.g.*, *Bastys v. Lithuan*ia, no. 80749/17, paras. 67-87 ECHR (2020).

[151] *Silver and Others v. UK*, *supra* note 13, at para. 118; *Campbell and Fell* v. UK, *supra* note 116, at paras. 110, 120, 124-128.

[152] That said, the case-law on Article 8 (or any other personal freedom rights contained in Articles 9-12) has yet to recognize fully the dualist dimensions of the obligations (substantive and procedural) in the manner comparable to the established case-law on Articles 2 and 3. Compare the German Federal Constitutional Court's position that all substantive constitutional rights include procedural-right aspects: R. Alexy, *A Theory of*

This approach was observable across a different range of issues. In *Malone*, the interception of postal and telephone communications as well as the 'metering' of telephones were found to contravene Article 8. In contrast, the applicant's claim under Article 13 was jettisoned, with the Court holding that there was no need to examine issues raised under Article 13.[153]

Controversially, the Court's 'abstentionist' policy in regard to a further review under Article 13 was applied even in cases where serious infringement of either the dignity of persons or of intimate aspects of privacy was at issue. In *X and Y v. the Netherlands*, which concerned the absence of adequate means of obtaining a remedy for a mentally handicapped victim of rape, the Court was at pains to justify eliminating a separate examination under Article 13, holding that this issue was fully taken into account for the purpose of Article 8.[154] The similar method of eliminating outright any separate review under Article 13 was discernible in *Herczegfalvy*, which involved the forced medical treatment and feeding of a prisoner.[155] The Court's terse treatment of the Article 13 issues in these cases is squarely at odds with the more recent tendency. As will be explained in the next subsection, the fundamental nature of core privacy aspects is likely to incentivise the Court's further examination under Article 13.

C. The 'Concurrent-Examination Method' in the Interplay between Article 8 and Article 13

It seems that since the operation of the new Court in the wake of the entry into force of the Eleventh Protocol, the Court has shown an impetus to engage in a separate review under Article 13 even after the same or related procedural issues have been examined under the heading of Article 8. This propensity has provided added complexity to the task of ascertaining the still unfixed and fluid nature of the judicial 'policies' towards the coordination between Articles 8 and 13.[156] As when any of other substantive rights and Article 13 are invoked in parallel, the length of 'separate' review under Article 13 tends to be limited. It may well be that findings under Article 8 are invoked as the (exclusive or principal) rationale for identifying a parallel

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Constitutional Rights, 318 (2002) (translated by J. Rivers from the original German text, (1986).

153 *Malone v. UK*, Judgment, no. 8691/79, paras. 90-91 ECHR (1984).

154 *X and Y v. the Netherlands*, no. 8978/80, paras. 35-36 ECHR (1984). *See also Hokkanen v. Finland*, *supra* note 124, at paras. 73-74.

155 *Herczegfalvy v. Austria*, no. 10533/83, paras. 95, 96 ECHR (1992).

156 Apart from the cases discussed here, *see also Sabou and Pircalab v. Romania*, no. 46572/99, paras. 44-56 ECHR (2004).

breach of Article 13 (together with, or in the light of, Article 8).[157] Further, in principle the decision to undertake a further review under Article 13 should not hinge on whether or not a violation of Article 8 provision has been found.[158]

From the empirical verifications of the case law, it is possible to extrapolate some guidance as to the circumstances in which the 'concurrent-examination method' may be justified or even necessitated when ascertaining the interplay between Article 8 and Article 13. This can help to discern some crude rationales for the Court's tendency toward further inquiries under Article 13 even where related procedural issues have been discussed for the purpose of Article 8.

First, it may well be that the nature of procedural defects may be considered issues of sufficiently distinct nature to be evaluated under Article 13.[159] An excessively high standard of national judicial review[160] imposed for the purpose of raising complaints of a breach of Article 8 may be recognized as such a case in point.

Second, as in the context of other substantive-right provisions, the judicial tendency toward separate and even in-depth examinations under Article 13 is stronger when deficiencies in a national procedural system appear to be manifest and dire.[161] These issues are far from being minor matters that are

[157] *Dorđević v. Croatia*, no. 41526/10, paras. 148-149, 152-153, 168 ECHR (2012); *Sargsyan v. Azerbaijan*, [GC] no. 40167/06, paras. 272-274 ECHR (2015).

[158] *See* cases involving searches of home or offices: *Posevini v. Bulgaria*, no. 63638/14, paras. 83-87 ECHR (2017); *Panteleyenko v. Ukraine*, no. 11901/02, paras. 78-81 ECHR (2017); *Keegan v. UK*, no. 28867/03, paras. 41-43 ECHR (2003); *Peev v. Bulgaria*, no. 64209/01, para. 70 ECHR (2007). For the procedural deficiencies of English public law prior to the 1998 Human Rights Act: *Hatton and Others v. UK*, GC, *supra* note 38, at paras. 137-142.

[159] *See, e.g.*, *X and Others v. Russia*, no. 78042/16, paras. 73-79 ECHR (2020). Again, one such area that falls clearly within the ambit of Article 13 is the question of pecuniary compensation: *Wainwright v. UK*, no. 12350/04, para. 55 ECHR (2006).

[160] *Smith and Grady*, no. 33985/96, paras. 135-139 ECHR (1999); *Khan v. UK*, no. 35394/97, paras.28, 47 ECHR (2000); *Beck, Copp and Bazeley v. UK*, no. 48535/99, 48536/99, 48537/99, para. 58 ECHR (2002). *Compare Christine Goodwin v. UK*, [GC] no. 28957/95, paras. 109-114 ECHR (2002). For the more recent cases dealing with the use of surveillance measures like *Khan*, *see Allan v. UK*, no. 48539/99, paras.36, 55 ECHR (2002); *Chalkley v. UK*, no. 63831/00, paras. 25, 27 ECHR (2003).

[161] *Khan v. UK*, *supra* note 160, at paras.28, 47; *Albanese v. Italy*, no. 77924/01, paras. 66, 73-77 ECHR (2006); *Özpinar v. Turkey*, no. 20999/04, paras.78-79, 82-88 ECHR (2010); *De Souza Ribeiro v. France*, [GC] no. 22689/07, paras.93-100 ECHR (2012). For Article 13 claims regarding similar surveillance measures: *Allan v. UK*, supra note 160, at paras. 36, 55; *Chalkley v. UK*, *supra* note 160, at paras. 25, 27. *See also Sargsyan v. Azerbaijan*, *supra* note 157, at paras. 259-261, 270-274.

auxiliary to the substance of family or private life and apt to be subsumed in the context of Article 8.[162] In the case of *İrfan Güzel*, which concerned the interception of telephone conversations of a suspect of money-counterfeiting, the Court carried out further review under Article 13 (and this, even with vigour). In that case, there was an outright failure of the authority to inform the applicant even of the judicial decision that authorized the impugned interception.[163]

Third, understandably, the Court is more incentivised to undertake additional examinations under Article 13 when *prima facie* serious infringements of the core aspects of the Article 8 rights are at stake. It is well-anchored in the case-law that 'the nature and gravity of the interference complained of under Article 8 of the Convention' was determinative of the question whether or not to evaluate the complaint under Article 13.[164] There is gradual but steady ascendancy of the 'concurrent-examination method' in cases where infringements of Article 8 rights appear to be grave. These include: abuses or harassment against handicapped persons;[165] discrimination based on sexual orientation;[166] separation from families in the case of expulsion;[167] the right of access to children of parents in custody;[168] the blanket impact of the deletion of permanent residency records;[169] the deliberate destruction of family homes and possessions as well as denial of access to them;[170] trespass or nuisance caused by night flights near an international airport.[171] No doubt, the judicial inclination for a separate review under Article 13 can be bolstered when the severity of intrusion into Article 8 rights is aggravated by elements of discrimination,[172] as when there

[162] *See also P.G. and J.H. v. UK*, no. 44787/98, paras. 63, 87-88 ECHR (2001) (lack of independence of the relevant police authority assigned to filter complaints).

[163] *İrfan Güzel v. Turkey*, no. 35285/08, paras.89, 100-109 ECHR (2017). *See also Parlamış v. Turkey*, (decision) no. 74288/01 ECHR (2007).

[164] *Menteş and Others v. Turkey*, *supra* note 146, at para. 89. *See also Cyprus v. Turkey*, [GC] no. 25781/94, paras.193-194 ECHR (2001).

[165] *Dorđević v. Croatia*, *supra* note 157, at paras.167-168.

[166] *Smith and Grady v. UK*, *supra* note 160, at para. 137; and *Beizaras and Levickas v. Lithuania*, no. 41288/15, paras. 125-130, 151-156 ECHR (2020).

[167] *See, e.g.*, *De Souza Ribeiro v. France*, *supra* note 161, at paras. 84-100.

[168] *See, e.g.*, *Sabou and Pircalab v. Romania*, *supra* note 156, at paras.49, 53-56; *Iordache v. Romania*, no. 6810/02, paras.57-67 ECHR (2008).

[169] *Kurić and Others v. Slovenia*, *supra* note 150, at paras.360-362, 370-372, 415.

[170] *See Menteş and Others v. Turkey*, *supra* note 164, at para. 89; *Nuri Kurt v. Turkey*, no. 37038/97, paras.117-122 ECHR (2005).

[171] *Hatton and Others v. UK*, *supra* note 38, at paras.137-142.

[172] *Smith and Grady v. UK*, *supra* note 160, at para. 137; and *Beizaras and Levickas v. Lithuania*, *supra* note 166, at paras. 125-130, 151-156.

is failure to carry out effective investigations into incitement to hatred and violence against homosexuals.[173]

In situations where the second and third factors described above are combined, clearly the case for additional appraisals with rigour under Article 13 intensifies. In the case of *Nada,* the complaints related to, among others, the procedural avenue for requesting the removal of the applicant's name from the 'Taliban ordinance', which implemented sanctions imposed by the UN Security Council, even though the national investigations had long cleared the applicant from any participation in terrorism. After finding a violation of Article 8, the Court engaged in detailed examinations under Article 13 and concluded that this provision was also breached.[174] Spurred on with the same rationale based on the combined gravity of glaring procedural deficiencies and serious infringements of Article 8 rights, the Court has been reinvigorated to undertake a further review under Article 13 in several cases concerning child victims of sexual or other abuses. In case child victims were unable to determine the authorities' oversight in the duty of protection under Article 3 and 8 and to obtain award of compensation for the damage, the absence of appropriate procedures was readily recognized as distinct issues that had to be determined under Article 13.[175] Moreover, when it comes to the decision to expel family members, an additional review under Article 13 is crucial for underscoring special procedures that must be complied with by national authorities in view of the possible irreparable damage on their Article 8 rights.[176] The Court is disposed to engage in strict scrutiny of key procedural questions, including whether persons awaiting decisions are duly given reasons for expulsion,[177] and the right to institute a challenge before an independent and impartial forum that is equipped with 'sufficient procedural safeguards and thoroughness'.[178]

[173] *Beizaras and Levickas v. Lithuania*, *supra* note 166, at paras. 129-130, 151.
[174] *Nada v. Switzerland*, [GC] no. 10593/08, paras. 187, 199, 200-214 ECHR (2012).
[175] *T.P. and K.M. v. UK*, [GC] no. 28945/95, paras.83, 110 ECHR (2001); *D.P. and J.C. v. UK*, no. 38719/97, paras. 114, 118-119 and 136-138 ECHR (2002).
[176] This is the case, again irrespective of the outcome of such scrutiny: *Abuhmaid v. Ukraine*, no. 31183/13, paras.114-115, 119-126, ECHR (2017). *See also Jabari v. Turkey*, no. 40035/98, paras. 39 and 50 ECHR (2000) (the substantive limb of Article 3 and Article 13 contravened concerning the anticipatory deportation to Iran of a woman who risked being stoned to death due to adultery).
[177] *Al-Nashif v. Bulgaria*, no. 50963/99, para. 135, ECHR (2002).
[178] *Id.*, at para. 133. *See also* No. 13718/89, Commission's decision, 15 Jul. 1988, unreported, *No. 22406/93*, Commission's decision, 10 Sept. 1993, unreported; No. *27794/95*, Commission's decision, 14 Oct. 1996, unreported; and *Shebashov v. Latvia*, no. 50065/99 (decision) ECHR (2000) (unreported).

D. Some Exceptions to the General Tendency Based on the 'Concurrent-Examination Method'

The aforementioned general proclivity toward the 'concurrent-examination method' has met with some deviating patterns. One such exceptional 'pattern' is relatively more justifiable. As briefly discussed in the previous subsection, this matter concerns situations where procedural issues raised under Article 13 are relatively minor, or where they are considered closely related to the substantive aspects of private or family life. In such circumstances, the Court may see it fit to merge those procedural issues into the process of appraisals under the limitation clause of Article 8. In such cases, the reasoning fleshed out in the context of Article 8 is invoked as the ground for eliminating a separate review of the same fact under Article 13.[179]

A more striking feature emerging from the recent case law is that where remedies are contested in relation to secret surveillance and data protection measures,[180] the Court has exhibited an oscillating stance between the 'absorption approach' in favour of Article 8 review alone and the 'concurrent-examination method' that requires a further review under Article 13. It should be noted that the consideration that these issues have implications of national security has little bearing on the Court's decision as to which of those two models to be selected. In the case of *P.G. and J.H. v. UK*, which involved the use of covert listening devices used by the police to monitor at a flat, the Court, even after finding a violation of Article 8, duly engaged in separate review under Article 13. It found a breach of this provision partly because of the lack of independence of the Police Complaints Authority.[181] This should be contrasted to the approach of absorbing procedural issues under Article 8 in *Liberty* and *Roman Zakharov*. In *Liberty*, the Court found that the system for interception of external communications under the impugned English legislation was not formulated with sufficient clarity to give individuals adequate protection against arbitrary interference under Article 8. Hence, the legal basis test in relation to the expression 'in accordance with the law' of the limitation clause was unfulfilled. The Court, following its method in *Malone*, held that such a finding was deemed sufficient to dismiss any separate appraisal under Article 13.[182] Similarly in *Roman Zakharov*, the Court dismissed the claim of

[179] *Roman Zakharov v Russia*, [GC] no. 47143/06, paras.302-305, 307 ECHR (2015).

[180] For other cases on surveillance and data protection, *see Amann v. Switzerland*, [GC] no. 27798/95, paras. 89-90 ECHR (2000); *Roman Zakharov v. Russia*, *supra* note 179, at paras. 233, 287, 291.

[181] *P.G. and J.H. v. UK*, *supra* note 162, at paras. 63, 87-88.

[182] *Liberty and Others v. UK*, no. 58243/00, para. 73 ECHR (2008). For the same approach, *see also Roman Zakharov v. Russia*, *supra* note 179, at para. 307.

an alleged violation of Article 13 by holding laconically that 'although the complaint under Article 13 of the Convention is closely linked to the complaint under Article 8 and therefore has to be declared admissible, it is not necessary to examine it separately'.[183]

IX. THE COURT'S MODALITIES OF EXAMINATIONS OF ARTICLE 13 IN TANDEM WITH ARTICLES 9-12

A. General Overview

In view of the comparatively much smaller volume of case-law in which grievances relate to any of the rights guaranteed under Articles 9-12 in conjunction with Article 13, one ought to be cautious when seeking to extrapolate from the case law any general guidance on the Court's methodology. On one hand, the Court may hold that the procedural issues are discussed at sufficient length or depth within the framework of any of the Article 9-12 rights to dispense with separate inquiries under Article 13.[184] On the other hand, when confronted with issues of glaring denial of justice for addressing alleged violations of any of the Articles 9-12 rights, the Court has been incentivised to embark on separate inquiries into complaints under Article 13.[185] As in the context of Article 8, what can emerge from the analyses is the Court's stronger inclination toward a further review under Article 13 where such situations of serious procedural deficiencies are combined with the prima facie grave infringement on personal freedom rights.[186]

B. The Court's Modalities of Examinations of Article 13 in Tandem with Article 9

With respect to the interplay between Articles 9 and 13, it should be noted that the decision to call for further examinations under Article 13 is not necessarily undermined by the conclusion that no violation of Article 9 is found.[187] In two Greek cases involving the pupils of Jehovah's Witnesses, the primacy of judicial scrutiny was placed less on their religious freedoms

183 *Roman Zakharov v. Russia, supra* note 179, at para. 307.

184 *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia,* 3 May 2007, at para. 137.

185 *See Supreme Holy Council of the Muslim Community v. Bulgaria,* no. 39023/97 ECHR (2004) (finding a violation of Article 9, but no breach of Article 13).

186 *Compare* C. Gray, *Judicial Remedies in International Law,* 24 (1987) (the international arbitral practice on awarding damages based on the similar rationales).

187 *See Efstratiou v. Greece*, no. 24095/94, paras.48-50 ECHR (1996); *Valsamis v. Greece,* no. 21787/93, paras.47-49 ECHR (1996); *Hasan and Chaush v. Bulgaria*, [GC] no. 30985/96, paras. 97-104 ECHR (2000).

than on the absence of an avenue to challenge the disciplinary measure of suspension from school for their non-participation in school and military parades and to institute actions for damages.[188] As in the context of other provisions, in case procedural defects disputed relative to Article 9 rights are considered sufficiently distinct from substantive issues under this provision, this may bolster the case for the concurrent violations of Articles 9 and 13.[189]

C. The Court's Modalities of Examinations of Article 13 in Tandem with Article 10

Turning to the coordination between Articles 10 and 13, unsurprisingly the Court's approach bears resemblance to that pursued under other personal freedom rights guaranteed under Articles 9-11. In some situations, the Court has held that grievances over procedural aspects of free speech rights have been sufficiently addressed under Article 10 to justify the decision to dismiss out of hand separate queries under Article 13.[190]

In other situations, the finding of a violation of Article 10 has not resulted in the obliteration of separate appraisals under Article 13. It seems that as under Articles 8-9, and 11, this policy drive for the 'concurrent-examination method' is discernible in case procedural deficiencies in addressing issues of expression rights appear to be so flagrant as to be distinguishable from the claims under Article 10.[191] In the *Karasu* case, a public prosecutor was unable to challenge the decision to remove him from office after he was criminally convicted for having criticized the armed forces in his private capacity. In that case, several disciplinary sanctions were not subject to judicial review, and the reviewing bodies were marred by serious doubts over impartiality.[192] The cumulative effect of those severe procedural defects was considered to necessitate the finding of a violation of Article 13 read together with Article 10. In the case of *Kenedi*, a violation of Article 10 was

188 *Efstratiou v. Greece*, *supra* note 187; Valsamis v. Greece, *supra* note 187.

189 *Metropolitan Church of Bessarabia and Others v. Moldavia,* no. 45701/99, paras.130 & 140 ECHR (2001).

190 *Zarakolu and Belge Uluslararasi Yayincilik v. Turkey*, no. 26971/95, paras. 39, 45 ECHR (2004); *Bucur and Toma v. Romania*, no. 40238/02, para. 170 ECHR (2013); *Karácsony and Others v. Hungary*, [GC] no. 42461/13, 44357/13, paras.159-162, 174 ECHR (2016) (*Contra,* Chamber's finding of a separate breach of Article 13 in its judgment of 16 September 2014, *id*., at para. 164).

191 *See, e.g.*, *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria,* no. 15153/89, paras. 40, 53 ECHR (1994); *Wille v. Liechtenstein*, [GC] no. 28396/95, paras.70, 76-78 ECHR (1999); *Vgt Verein gegen Tierfabriken Schweiz v. Switzerland*, no. 32772/02, paras.79-83 ECHR (2001); *Peev v. Bulgaria, supra* note 158, at paras.63, 71-73; *Kayasu v. Turkey*, no. 64119/00, 76292/01, paras. 114-123 ECHR (2008).

192 *Kayasu v. Turkey*, *id.*, at paras. 114-123.

found in relation to the national authorities' refusal to comply with the execution orders given by the judiciary that should have enabled a researcher to gain access to documents on the state secret services.[193] In this case, the Court's decision to undertake further reviews under Article 13 was no doubt borne out by the concern that such an obstinate refusal posed a serious affront to the Council of Europe's rule-of-law foundation with serious ramifications on other countries that underwent the democratic transition from the totalitarian regime relatively recently.[194] The refusal to comply with the judicial orders, which was employed as a rationale for the purpose of Article 10 (and under Article 6(1)), was reiterated as the sole ground for concluding that there was also a concurrent infringement of Article 13.[195]

D. The Court's Modalities of Examinations of Article 13 in Tandem with Article 11

Just as with issues of remedies contested in relation to the rights guaranteed under Articles 9 and 10, the Court's approach to claims of Article 13 relative to Article 11 rights seems to fluctuate between two main approaches: the 'absorption-approach' in favour of Article 11 and the 'concurrent-examination method'. On this matter, the analyses of more recent case law suggests that there is some difference in the Court's policy choice between cases involving the freedom of association[196] and those concerning the freedom of assembly.[197] The cases involving the latter freedom discloses a relatively greater drift toward the 'concurrent-examination method'. This may presumably be because of special considerations of the timing of public events as examined below.

In some situations, the Court has held that procedural issues are 'absorbed' under the heading of Article 11 to the exclusion of any separate review under Article 13.[198] This approach seems to be built again on either of the following two rationales. First, there may operate a tacit understanding that any procedural aspect of Article 11 is seen as an approximate to *lex specialis* in relation to '*lex generalis'* under Article 13. Second, the Court may find

193 *Kenedi v. Hungary*, no. 31475/05, para. 45 ECHR (2009).

194 For discussions on the rule of law and morality, *see* J. Raz, *The Authority of Law*, 221, 226 (1979).

195 *Kenedi v. Hungary*, 26 May 2009, at paras. 47-48.

196 *Young, James and Webster v. UK*, (plenary) no. 7601/76, para. 67 ECHR (1981); *Tüm Haber Sen and Çinar v. Turkey*, no. 28602/95, paras. 40-42 ECHR (2006).

197 *Ekşi and Ocak v. Turkey*, no. 44920/04, paras.36-38 ECHR (2010); *Chernega and Others v. Ukraine*, no. 74768/10, para. 233-241, 285 ECHR (2019).

198 *Young, James and Webster v. UK*, *supra* note 196, at para. 67; *Tüm Haber Sen and Çinar v. Turkey*, *supra* note 196, at paras.40-42; *Ekşi and Ocak v. Turkey*, *supra* note 197, at paras.36-38; *Chernega and Others v. Ukraine*, *supra* note 197, at para. 233-241, 285.

that any procedural issues raised under Article 13, especially when they are of minor nature, has been sufficiently examined for the purpose of Article 11.[199]

In other situations, one can observe that the judicial strategy has been geared toward the 'concurrent-examination method', and this, even with concurrent identification of breaches of both Articles 11 and 13. The Court's policy in this regard seems to be driven by the *prima facie* indication that procedural deficiencies in challenging infringement on Article 11 rights are so outrageous as to be treated as separate grievances, as is in tune with evolution in the context of Articles 8-10.[200]

That the meaningful exercise of the freedom of assembly hinges upon the national authorities fulfilling procedures diligently and promptly is of special pertinence to the question if a further review under Article 13 is necessary. Needless to say, the timing of public meetings, commemorations and demonstrations is pivotal in raising public awareness and carrying certain political or social weight. In view of this, the benefit of any *post-hoc* remedies may be limited.[201] Here, therefore, the Court's assertive policy of review under Article 13 may intervene alongside the 'concurrent-examination method'. This can be borne out by its relatively lengthy examinations and attention paid to details of procedures which it has stressed to be followed by the national authorities. The omission of the national authorities to provide time-limits within which requests for permission for a public march could be heard risks undermining the exercise of the assembly rights.[202] Hence, such procedural failure is perceived serious enough to lend itself to the almost automatic presumption in favour of a further query under Article 13.[203] Further, unsurprisingly, if any procedural irregularity is tainted with a discriminatory element in the breach of Article 14, this reinforces the bent toward a separate finding of a breach of Article 13.[204]

199 *See, e.g., Young, James and Webster v. UK*, *supra* note 196, at paras. 65, 67. *But see Gustafsson v. Sweden*, Commission's Report, no. 15573/89, ECHR (1995), as referred to in Judgment, 25 Apr. 1996, at paras. 43, 46, 69.

200 *Metin Turan v. Turkey*, no. 20868/02, paras. 36-38 ECHR (2006); *Karaçay v. Turkey*, no. 29604/05, paras. 39, 44-45 ECHR (2007); *Kaya and Seyhan v. Turkey*, no. 30946/04, paras. 32, 41-42 ECHR (2009); *Doğan Altun v. Turkey*, no. 7152/08, paras. 52, 58-60 ECHR (2015).

201 *Alekseyev v. Russia*, no. 4916/07, 25924/08, 14599/09, para. 99 ECHR (2010); *Lashmankin and Others v. Russia*, 7 Feb. 2017, at paras. 345-346.

202 *Baczkowski and Others v. Poland*, no. 1543/06, paras. 82-83 ECHR (2007); *Alekseyev v. Russia*, *supra* note 201, at paras. 97-100.

203 *See also Lashmankin and Others v. Russia*, 7 Feb. 2017, at paras. 345, 342-361.

204 *Baczkowski and Others v. Poland*, *supra* note 202, at para. 101; *Alekseyev v. Russia*, *supra* note 201, at para. 110.

X. ARTICLE 13 ECHR TAKEN TOGETHER WITH SUBSTANTIVE RIGHTS GUARANTEED IN THE PROTOCOLS -OVERALL REMARKS

With respect to the complaints of a breach of Article 13 taken in conjunction with (or in the light of) a substantive right guaranteed by the Protocols, most cases focus on Article 1 of the First Protocol. The Court's judicial strategies in this context are analysed under a separate subheading below. There are several cases which can shed some limited light on the Court's policy toward the coordination between Article 2 or 3 of the First Protocol and Article 13 ECHR. Further, there is only a fraction of cases that have drawn on the coordination between Article 13 and any of the substantive rights guaranteed in the Fourth Protocol.

In two cases concerning Jehovah's Witnesses examined above in the context of Articles 9 and 13, the Court ruled that the finding that there was no violation of Article 2 of the First Protocol did not forestall the Court's further examinations under Article 13. As in the context of other substantive rights, the outright absence of the judicial remedy by which to address school disciplinary measures, which was a prerequisite for claiming compensation,[205] was perceived serious enough to bolster the case for a separate finding of a breach of Article 13. It is sound that any element of discrimination in benefitting from the right to education be susceptible of reinforcing this.[206]

Turning to the context of Article 13 taken in conjunction with (or in the light of) Article 3 of the First Protocol, again two common approaches have emerged. In some situations, the Court has invoked 'special features' of the case to justify its decision to subsume procedural irregularities into the examinations under the right to free elections and to eliminate any separate inquiries under Article 13.[207] Yet, in other situations, the Court has felt the need to conduct separate examinations under Article 13 even after the related procedural matters have already been discussed under Article 3 of the First Protocol.[208] The need for identifying such a concurrent breach of Article 13

[205] *Efstratiou v. Greece*, *supra* note 187, at paras. 48-50; and *Valsamis v. Greece*, *supra* note 187, at paras. 47-49.

[206] *Sampanis and Others v. Greece*, no. 32526/05, paras. 57-58, 96 ECHR (2008).

[207] *See, e.g.*, *Gahramanli and Others v. Azerbaijan*, no. 36503/11, para. 56 ECHR (2015); and *Riza and Others v. Bulgaria,* no. 48555/10, paras.94-95 ECHR (2015); *Davydov and Others v. Russia*, no. 75947/11, para. 200 ECHR (2017). *See also Kerimova v. Azerbaijan*, no. 20799/06, paras.31-32 ECHR (2010); *Kerimli and Alibeyli v. Azerbaijan*, no. 18475/06, 22444/06, paras.29-30 ECHR (2012).

[208] *Grosaru v. Romania*, no. 78039/01, paras. 55-57, 61-62 ECHR (2010); *Paunović and Milivojević v. Serbia*, no. 41683/06, paras. 68-73 ECHR (2016).

may be felt even keener by *prima facie* severe procedural deficiencies in judicial reviews.[209] This rationale can be pertinent where there is only a very short time-limit for appealing against the refusal to register candidatures of electoral groups and seeking judicial review.[210] The cogency of this is stronger in case of glaring procedural irregularities that were seen as an afront to 'meaningful democracy'.[211] Thus, a separate review under Article 13 was felt essential in situations where national authorities deliberately prevented parliamentary candidates from running for elections,[212] and where there was no national mechanism for reviewing grievances of electoral fraud or irregularities.[213] Still, the Court's policy on this matter remains incoherent and in flux.[214]

With respect to the cases concerning Article 13 taken in conjunction with (or in the light of) the freedom of movement under Article 2 of the Fourth Protocol (and of Article 8 ECHR), the Court may justify a separate review of Article 13 claims in situations where remedies are missing or where procedural defects are too evident or too formalistic.[215] The cases where Article 13 is taken in conjunction with (or in the light of) the prohibition of collective expulsion of aliens under Article 4 of the Fourth Protocol, bear much of similarity to those of expulsion examined under Article 13 taken together with (or in the light of) Article 8, so that the similar principles apply.[216] The Court's strategy of identifying a violation of Article 13 ECHR

[209] *Russian Conservative Party of Entrepreneurs and Others v. Russia*, 11 Jan. 2007, at paras. 87-88; *Paunović and Milivojević v. Serbia, supra* note 208, at paras.15-16, 47, 72-73. *Compare Strack and Richter v. Germany* (decision) no. 28811/12, paras.42-43 ECHR (2016).

[210] The Venice Commission recommended three to five days: *Etxeberria and Others v. Spain*, no. 35579/03 *et al.*, para. 79 ECHR (2009). Yet, in *Etxeberria*, the application of the margin of appreciation in evaluating grounds of national security and territorial integrity, coupled with absence of European consensus on this matter, loomed large in its finding under Article 3 of the First Protocol, and this had disturbing bearing on the examinations under Article 13: 30 Jun. 2009, at paras. 55-56, 72-73, 78-82.

[211] *Petkov and Others. v. Bulgaria*, no. 77568/01, *et al.*, paras.79-80 ECHR (2009).

[212] *Ibid*.

[213] *Davydov and Others. v. Russia, supra* note 207, at paras.199-200, 322-334.

[214] In *Gahramanli*, the constitutional court's premature confirmation of the election results as final, despite the applicants' appeal being pending, rendered all avenues of redress futile. While this, coupled with alleged electoral fraud and irregularities, should have warranted a separate finding of a breach of Article 13, the Court subsumed Article 13 claims into the single heading of Article 3 of the First Protocol. *See Gahramanli and Others v. Azerbaijan*., *supra* note 207 at paras. 55-56, 60-61, 87.

[215] *Riener v. Bulgaria*, no. 46343/99, paras. 112-114, 118-130, 141-143 ECHR (2006). *See also De Tommaso v. Italy*, [GC] no. 43395/09, paras. 122-127, 181-185 ECHR (2017).

[216] To fend off the potentially irreversible nature of collective expulsion, it is important that the remedies should have an automatic suspensive effect: *Čonka v. Belgium*, *supra* note

besides that of Article 2 of the Fourth Protocol is crucial for highlighting the procedural requirement that the substance of the applicants' requests be subject to a 'thorough and rigorous assessment' before their expulsion. There is a greater urgency in case they are faced with a real risk of anticipatory ill-treatment contrary to Article 3.[217]

XI. THE COURT'S MODALITIES OF EXAMINATIONS IN RELATION TO ARTICLE 13 ECHR TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL NO. 1

A. Overview

Where remedial or other procedural issues relative to alleged violations of Article 1 of the First Protocol are raised under Article 13, the Court's general policy is characterized by the 'concurrent-examination method'. Even after the related procedural issues have been addressed under the heading of Article 1 of the First Protocol, the Court has often considered issues of remedies and other procedural issues distinct enough to be examined under Article 13. Still, there are some exceptions.

B. The 'Absorption Approach' by which a Further Review under Article 13 ECHR is Eliminated in View of Sufficient Examinations under Article 1 of the First Protocol

In contrast, a small number of cases have exhibited the 'absorption approach' by which the Court has dispensed with a separate inquiry into claims under Article 13. The rational for this method is that the procedural issues lodged under Article 13 have already been sufficiently addressed for the purpose of Article 1 of the First Protocol.[218] Questions of remedies by which to address any alleged encroachment on possession rights may be considered 'intrinsically linked' to issues raised under this provision.[219]

37, at paras.61-63, 79-85; and *Hirsi Jamaa and Others v. Italy*, [GC] no. 27765/09, para. 206 ECHR (2012).

217 *Hirsi Jamaa and Others v. Italy*, *id*., at paras.185-186, 201-207.

218 This point is of special pertinence not least to issues of compensation that form the core of issues under that provision.

219 *Džinič v. Croatia,* no. 38359/13, paras.81-82 ECHR (2016). *See also Velikovi and Others v. Bulgaria*, no. 43278/98 *et al*.,, paras. 249-251 ECHR (2007).

C. The 'Concurrent-Examination Method' in the Interplay Between Article 1 of the First Protocol and Article 13 ECHR

In most situations, the Court has readily engaged in further examinations under Article 13 (taken together with, or in the light of, Article 1 of the First Protocol) even after in-depth queries are made into the relevant issues under the latter provision.[220] The Court's rationale in such situations is that there is a salient difference between those two provisions.[221] It should, however, be appreciated that even when the Court is engaged in 'separate' appraisals under Article 13, again, as under other provisions, the depth and length of its method of review may vary. In some cases, all it does may be limited to restating the same rationale deployed in the context of Article 1 of the First Protocol or referring to the relevant paragraphs in that context.[222]

As in the contexts of other substantive-right provisions, the Court has been more incentivised for separate appraisals (and even with rigour) under Article 13 in situations where procedural defects are perceived as dire and sufficiently distinct from the core of substantive complaints of infringement of possession rights. A knack for finding a breach of Article 13 is conspicuous in situations where corruption, bias or operational inefficacies contaminate the national system of procedure almost as an endemic problem,[223] or where the cumulative effect of impugned measures is excessively detrimental to the complainants.[224] The vigorous judicial policy of review under Article 13 may also intervene to verify if the national

[220] *McMichael v. UK*, no. 16424/90, para. 91 ECHR (1995); *Iatridis v. Greece*, [GC] no. 31107/96, paras. 65-66 ECHR (1999).

[221] In this connection, the Court has asserted that the procedural requirement inherent in Article 1 of the First Protocol is only 'ancillary' to the rights of possessions: *Iatridis v. Greece*, *supra* note 220, at para. 65. Again, it does not matter if the Court, after separate appraisals under Article 13, finds no violation of this provision: *Nuri Kurt v. Turkey*, *supra* note 170, at paras.118-122; *Budayeva and Others v. Russia*, *supra* note 53, at paras. 196-198. *See also Saggio v. Italy*, no. 41879/98, paras. 35-36, 42-44 ECHR (2001).

[222] *See, e.g.*, *Chiragov and Others v. Armenia*, [GC] no. 13216/05, paras. 201, 213-215 ECHR (2015); *Sargsyan v. Azerbaijan*, *supra* note 157, paras. 269-274. *See also Edward and Cynthia Zammit Maempel v. Malta*, no. 335/15, paras.70-86 ECHR (2019).

[223] *See Edward Zammit Maempel and Cynthia Zammit Maempel v. Malta*, *ibid*; *Marshall and Others v. Malta*, no. 79177/16, ECHR (2020).

[224] *See Edward Zammit Maempel and Cynthia Zammit Maempel v. Malta*, *supra* note 222, at paras.39, 48-49, 85-86; *Marshall and Others v. Malta*, *supra* note 223, at paras. 70-81. Where there are parallel issues relating to the procedural limb of the right to life under Article 2, unsurprisingly the scrutiny intensifies, demanding the national authorities to discharge the burden of proving the availability of a remedy capable of providing redress: *Öneryildiz v. Turkey*, *supra* note 64, at paras.156-157. Compare *Budayeva and Others v. Russia*, *supra* note 53, at paras. 196-198.

authorities have discharged the positive duty to allow property rights to be duly restored with compensation.[225]

XII. THE HYPOTHESIS THAT APPRAISALS UNDER THE LIMITATION CLAUSE AS THE GROUND FOR EXCLUDING SEPARATE REVIEW UNDER ARTICLE 13

From the foregoing analyses of the case-law on Article 13 overall, this author draws one hypothesis that seems to be more or less corroborated, albeit with some deviations. It may be hypothesized that the 'absorption approach' in favour of the exclusive assessment under the substantive-right provision is more likely to occur in cases where remedies and other procedural issues relating to that substantive provision have already been examined under the limitation clause. One plausible rationale for this hypothesis is that the evaluation under the limitation clauses of Articles 8-11 ECHR (and under the two escape clauses under Article 1 of the First Protocol)[226] is a highly systematized process. On this view, it may be argued that elaborate appraisals based on the established criteria (such as the principle of proportionality) can capture sufficiently issues of remedies and other procedures. As is well-known, any interference with the substantive rights secured under those provisions is examined by the tripartite tests developed in the case-law: (1) the first test of legal basis; (2) the second one of legitimate aims; and (3) the third one of 'necessary in a democratic society', which is comprised chiefly of proportionality.[227] Accordingly, the Court may judge that procedural issues submitted under Article 13 may be subsumed in the process of such refined evaluations,[228] especially in the course of proportionality appraisals.

As a variant of this hypothesis, it can be propounded that where the evaluation of the impugned interference under the limitation clause fails to reach the third stage of proportionality in the limitation clause, the need for a

[225] *Sargsyan v. Azerbaijan supra* note 157, at paras. 271-272.

[226] Namely, the condition 'except in the public interest and subject to the conditions provided for by law …in the second sentence of Article 1(1); and the proviso 'in accordance with the general interest or to secure the payment of taxes or other contributions or penalties' under Article 1(2) of the First Protocol.

[227] Y. Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of *Proportionality in the Jurisprudence of the ECHR*, (Antwerp/Oxford: Intersentia/Hart, 2002), at 9-12.

[228] For this hypothesis under Article 1 of the First Protocol, *see Velikovi and Others v. Bulgaria*, *supra* note 219, at paras.159-161, 177-249. While the Court in that case referred to the 'fair balance' test, in essence it was the proportionality appraisals carried out under the second sentence of Article 1(1) of the First Protocol.

separate review under Article 13 may still be perceived.[229] A possible reason for this variant hypothesis is that the process of weighing in balance on the basis of the yardstick of proportionality is considered the fulcrum of evaluations under the limitation clause, and that it involves the most elaborate appraisals that should be able to take into account any procedural irregularities. Arguably this variant hypothesis seems to be defended in several recent cases. These cases include: surveillance and interceptions;[230] disclosure of medial data;[231] and inability of prisoners to seek judicial review of permanent CCTV camera surveillance.[232] In all those cases, the appraisals under the limitation clauses stopped at the first stage, namely, that of the 'in accordance with the law' standard.

From this hypothesis, it might be inferred contrariwise that the Court's preference to proceed with a further review under Article 13, even when the same procedural issues have been addressed under a substantive-right provision, would be more observable in cases where such a provision is devoid of the limitation clause. This inference seems to be corroborated in the few cases concerning Article 13 taken together with (or in light of) Article 12, where the right to marriage of a prisoner and the lack of remedies for this purpose were contested.[233]

Proceeding with the above reasoning, a further review under Article 13 would be more defensible with respect to the first sentence of Article 1(1) of the First Protocol, which is not equipped with any express escape valve. On this matter, special regard should be had to the Court's approach in the case of *Iatridis*, which involved the eviction order of an applicant running an open cinema in the leased property. In that case, the Grand Chamber ruled that the interference with his leased property right came to be assessed under the first sentence of Article 1(1) of the First Protocol.[234] Because the national court had judged the eviction order as unlawful, there was no dispute over

[229] *See P.G. and J.H. v. UK*, *supra* note 162, at paras.63, 87-88. However, *contra*, *İrfan Güzel v. Turkey*, *supra* note 163, at paras.89, 100-109 (proportionality assessment under Article 8(2) followed by a separate review under Article 13).

[230] *Rotaru v. Romania*, *supra* note 4, at paras. 62-63, 64-73; *Amann v. Switzerland*, *supra* note 180, at paras.62, 80, 82-90; *Irfan Güzel v. Turkey*, *supra* note 163, at paras. 88-89, 109. *Contra* the earlier cases showing a further review under Article 13 even after evaluations under the standard 'necessary in a democratic society' of Article 8(2): *Klass and Others v. Germany*, *supra* note 13, at paras.39-72; *Leander v. Sweden*, *supra* note 15, at paras. 47-68, 76-84.

[231] *Panteleyenko v. Ukraine*, supra note 158, at paras. 59-62 & 72-84.

[232] *Gorlov and Others v. Russia*, no. 27057/06 et al., paras. 99-100, 109-110 ECHR (2019).

[233] *Frasik v. Poland*, *supra* note 48, at paras.88, 90, & 104. *See also Jaremowicz v. Poland*, *supra* note 48, at paras. 61, 70-71.

[234] *Iatridis v. Greece*, *supra* note 220, at para. 55.

that order being arbitrary. According to the case law,[235] the rule contained in this sentence may be susceptible to the 'fair-balance' test, yet this test can be applied 'only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary'. [236] Accordingly, in this case there was no appraisal based on the 'fair-balance' test. Here, the complaint under Article 13 ECHR concerned the same procedural issues as those raised under Article 1 of Protocol No. 1. Yet, the Grand Chamber, undeterred, proceeded with the 'concurrent-examination method' and found a violation of Article 13. It invoked the difference both in the 'nature of the interests protected' and in the 'purpose of the safeguards' between those two provisions as the ground for following this method.[237] It is plausible that the absence of any elaborate proportionality appraisal in the context of the first sentence of Article 1(1) of the First Protocol might have operated as an additional and unstated rationale. Subsequently, the same rationale of the absence of proportionality appraisals relative to the first sentence of Article 1(1) of the First Protocol seems to be tacitly operational in some cases.[238]

CONCLUSION

The foregoing analyses have explored some underlying rationales for the Court's strategy to decide whether or not to undertake further examinations under Article 13 subsequent to its examinations of the same or related procedural issues under a substantive-right provision.[239] It seems that the judicial step in the direction of furnishing elaborate grounds under Article 13 initially tiptoed on the fringe.[240] Yet, in some contexts, such a timid stance in the earlier case-law has been gradually overtaken by bolder and relatively more coherent judicial stances.

The survey has identified three *principal* 'methods': (1) the 'absorption approach' in favour of exclusive examinations of remedial and procedural issues under the specific substantive provision; (2) the 'absorption approach' which, in a diametrically opposite way to the first approach, shows all

235 *Sporrong and Lönnroth v. Sweden, supra* note 115, at para. 69.

236 *Iatridis v. Greece, supra* note 220, at paras. 58, 62.

237 *Id*., at para. 65. *See also Vasilev and Doycheva v. Bulgaria*, no. 14966/04, para. 65 ECHR (2012).

238 *Vasilev and Doycheva v. Bulgaria, supra* note 237, at paras. 29, 59. *See also Driza v. Albania*, no. 33771/02, paras. 108-109, 115-120 ECHR (2007).

239 Here, the notion 'procedure' is understood broadly as referring to 'systems of rules and/or principles for the production of outcomes': Alexy, *supra* n. 159, at 316. Note, however, Alexy's caveat against 'simple transfer of *the* idea of procedure to *all* constitutional rights', *id*., at 315, emphasis in original.

240 *See Khashiyev and Akayeva v. Russia, supra* note 51, at paras. 184-186.

procedural issues being subsumed in the supposedly broader purview of Article 13; and (3) the 'concurrent-examination method' by which the Court reviews the same or related procedural issues without any fear of possible criticism of duplication under both the substantive provisions and Article 13. The Court's policy of following any of those methods and its 'interpretive attitude' vary, depending chiefly on some value-driven factors such as: the nature of the substantive right; serious degree of interference; fundamental aspects of the substantive right in question; and the nature of remedial and other procedural issues (above all, if they are seen sufficiently grave and distinct from complaints of substantive rights).

When the Court chooses the '*lex-specialis* absorption approach' and eliminates further review under Article 13, the question remains hard to explain away why the grievances at issue that have been declared not manifestly ill-founded by the admissibility decision are found superfluous and dismissed out of hand at the merit stage. This author has proposed that the concurrent-examination method should be the 'default' mode, and that threshold for the 'arguable' test is set as low as the '*prima facie'* case, namely the same low standard as the affiliated notion '[not] manifestly ill-founded'. With special regard to the provisions on personal freedom rights which have a two-tier structure of the substantive and limitation clauses, it is submitted that the standard should be tuned at the '*prima facie* case of *interference'* that may be evaluated pursuant to the substantive clause, not at a higher level of the '*prima facie* case of *violation'* which would require evaluations in the light of the limitation clause.[241] Such a low-threshold test of 'arguability' can be rationalised when considering the law-making character of IHRL treaties such as the ECHR.[242] They are designed to create rights for individual persons. Accordingly, it makes better sense to assume that the ECHR should facilitate them to institute any legal claim of violation of those rights. Indeed, the low threshold for the arguability test can also be rationalized in the overarching discourse on the nature of the law as an inter-subjective 'argumentative discipline' in our social life.[243] As MacCormick observed, the law's intrinsically arguable character may not be entirely laid

[241] *See, e.g., Anne-Marie Andersson v. Sweden*, *supra* note 36, at paras. 41-42 (non-arguability was based on the admissibility decision that the complaint under Article 8 was manifestly ill-founded, taking into account a 'margin of appreciation' under the limitation clause).

[242] *Wemhoff v Germany*, no. 2122/64, para. 8 ECHR (1968); *Golder v. UK*, *supra* note 115, at para. 36.

[243] N. MacCormick, *Rhetoric and the Rule of Law – A Theory of Legal Reasoning*, 14-15, 17 (2005).

to rest even when one tries to dissect the meaning of the rule of law,[244] the epitome of legal certainty and security.[245]

[244] For 'the rule of law' as 'one of the fundamental principles of a democratic society', and 'inherent' in the ECHR, *see Amuur v. France,* no. 19776/92, para. 50 ECHR (1996); *Iatridis v. Greece*, *supra* note 220, at para. 58.

[245] MacCormick, *supra* note247, at 28.