



The Portuguese Legal Framework of State Liability for Delayed Justice: The Relevance of ECtHR Case-Law

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RICARDO PEDRO 



ABSTRACT

This article examines the Portuguese legal framework of State liability for violation of the right to a decision within a reasonable time and, in particular, the extent to which the case-law of the ECtHR has allowed the Portuguese State to comply with the obligation of an effective remedy to guarantee the reparation of the referred damages. Starting from the analysis of the legislative legal framework which, despite admitting the aforementioned liability, does not foresee the specificities that the subject imposes, we then examine how such a task falls to national judges who, under the influence of the ECtHR's case-law, have gradually developed a State liability framework capable of fulfilling the obligations of the ECHR by the Portuguese State for compensation for violation of the right to a decision within a reasonable time, and allowing for the assurance of a swift indemnity action to repair the resulting non-pecuniary damage.

CORRESPONDING

AUTHOR:

Ricardo Pedro

Lisbon Public Law (CIDP)
– Faculdade de Direito de
Lisboa, PT

r.lopesdinis@gmail.com

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1. Justice delayed is justice denied. Under this premise it has been accepted that if sluggish justice causes damage, it should be repaired. Therefore, in countries, such as Portugal,¹ where there are delays in obtaining a decision or a trial within a reasonable time, it is not surprising that national courts are frequently presented with civil liability claims seeking damages against the State for violation of Article 6(1) of the European Convention on Human Rights (ECHR)'s guarantee of a hearing within a reasonable period of time.

For more than three decades the national courts have been deciding civil liability claims for the slowness of justice. In other words, even before the Portuguese legal system had a law providing for the State's civil liability for violating the right to a decision within a reasonable period of time, the courts were already attempting to create rules that would guarantee compensation for such damages.

2. Early on, Portuguese case-law closely followed the case-law of the European Court of Human Rights (ECtHR) in providing a *reasonable remedy* for the breach of the right to a fair trial under Article 6(1) ECHR.² The progressive acceptance of this case-law has led to the ability to pursue a civil liability action against the State for violation of the right to a decision within a reasonable period of time at a national level in compliance with Article 13 ECHR. As such, it is no longer necessary to appeal to the ECtHR and, consequently, exempting it from resorting to the provisions of article 41 ECHR and awarding damages to the injured parties for the unjustified delay in the administration of justice, under the principle of subsidiarity.³

When a legal system⁴ does not have an effective remedy, or when the case-law of that legal system does not comply with the ECHR and/or the interpretative and integrative case-law of the Strasbourg Court, that State will face condemnation as a result (if all the presuppositions are fulfilled).⁵ Portugal has been condemned about half a hundred times for violating the right to a decision within a reasonable time.⁶

1 For a general idea of the duration of legal proceedings in Portugal, statistical data up to 2022 can be found at: <https://estatisticas.justica.gov.pt/sites/siej/en-us/pages/duracao-media-de-processos.aspx>. Bearing in mind that recently the area that has shown the most judicial delays is the administrative and tax area, it will be very useful to consider the Legal Opinion for the reform of the administrative and tax jurisdiction of the Associação Sindical dos Juizes Portugueses, cf. *ASJP*, 2018.

2 On the human rights protection system provided by the ECHR, see *Soyer and de Salvia*, 1999, p. 240; *Redor* 2002, p. 101; *Mowbray* 2004, pp. 108; *Meyer* 2012, pp. 136–137; *Esparza and José Etxebarria* 2009, p. 173.

3 The principle of subsidiarity makes clear that it is primarily up to the national authorities to remedy alleged violations of the Convention, and only then does the ECtHR intervene. In this context, see also the doctrine of the national margin of appreciation: *Benvenisti* 1999, pp. 843–854; *Hoffmann and Ringelheim* 2004, pp. 109–142; *Letsas* 2006, pp. 705–732; *de la Rasilla del Moral* 2006, pp. 611–624.

4 Ordinance that is bound by the ECHR.

5 We refer to the assumptions required by the ECHR, from conditions of admissibility (Article 35), non-existence of a right to an effective remedy in the domestic legal order (Article 13), violation of a right provided for in the Convention, for what concerns us, the right to a decision within a reasonable time [Article 6(1)].

6 For a list of the main cases against Portugal decided by the ECtHR, which also includes those concerning the violation of the right to a judicial decision within a reasonable time, cf. <https://gdcd.ministeriopublico.pt/faq/acordaos-relativos-portugal>.

The State has one main obligation when it has violated the right to a trial within a reasonable time, specifically, *restitutio in integrum*.⁷ It is necessary to place the applicant, as far as possible, in a situation equivalent to that in which he or she would have been if there had not been a violation of their Article 6(1) right,⁸ and it is for the State to choose the appropriate means to do so. Alternatively, if this is not possible, the ECtHR will then provide a *reasonable remedy for the applicant*.⁹

3. Those injured by a violation of the right to a judgment within a reasonable time have domestic means of redressing the damage, and can bring a civil liability action against the State (RRCEE). This action has been considered an effective remedy for damages caused by the violation of the right to a decision within a reasonable time, in particular because national judges have incorporated the main interpretative guidelines developed by the ECtHR in this area.

The way in which national judges have accepted the ECtHR's case-law has been fundamental in assisting the Portuguese State to comply with the requirements of Article 13 ECHR in allowing for an effective remedy for damages at national level.

This article aims to analyse the extent ECtHR case-law ECtHR has had a decisive influence on Portuguese case-law on the civil liability of the State for damages caused by the violation of the right to a decision within a reasonable time.

II – THE PORTUGUESE LEGAL FRAMEWORK OF STATE LIABILITY FOR THE VIOLATION THE RIGHT TO A JUDICIAL DECISION WITHIN A REASONABLE TIME

4. Article 12 of the RRCEE provides the right to compensation for damages caused by violation of the right to a judicial decision within a reasonable time.¹⁰ This Article finds inspiration in the ECtHR case-law developed in relation to Article 6(1) ECHR, as well as Article 20(4) of the Constitution of the Portuguese Republic, which provides for the right to a judicial decision within a reasonable time.¹¹

This legal framework is designed to repair the damage caused by the administration of justice in general, but importantly, addresses time-related malfunctioning, specifically, the violation of the right to a judicial decision within a reasonable time.

5. Despite this express reference, Article 12 RRCEE requires the application of the general regime of administrative civil liability. In order for State liability to occur four cumulative assumptions must be met: (i) illicit fact, (ii) fault, (iii) damage and (iv) causal link.

(i) Illicit fact may be broken down into a voluntary fact and illicitness, the former consisting of all acts or omissions that may be controlled by the human will and illicitness the unlawfulness of that act or lack thereof. In terms of the State's liability

7 In this sense, Judgment of the ECHR of 31 January 1995, case Schuler-Zraggen.

8 ECtHR judgments: 22 April 2004, Cianetti v. Italy and 21 April 2005, Basoukou v. Greece.

9 See Article 41 ECHR.

10 We follow the research started in Pedro 2011, pp. 98 et seq.

11 See Catarino 2002, p. 283; Correia, Medeiros and Ayala 2002, p. 60.

for unjustified delays in administering justice, as the State claims a (tendential) monopoly on the administration of justice, this duty to administer justice results from the *constitutional and social contract* it has made with citizens. Although it may not be a human fact that can be controlled by the will, the important thing to analyse is the illegality resulting from the breach of the duty to administer the justice service, in short, the illicit fact. The fact will be, as a rule, that an act or omission of the State in the administration of justice, will be unlawful whenever it violates the reasonable period of time [Articles 7(1), 8(1)(2) and 10 RRCEE].

(ii) According to Article 10(1) RRCEE, the fault requirement must be assessed in light of the diligence and aptitude that may reasonably be required, in light of the circumstances of each case, of a zealous and compliant body or agent holder. This rule transcribes and adapts the criterion of the *bonus pater familiae* from civil law,¹² provided for in Article 487(2) Civil Code and requiring an analysis in the abstract, taking into account the diligence and aptitude of an average body holder or agent, in light of their functional duties, under the circumstances of the case. In addition to the model of personal or individual fault, the RRCEE establishes a model of collective and anonymous fault for the abnormal functioning of services under Article 7(3)(4) RRCEE. That is to say, it establishes a model for those cases in which the damage has not resulted from the conduct of a specific member of an organ or official or agent, or where it is not possible to prove personal authorship of the action or omission. This precept is in line with the doctrine of the *fault of the service*, which has been widely developed by the Portuguese Courts.¹³ An abnormal functioning of the service exists when, taking into account the circumstances and the average standards of result, the service could reasonably have been required to act in such a way as to avoid the damage caused.

(iii) The requirement of *actual damage or loss that the injured party suffered 'in natura', in the form of destruction, subtraction or deterioration of a certain tangible asset or ideal*¹⁴ results from the function of the institute of civil liability. The existence of two categories of damage which are so different in nature (property¹⁵ and non-property¹⁶) led the legislator to adopt two distinct compensation models, establishing a *summa divisio* which, on the one hand, makes it possible to repair property damage and, on the other hand, compensates non-property damage. Reparation and compensation represent two ways of reacting against unlawful acts, applicable, respectively, whether the latter give rise to damage which is or is not reducible to a perfect pecuniary equivalent. The aim of compensation for non-pecuniary damage is to “mitigate an injured party,

¹² This concept has evolved and adapted to the legal-administrative reality, and today we speak of a “competent and law-abiding civil servant”.

¹³ Among many, Judgments of the Supreme Administrative Court (Supremo Tribunal Administrativo = STA): 14 October 2004, Case No. 813/04; 7 December 1999, Case No. 44836; 16 May 1996, Case No. 36075; 10 February 2000, Case No. 45101 and of the Conflicts Court, 28 November 2007, Case No. 6/07. All Portuguese case-law cited can be found in www.dgsi.pt.

¹⁴ See *Coelho* 1955, p. 250.

¹⁵ This category includes the modalities of loss of profits and emergent *damages*, as well as *indirect pecuniary damages* [although non-patrimonial assets are affected, these are reflected in the assets of the injured party (e.g. loss of clientele as a result of the damage to good name)]. As regards the dogmatic category of *pure property damages*, the majority of legal scholars have understood that such damages are not compensable.

¹⁶ In this category, the doctrine subsumes pleasure damage, sexual damage, juvenile damage, aesthetic damage, suffering damage, biological damage, existential damage, etc.

knowing that the monetary settlement may be used to satisfy a wide variety of needs”.¹⁷ As such, the monetary settlement will represent a means of obtaining a sense of justice in exchange for the suffering unjustly caused and this would be the true essence of reparation.¹⁸ This bifurcation of compensation models, despite benefiting from common principles, is materialised in the Portuguese legal system with distinct regimes, namely in the quantification of the measure of damage.

(iv) Finally, the last assumption of State liability in this analysis is the causal link implicit in Articles 7(1) and 8(1) RRCEE, of damages resulting from culpable unlawful acts. Portuguese jurisprudence, based on the wording of Article 563 Civil Code, has long since elected the *theory of adequate causation*,¹⁹ according to which a condition of the damage will no longer be considered a cause of the damage whenever it is completely indifferent to the production of the damage and has only become a condition of it, by virtue of other extraordinary circumstances.

In short, the Portuguese legal system does not provide for any type of legal framework adjusted to the case-law of the ECtHR, as is the case in other countries.²⁰ This means that the specificities that the theme of the State’s civil liability for breach of the right to a decision within a reasonable time demand will have to be the object of case-law creation and development. To this end, Portuguese judges have sought to follow closely the case-law of the ECtHR.

III – THE RELEVANCE OF ECTHR CASE-LAW

III.1 – CONTEXT

6. The relevance of the ECHR’s case-law on the civil liability of the State for breach of the right to a judicial decision within a reasonable time is unquestionable, as we shall see below. The preliminary and theoretical question that may be asked is what would be the best framework to recognize such legal validity in the Portuguese legal system or, in other words, how the *relationship between the national judge and the ECHR case-law* should be equated.²¹

This question is not resolved by the fact that the ECHR has supra-legal value, although this argument may help the discussion insofar as the ECtHR is the privileged body in the interpretation and application of the ECHR. Nor is the question resolved by the fact that the ECHR must be interpreted in accordance with the canons proper to public international law and not in accordance with the interpretative canons of domestic law, insofar as it is for national judges to mobilise the canons or criteria proper to international law.²²

¹⁷ Varela 2000, p. 604.

¹⁸ Serra 1961, p. 79 and 80.

¹⁹ See, for all, the Judgment of the Supreme Administrative Court of 17th January 2007, Case No. 1164/06, and the doctrine and jurisprudence indicated therein should be consulted.

²⁰ Pedro 2011, p. 101.

²¹ Regarding the relationship between the national judge and the case-law of the ECtHR, some authors state that the time of mere “dialectical interaction” between the two jurisdictions is long gone, recognising the ECtHR as the competent body to provide the authoritative interpretation of the ECHR norms. In this sense, de Schutter 1997, p. 21 et seq.

²² In this sense, see Ramos 1982, pp. 154 et seq.

7. One might suggest that if the decisions of the ECHR had the force of *precedent in law* that this would provide a solution. This is not the case, however, as there is no legal basis to recommend this solution and the majority legal doctrine²³ and the ECtHR itself do not expressly assume this. Although the ECtHR does not expressly state that its judgments are *precedents in law*, it has long been considered that its judgments serve not only to resolve cases before it, but also to clarify, develop and safeguard the standards of the ECHR and contribute to the respect of the commitments entered into by the contracting states.²⁴ In a more recent period, the ECtHR has been requiring national courts to consider its case-law in domestic decisions when similar cases are involved. That is, States are obliged to comply with its case-law or apply domestic legislation that guarantees equivalent protection.

8. When confronted with ECtHR case-law when dealing with State liability for violations of the right to a decision within a reasonable period of time the Portuguese higher administrative courts, there is a relationship which, to some extent, reveals fear and, at the same time, respect for the commitment assumed by the Portuguese State by judges with the ratification of the ECHR.

The aforementioned case-law of the Portuguese courts clarifies that one should take into account the interpretation of the ECHR case law “*under penalty of future international condemnation of the State for divergences between the application deemed appropriate in the national order and the interpretation given by the Strasbourg court...*”.²⁵ This case-law seems to reflect the evolution towards a material and *de facto* control of the ECtHR as a “fourth instance”,²⁶ while reflecting that judicial interaction is not without tensions, even implying, on the part of national jurisdictions, some loss of judicial sovereignty.²⁷

9. The question of the effectiveness of the judgments of the ECtHR²⁸ is much debated in foreign legal literature, with some people considering that they have *erga omnes* effect.²⁹ However, most of them are considered to have *inter partes* effectiveness.³⁰

23 Whereas the case-law of the ECtHR, in particular the criteria for objectifying the concept of reasonable time, may function as an extra-legal normative source, see Canotilho and Moreira 1991, p. 57.

24 ECtHR Judgment, 18 November 1978, Ireland v. UK.

25 Judgment of the STA, 28 November 2007, Case No. 308/07.

26 This recognition of the ECtHR as a *de facto* “fourth instance” ultimately contradicts, in law, the conventional model of judicial review.

27 See Gaspar 2009, p. 41.

28 The reasoning developed here is based on the assumption that the judgements of the ECtHR are binding, declaratory and non-executive, as they do not constitute an enforceable title (*a contrario* of Article 46 of the Code of Civil Procedure), and their execution is supervised by the Committee of Ministers. In this study we are only interested in the effectiveness of the judgements as a means of contributing to the standardisation of the interpretation and application of the ECHR’s right to a decision within a reasonable time in the national legal system. The *modus operandi* of the execution of these judgments is left out. For further developments on the implementation of ECtHR judgments, see Pires 2006, pp. 821–841.

29 See Lambert-Abdelgawad 1999, p. 287 et seq. Some doctrine points out that the ECtHR implicitly strives for an *erga omnes* effect of its judgments although it does not expressly admit it – see Velu and Ergec 1990, p. 1072 et seq.

30 See that although the judgments of the ECtHR are recognised as having *inter partes* effectiveness, the doctrine does not fail to mention “*that the Court considers, without expressly admitting it, that its jurisprudence must be taken into account by the other States Parties*” – Pires 2006, p. 826.

Even so, it is necessary to recognise other indirect effects³¹ that go beyond the effectiveness within the process, to the extent that most ECtHR judgments, besides being a *de facto precedent*, irradiate law and should be valid as interpretative *topoi*. In the same logic of law irradiation beyond the concrete case, the ECtHR has adopted “pilot judgments”.

Through these judgments, the ECtHR not only determines the measures necessary to resolve the case in question, but also obliges the State in *default* to remedy the problem before all persons who are in a similar situation to the applicant, freezing the consideration of complaints based on the same violation.³²

Moreover, as a *matter of interpretation*, the judgments of the ECtHR have indirect and *erga omnes* effects which go beyond the case *sub judice*, and this interpretation appears to integrate the norms of the ECHR. This implies that the judiciary, as an integral part of the State, should endeavour to comply with this *a priori* case-law in order for the ECtHR to maintain its subsidiary function and to ensure compliance with the ECHR. On the other hand, only the attitude of the national judge can avoid the violation of Article 13 ECHR by ensuring, through the uniform interpretation given by the ECtHR judge, the existence of an internal means capable of effectively protecting the rights recognised by the ECHR.

10. The freedom of the national judge in the interpretation and application of norms of international law, as is the case of the ECHR norms, can only put at stake a single interest, but this interest is international, and not domestic. Its focus therefore is the interest of guaranteeing uniformity of meaning in the application of international norms.³³ Thus, the national judge must privilege, on pain of making the State incur international liability, the interest of uniformity of ECHR law.

Of course, this interest would be better served if there existed a mechanism for recourse to an international body which had exclusive powers of interpretation of the norms of conventional international law or if, in the specific case of the ECHR, a preliminary reference mechanism to the ECtHR similar to that which exists for the Court of Justice of the European Union (Article 267 of the Treaty on the Functioning of the European Union) were possible.³⁴ However, there is no mechanism which would allow national courts to ask for clarification as to the interpretation to be given to a rule contained in the ECHR, in particular with regard to the rule contained in Article 6(1) ECHR. The absence of a preliminary reference system in the Convention system, far from militating in favour of limiting the effects of judgments to specific cases, pleads for an extension of their effects to similar cases. Therefore, it will be up to the national judge, in his freedom of interpretation of the ECHR norms, to invoke the case-law of the ECtHR as a coadjutant way of elaborating the “decisive norm” of the concrete case. A principle of *the necessary consideration by national judges of the ECtHR case-law in the interpretation and application of the ECHR* thus emerges.

31 Queralt Jiménez 2003, p. 239, pointing out that the States Parties to the ECHR, in addition to complying with the judgments of the ECtHR in which they have been convicted, must take into account the possible repercussions that the other judgments may have in their respective legal systems.

32 See Pires 2006, p. 827.

33 In this sense, see Ramos 1982, p. 152.

34 This hypothesis was no stranger to the Council of Europe, which even drew up a draft agreement entrusting the interpretation of European treaties to the Strasbourg Court. It advocated the admission of preliminary rulings as a standardisation mechanism.

11. In short, the *relationship between the national judge and the case-law of the ECtHR* seems to be driven by the *principle of uniform interpretation*,³⁵ with the ECtHR acting as the guardian of this principle. This conclusion is drawn because: (i) in practice the ECtHR's judgments aim at a common interpretation for all State Parties to the ECHR; (ii) national judges³⁶ show a high respect for the doctrine resulting from the ECtHR's judgments even though their respective states were not parties to those judgments,³⁷ (iii) states accept the ECtHR's interpretation in cases to which they are not a party, even making legislative amendments in order to comply with the ECtHR's understanding in those specific cases.

Any different understanding would lead to the ECHR, which is interpreted and applied by a large number of national jurisdictions, being subject to a "jurisprudential anarchy"³⁸ that is hardly compatible with its object and spirit.

III.2 – THE MAIN LINES OF ECTHR CASE-LAW INFLUENCING PORTUGUESE CASE-LAW

12. As already mentioned, since there is no law in the Portuguese legal system that sets out specific rules on the State's civil liability for violation of the right to a decision within a reasonable time, referring to the general rules on administrative civil liability, it is essential that the national judge considers the case law of the ECtHR. Several topics are dealt with by national case-law. We will highlight the main ones.

13. A first topic worth mentioning is the one related to the *concept of reasonable time*, understood as an autonomous concept, totally independent from the concept of disciplinary term. The former is useful in terms of secondary protection (for the purposes of fulfilling the requirements of the State's liability), whereas the latter is restricted to primary protection (avoiding the consequences that exceeding it would have if it were a peremptory deadline – as happens for lawyers – with implications at the level of the exercise of rights). The delay is on the part of the judge or any other public entity.

The subject of this liability is the State (in a broad sense – including not only all judicial bodies, but also all other manifestations of state function that have an impact on the administration of justice), which is directly liable; the attitude of the judge is only relevant in the context of a right of recourse. The administration of justice within a reasonable period of time should be guaranteed to the administered person.

14. The second topic is *how to determine the concept of reasonable time*, which cannot be done in the abstract, but in concrete terms, by resorting to the criteria developed by the ECtHR including:

35 We think that the principle of uniform interpretation and application of the ECHR law is only limited by the constitutional values with which it collides. However, such a collision has a great tendency not to occur in the Portuguese legal system insofar as there is a common matrix between the ECHR and the Constitution of the Portuguese Republic. The ECHR is based on the Universal Declaration of Human Rights (UDHR) (see preamble of the ECHR) and the fundamental rights of our Constitution of the Portuguese Republic (CRP) must be interpreted and integrated in accordance with the UDHR [Article 16(2) CRP].

36 See Lambert-Abdelgawad 1999, p. 287 et seq.

37 In this respect one speaks of a "semi-vertical" relationship, in the sense that the courts of any State Party are directly committed to respecting fundamental rights as they are guaranteed by the ECHR, i.e. with developments and as they are interpreted and applied by the ECtHR. Supreme Courts are attributed responsibility for adjustments of national law to the ECHR as interpreted by the ECtHR. See Gaspar 2009, p. 39.

38 See Velu and Ergec 1990, p. 1077.

- (i) complexity of the cause;
- (ii) conduct of the authorities;
- (iii) conduct of the parties; and
- (iv) importance of the dispute for the person concerned (necessitating special or exceptional diligence).

The concrete determination of the concept of reasonable time arises by analogical appeal to similar cases and the burden of proof that the reasonable time was not exceeded is on the State.³⁹

15. A third topic is based on the *calculation of the reasonable time*, which, in our opinion, may take place according to a *punctual perspective* or according to a *global perspective*. In the punctual perspective⁴⁰ we specifically and only compute the dead time⁴¹ or the dead time of the procedure and that, by itself, may also lead to the conclusion of the existence of violations of the right to a decision within a reasonable time.

The initial moment to be taken into account from a *point of view* is the beginning of a standstill in the proceedings and the *dies ad quem* will be the end of the dead time or the standstill in the proceedings. However, the injured party may trigger the liability action even before the dead time or procedural standstill has ended.

The *global perspective*⁴² takes into account the duration of the entire proceedings. From that perspective, Strasbourg case-law usually distinguishes between the calculation of the period depending on whether the proceedings are criminal or civil in nature.

16. Lastly, a final topic is that concerning the fact that the case-law of the ECtHR imposes *special attention with regard to non-pecuniary damage* arising from the administration of justice that is protracted, highlighting the following subtopics:

- (i) a *presumption of non-material damage* in favour of the administered must result from a lengthy justice system;
- (ii) the previous topic should be supplemented with the idea that the damages are to be considered *general damages*;⁴³
- (iii) Article 496(1) Civil Code must be interpreted in accordance with ECtHR case-law;⁴⁴
- (iv) attention should be paid to the case-law of the ECtHR concerning the *compensability of non-pecuniary damage to legal persons*;
- (v) the need for constant reflection to keep pace with the case-law of the ECtHR, particularly as regards the *amount of compensation for non-material damage*, should be expressly stated.

39 For further developments, see Pedro 2011, pp. 105 et seq.

40 For example, the assessment of the reasonability of the duration of a procedural stage. On the assessment of the reasonableness of the length of the criminal investigation, see, among others, judgment of the Supreme Court of Justice (Supremo Tribunal de Justiça = STJ), March 2011, Case No. 88/2002.L1.S1.

41 “Dead time” can be understood as “a situation of abnormal stoppage that prevents the process from progressing to the next step”. In this sense, see Gomes 2003, p. 263.

42 Among many, see ECtHR judgments: 19 February 1992, Viezzer case; and 28 June 1978, König case.

43 Already accepted in the judgment of the North Central Administrative Court (Tribunal Central Administrativo Norte = TCAN), 22 February 2013, Case No. 01945/05.7BEPRT.

44 A different orientation can be found in the TCAN judgement, 30 March 2006, Case No. 10/04.9 (not published), with a dissenting vote in the sense of the text.

III.3 – THE IMPACT OF ECtHR CASE-LAW ON THE PROMPTNESS OF STATE LIABILITY CLAIMS FOR VIOLATION OF THE RIGHT TO A DECISION WITHIN A REASONABLE TIME

17. It is also important to highlight that compliance with the case-law of the ECtHR by national courts,⁴⁵ in addition to enabling compliance with the dictates of the ECHR, has allowed the action for the enforcement of civil liability for breach of the right to a decision within a reasonable period of time to become faster and more effective. The compliance with the case-law of the ECtHR allows complying with the requirements of Article 13 ECHR and also ensure that this action for damages, in certain situations, takes place within a reasonable period of time. This occurs in the context of compensation for general non-material damage caused by the length of justice because of ECtHR case law on the presumption of non-material damage and with regard to the quantum of compensation.

III.3.1 – Presumption of non-material damage

18. As regards the presumption of damage itself, the ECtHR has concluded that, sometimes, the excessive duration of proceedings causes the applicant non-material damage, the amount of which he is not required to prove,⁴⁶ thus creating a presumption of non-material damage in favour of the applicant.⁴⁷ It is clear that this jurisprudence must be understood *cum grano salis*, being valid only as a general principle and, in the concrete case, it should be evaluated if the simple verification of the violation does not already constitute in *itself* a reasonable compensation for the non-material damage.⁴⁸

As far as the presumed damage is concerned, it is important to start by delimiting the non-material damage that we are considering. Thus, in accordance with the positive delimitation, we can say that the presumption defended here is the presumption of non-material damage that presumably is suffered by all those people who go to court and do not see their claims resolved within a reasonable period of time or without undue delay. This is not just any non-material damage, but typical damage resulting from unreasonable delay in the administration of justice. This is damage which is a presumed fact of life, known to all,⁴⁹ which must have repercussions in terms of compensation. It is, therefore, a general damage which, as a rule, according to the experience of life in society, all citizens suffer. As regards the negative delimitation it should be clarified that this judicial presumption should not cover all damages, namely special or specific non-pecuniary damage, which goes beyond the common moral damage resulting from the unreasonable delay in the administration of justice (special or specific non-pecuniary damage may include non-pecuniary damage resulting from a situation of psychological depression that causes discouragement, physical unease, generalised incapacity and

⁴⁵ For an account of the most recent Portuguese jurisprudence on reparation of damages caused by the violation of the right to a judicial decision within a reasonable time, see [Pedro 2022](#), pp. 223–245. And for an overall review of Portuguese case law on this subject, [Pedro, 2011](#), p. 76 et seq.

⁴⁶ ECHR Judgment, 22 June 2004, *Bartl v. Czech Republic*.

⁴⁷ ECtHR Judgment, 29 March 2006, *Riccardi Pizzati v. Italy*.

⁴⁸ ECtHR Judgments: 26 June 1991, *Letellier v. France*; 21 April 2005, *Basouskou v. Greece* and 10 June 2008, *Martins Castro and Alves Correia Castro v. Portugal*.

⁴⁹ In our opinion, the court was right to decide in this sense – provided that it is considered that this is a judicial presumption – Judgment of the STA, 9 October 2008, Case No. 319/08.

lack of interest in life),⁵⁰ which the administered person has suffered due to the delay.⁵¹ These damages must obviously be subject to compensation protection, but this requires proof. Therefore, all non-pecuniary damage (caused by unjustified delay) greater than ordinary damage must be proven, and should not benefit from the judicial presumption that should be considered to be limited to ordinary non-pecuniary damage that results from unjustified delay in the administration of justice.

This presumed *ordinary non-pecuniary damage* produced by the unreasonable delay in the administration of justice is mirrored in a “capture” of the person’s freedom or in the suspension of the self-determination of the natural or legal person, which goes beyond what is reasonably allowed to the State for the administration of justice within a reasonable time. In effect, the unreasonable delay in the administration of justice limits the performance in planning one’s life, at the same time as, as a rule, it causes anguish, anxiety,⁵² frustration,⁵³ much discomfort or uncertainty⁵⁴ in the natural person. Likewise, it limits the performance of commercial activity and causes the disruption of the proper functioning of the legal entity.

19. Judging by the case-law of the ECtHR, it appears that we are dealing with a presumed fact which falls under the system of presumptions of innocence and not with an established fact. A notorious fact must be understood as a concrete fact of general knowledge, its verification being indisputable, the fact itself not requiring proof and not susceptible of proof to the contrary.⁵⁵ A presumed fact or judicial presumption should be understood to be the result of deductive reasoning of a general nature. These are maxims of experience which the judge uses in evidential operations, given the indirect nature it normally has.⁵⁶

As it is easy to see, the two types of facts (notorious and presumed) are mutually exclusive, so we have to agree if we are dealing with notorious facts, which by definition are indisputable for their verification it will not be necessary to presume them.⁵⁷ Thus, a fact cannot be qualified as a notorious fact if it is nothing more than a natural or “*ad hominem*” presumption that is arrived at through judgements based on common experience.⁵⁸

III.3.2 – Quantum of damages

20. As regards the determination of the *quantum* of damages caused by the infringement of the right to a decision within a reasonable time, the case-law of the ECtHR must be taken into account. The case-law of the ECtHR is in the same direction.

⁵⁰ These situations are more easily dealt with when we are dealing with matters of family law, adoption, requests for social assistance or the imminent death of the applicant.

⁵¹ See, in this regard and as an example of the “specific” non-material damage alleged and proven and that therefore did not benefit (nor should benefit) from the judicial presumption, Judgement of the STA, 28 November 2007, Case No. 308/07.

⁵² ECHR Judgment, 8 December 1999, OZDEP v. Turkey.

⁵³ ECHR Judgment, 28 July 1999, Imobiliária Saffi v. Italy.

⁵⁴ ECHR Judgment, 27 February 2003, Textil Traders v. Portugal.

⁵⁵ See Freitas, *et al.* 1999, p. 397.

⁵⁶ See Freitas 1996, p. 134.

⁵⁷ Judgment of the STJ of 12 November 1991, Case No. 81133 – see summary in Neto 2004, p. 736.

⁵⁸ *Ibid*, p. 736.

In a batch of almost ten judgments⁵⁹ the Italian State was condemned to repair the non-material damage, when this State, through the internal appeal that had been created for this purpose, the “Pinto Law”,⁶⁰ had already recognized internally the reparation of such damage, although in a much lower amount than the amounts awarded by the ECtHR. Therefore, the ECHR considered that the internal appeal had not been effective and condemned the State, requiring States to take into account the values awarded by the Court of Strasbourg for non-pecuniary damages in similar cases. Only the aforementioned standardisation can contribute in a more refined way to a reasonable reparation, avoiding subsequent condemnations.

In this regard, the ECtHR has held that “even if the method of calculation provided by domestic law does not meet the criteria laid down by it, an analysis of the law of precedent (case-law) must enable national courts to award sums which are quite reasonable in comparison with the amounts awarded by the ECtHR in similar cases”.⁶¹ The same court insists that “it must be ensured that the (national) authorities comply with the principles laid down in their case-law, or apply the provisions of their own domestic law in such a way that the applicants enjoy a level of protection in respect of their rights and freedoms guaranteed by the ECHR, which is higher or equivalent to that which they would have had if the national authorities applied the provisions of the ECHR directly”.⁶²

21. In view of the actions that the ECtHR is obliged to decide on for violation of the right to a decision within a reasonable time, first of all caused by the Italian State judge, Italy has been monitored by the organs of the Convention since 2000. These bodies have decided to standardise their decisions by establishing scales based on principles of equity with regard to the compensation of non-material damage in order to reach equivalent results in *similar or like cases*.

Asked to clarify what is to be understood by *similar cases*, the ECtHR confirms that “they are those in which two sets of proceedings have lasted the same number of years, by the same number of jurisdictions, with interests of equivalent importance, the same behaviour of the parties and in relation to the same country”.⁶³ Although each country reveals its own economic and social context, national judges should always take into account the amounts awarded by the ECHR in *similar cases*. Indeed, in the Portuguese context, the attribution of a *quantum* of compensation through consideration of the amounts awarded in similar cases by the ECtHR has proved to be of enormous value in facilitating the judge’s decision in each specific case.

IV – CONCLUSIONS

§ 1 – We argue that the influence of ECHR case-law on the civil liability of the State for damages caused by violation of the right to a decision within a reasonable time

⁵⁹ ECtHR Judgments: 29 March 2006 (all of the same date), Scordino v. Italy; Cocchiarella v. Italy; Musci v. Italy; Zullo v. Italy; Riccardi v. Italy; Giuseppina and Ornestina Procaccini v. Italy; Giuseppe Mostacciuolo v. Italy and Apicella v. Italy.

⁶⁰ See Pedro 2011, p. 101.

⁶¹ ECtHR Judgments, 29 March 2006, Scordino v. Italy, recital 213.

⁶² ECtHR Judgment, 29 March 2006, Scordino v. Italy, recital 166. The ECtHR appears here as a guardian of a quasi-principle of uniform interpretation, if not a principle of uniform interpretation, requiring protection analogous to that offered by it.

⁶³ ECtHR Judgment, 29 March 2006, Scordino v. Italy, recital 267.

has been pivotal for Portuguese Courts whenever they are faced with this type of compensation claim.

This influence has been decisive, from the outset, at the international level for Portugal to comply with the provisions of Articles 6(1) and 13 ECHR, i.e. for Portugal to fulfil, in this respect, its obligations as a State Party to this international-regional human rights instrument.

§ 2 – We further argue that this ECtHR case-law has also allowed for the fulfilment of obligations arising from the domestic legal order, in particular the constitutional right to a judicial decision within a reasonable time in its restorative dimension.

By this we mean that it is the very Constitution of the Portuguese Republic that imposes the duty of the Courts to decide within a reasonable period of time and, if this is not the case, it imposes, consequently, the duty to compensate those caused by a sluggish administration of justice.

Despite the provisions of the Constitution and the law that develops it⁶⁴ which provide for the right to compensation for violation of the right to a decision within a reasonable time, the truth is that what is meant by reasonable time is not defined. The understanding of the notion and scope of reasonable time is being developed by receiving the ECtHR case-law on this matter. In short, national courts concretize the notion of reasonable time as developed by the ECtHR. It is through these tools that the national judge is able to operationalize the right to compensation for damages caused by a violation of the right to a decision within a reasonable time.

In this respect, it would increase legal certainty if the national legislator were to lay down in law the criteria for assessing the notion of a reasonable time as defined by the ECtHR.

§ 3 – The analysis of the most recent case-law on civil liability of the State for violation of the right to a decision within a reasonable time allows us to argue that the technique developed by the ECtHR to compensate *ordinary non-material damages*, either by accepting a presumption of ordinary non-material damage, or by identifying standards for the determination of the compensatory *quantum*,⁶⁵ has allowed national judges to decide such actions within a short period of time.

In other words, while actions to establish State civil liability are generally very time-consuming because of the evidence that must be produced in relation to the requirements of this type of civil liability (fact, illegality, fault, damage and causal link), this should not be the case in actions for State liability for breach of the right to a decision within a reasonable time for the purposes of compensation for ordinary non-material damage. This should not happen because, on the one hand, the national judge benefits from a presumption of ordinary non-pecuniary damage, avoiding proof of it, and on the other, he benefits from the elements offered by the case-law of the ECtHR when it comes to determining the *quantum* of compensation, insofar as the ECtHR has presented values to be awarded in similar cases.

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⁶⁴ See *supra* II.

⁶⁵ See *above* III.4.2.

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AUTHOR AFFILIATIONS

Ricardo Pedro  orcid.org/0000-0001-6339-5140
Lisbon Public Law (CIDP) – Faculdade de Direito de Lisboa, PT

REFERENCES

- ASJP (2018) Legal Opinion for the reform of the administrative and tax jurisdiction of the Associação Sindical dos Juizes Portugueses, available at: <https://asjp.pt/propostas-pareceres-e-estudos/>.
- Benvenisti E (1999) Margin of Appreciation, Consensus, and Universal Standards, *New York University Journal of International Law and Politics*: 31–4, pp. 843–854.
- Canotilho G and Moreira V (1991) *Fundamentos da Constituição*. Coimbra Editora, Coimbra.
- Catarino LG (2002) Responsabilidade por facto jurisdicional – contributo para a reforma do sistema geral de responsabilidade civil extracontratual do Estado. In: *Responsabilidade Civil Extracontratual do Estado, Trabalhos preparatórios da reforma*. Ministério da Justiça, Lisboa, pp. 267–287.
- Coelho P (1995) *O problema da causa virtual na responsabilidade civil*. Coimbra Editora, Coimbra.
- Correia S, Medeiros R and de Ayala D (2002) *Estudos de direito processual administrativo*. Lex, Lisboa.
- de Freitas (1996) *Introdução ao Processo Civil – conceitos e princípios gerais à luz do código revisto*. Coimbra Editora, Coimbra.
- de Freitas L et al. (1999) *Código de Processo Civil Anotado*, Vol. II. Coimbra Editora, Coimbra.
- de la Rasilla del Moral I (2006) The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine. *German Law Journal*: 7, pp. 611–624. DOI: <https://doi.org/10.1017/S2071832200004892>.
- de Schutter O (1997) La coopération entre La Cour Européenne des Droits de L’Homme et le Juge National. *Revue Belge de Droit International*, Vol. 30, n.º 1. Edition del’Institut de Sociologie, Bruxelles.
- Esparza I and Etxebarria JF (2009) Comentario al artículo 6º. In: *Convenio Europeo de Derechos Humanos – Comentário sistemático*, 2.º ed. Civitas, Madrid, pp. 170–256.
- Gaspar A H (2009) A influência de CEDH no diálogo interjurisdicional: a perspectiva nacional ou o outro lado do espelho. *Julgar*: 7, pp. 33–50.
- Gomes C (2003) *O tempo dos tribunais: um estudo sobre a morosidade da Justiça*. Coimbra Editora, Coimbra.
- Hoffmann F and Ringelheim J (2004) Par-delà l’universalisme et le relativisme: La Cour européenne des droits de l’homme et des dilemmes de la diversité culturelle. *Revue Interdisciplinaire D’Études Juridiques*: 52, pp. 109–142. DOI: <https://doi.org/10.3917/riej.052.0109>.
- Lambert-Abdelgawad E (1999) *Les Effets des Arrêts de la Cour Européenne de Droits de L’Homme – contribution à une approche pluraliste du droit européen du droit de L’Homme*. Bruylant, Brussels.

- Letsas G (2006) Two Concepts of the Margin of Appreciation. *Oxford Journal of Legal Studies*: 26–4, pp. 705–732. DOI: <https://doi.org/10.1093/ojls/gql030>.
- Meyer F (2012) Artikel 6 – Recht auf ein faires Verfahren. In *EMRK – Konvention zum Schutz der Menschenrechte und Grundfreiheiten: Kommentar*. C. H. Beck, Munique, pp. 133–204.
- Mowbray AR (2004) *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*. Hart Publishing, Oregon, pp. 97–125.
- Neto A (2004) *Código de Processo Civil Anotado*, 18.ª ed. Coimbra Editora, Coimbra.
- Pedro R (2011) Contributo para o estudo da responsabilidade civil do Estado por violação do direito a uma decisão em prazo razoável ou sem dilações indevidas. AAFDL, Lisboa.
- Pedro R (2022) *As time goes by: A “culpa do lesado” na violação do direito a uma decisão judicial em prazo razoável – Anotação ao Acórdão do TCAS, de 07.01.2021, P. 1427/19.OBELSB*. *Revista do Ministério Público*: 169, pp. 223–245.
- Pires MJM (2006) Execução dos Acórdãos do Tribunal Europeu dos Direitos do Homem: o Protocolo n.º 14 à Convenção Europeia dos Direitos do Homem. In: *Homenagem ao Prof. Doutor André Gonçalves Pereira*. Faculdade de Direito da Universidade de Lisboa, Lisboa, pp. 821–841.
- Queralt Jiménez A (2003) *El Tribunal de Estrasburgo: una jurisdicción internacional para la protección de los derechos fundamentales*. Tirant lo Blanch, Madrid.
- Ramos RMGM (1982) *A Convenção Europeia dos Direitos do Homem: sua posição face ao ordenamento jurídico português*. Gabinete de Documentação e Direito Comparado, Lisboa.
- Redor M-J (2002) *Garantie juridictionnelle et droits fondamentaux*. *Cahiers de la Recherche sur les Droits Fondamentaux*: 1, pp. 91–101.
- Serra S (1961) *Reparação do dano não patrimonial*. *Boletim do Ministério da Justiça*: 83, pp. 69–109.
- Soyer J-C and de Salvia M (1999) Article 6. In: *La Convention européenne des Droits de L’Homme – Commentaire article par article*, 2.ª ed. Economica, Paris, pp. 239–292.
- Varela A (2000) *Das Obrigações em Geral*, Vol. I, 10.ª ed. Almedina, Coimbra.
- Velu, J and Ergec, R (1990) *La Convention européenne des droits de l’homme*. Bruylant.

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