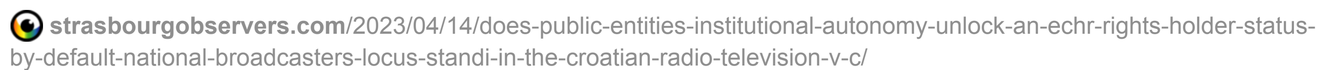
Does Public Entities’ Institutional Autonomy ‘Unlock’ an ECHR Rights-Holder Status by Default? National Broadcasters’ Locus Standi in the Croatian Radio-Television v. Croatia Case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On 2nd March 2023, the European Court of Human Rights (‘the Court’ or ‘the ECtHR’) delivered its judgment in the *Croatian Radio-Television v. Croatia* case, declaring – by a narrow majority – the application admissible under Article 34 of the European Convention on Human Rights (‘ECHR’), but unanimously holding that there has been no violation of Article 6(1) ECHR.

Leaving aside for a moment the Court’s findings on the merits, the present decision has further unravelled crucial issues concerning public broadcasters’ classification as ‘non-governmental organisations’ and their *locus standi* under Article 34 ECHR. Reiterating its well-established case-law on the matter, the Court clarified which are the criteria for assessing the *true* nature and powers of a given entity, despite its formal legal status. However, this case presented the ECtHR with a relatively new ‘dilemma’: should the attribution of convention rights to public broadcasters be considered implicit in the recognition of institutional autonomy at a domestic level, despite national courts systematically denying their right to lodge a constitutional complaint?

Factual Background

The applicant institution, Croatian Radio-Television (HRT), is the Croatian broadcasting company, whose legal status, regulated by the Croatian Radio-Television Act, is that of a non-profit public entity founded by the State.

Having discovered that an employee of its financial department, A.K., had been paying fees to 176 individuals for external translation services they had never performed, the applicant company lodged more than a hundred civil actions for ‘unjustified enrichment’ against those individuals. In half of those proceedings, the second instance courts ruled in favour of the applicant, whereas in the other half it ruled against it, applying the legal exception which provides that restitution cannot be sought if the person who made the payment knew that nothing was owed. The present case before the ECtHR concerns 20 of these domestic proceedings.

The applicant then lodged an extraordinary appeal on points of law before the Supreme Court in each of the 20 cases, arguing that, instead of harmonising the divergent case-law of the lower courts, the Supreme Court had itself become a source of uncertainty, declaring the appeal admissible in one case – but eventually dismissing it on the merits –, while rejecting the remaining appeals. Furthermore, the Constitutional Court held that, in any case, the applicant lacked *locus standi*, as it qualified as an entity founded and closely connected with the State.

The Majority Opinion

Having recalled the wording of Article 34 ECHR, which enshrines that a legal entity can lodge an individual application before the Court insofar as it qualifies as a non-governmental organisation, the ECtHR had to decide whether the present applicant can claim the 'victim status' for the purposes of the above provision. The key *rationale* behind this approach is to prevent a State from standing as both an applicant and a respondent in the same proceeding before the Court (*Slovenia v. Croatia*, para. 61).

The Court firstly clarified that the expression 'governmental organisations', as opposed to 'non-governmental organisation', refers to both central institutions and decentralised authorities exercising governmental powers or running a public service under the State's control (paras. 98-99). Nonetheless, there are entities which, albeit having a public law status under domestic law, can be considered as 'non-governmental' insofar as they are not established for public purposes and are independent of the State. On the other hand, there are entities that, although being formally governed by corporate law, do not enjoy a sufficient degree of institutional or operational independence, since they are either partially owned or controlled by the State (para. 100).

The ECtHR has thus developed several criteria to determine if a legal person can be qualified as a governmental organisation. Attention should be paid not only to its formal domestic legal status and to the rights connected thereto, but also, *inter alia*, to the activities performed, the context in which they are performed and the degree of independence from the political authorities (para. 101).

As for public broadcasters,the Court qualified them as non-governmental organisations, thus being entitled to lodge individual complaints (paras. 102-6), but only if the domestic legislation accords them sufficient editorial and institutional independence (*Radio France and Others v. France*, para. 26). However, the ECtHR observed that the present case differed from the previous ones about public broadcasters, as the Croatian Constitutional Court had previously denied HRT's *locus standi*, given that the applicant was not only founded by the Croatian Government, but also closely connected with the State that it could not be considered as a holder of constitutional rights (para. 107).

Against this backdrop, the ECtHR disagreed with the domestic court's findings. According to the majority, the Constitutional Court's findings on HRT's (lack of) *locus standi* had been justified on a 'cherry-picking' approach to the ex-Commission and ECtHR's case-law on public entities' standing, without even considering the specific jurisprudence on broadcasting organisations (paras. 111-112). Also, the ECtHR reiterated that not having *locus standi* before domestic courts does not 'automatically' mean not having *locus standi* before itself, as domestic rules in this respect may serve different purposes from those of Article 34 ECHR and, while those purposes may sometimes be analogous, they need not always to be so.

Accordingly, the Court noted that Croatian Radio-Television did not come 'under the *aegis* of the State', did not exercise governmental powers and had not been established for public administration purposes (para. 117). Rather, it guaranteed a public service consisting in providing various radio and television channels, enjoying the freedom of the media, guaranteed by the Constitution and the relevant legislation, and operating in a competitive market while being scrutinised by an independent regulatory authority. All these circumstances have been considered crucial in affirming the applicant's non-governmental nature, despite its extensive dependence on public resources, which did not represent a decisive criterion in the present case (paras. 118-119).

The ECtHR finally held that Croatian Radio-Television, albeit qualifying as a public institution under domestic law, was not under governmental control, therefore being fully entitled to submit an individual application under Article 34 ECHR (paras. 120-121).

The Court then assessed the merits of the case, deciding whether divergent domestic courts' decisions amount to a violation of the applicant's right to a fair trial (civil limb) under Article 6(1) ECHR.

The ECtHR firstly noted significant 'discrepancies' in the domestic case-law when the second-instance territorial courts issued their judgments against the applicant (para. 149). However, in other cases in which the Supreme Court had allowed ordinary or extraordinary appeals on points of law lodged by the defendants, it had set out in detail the relevant legal issues to be examined in unjustified enrichment disputes resulting from A.K.'s conduct.

Given that the lower courts had not established all the relevant facts, the Supreme Court had remitted the cases to the municipal tribunals, as it could not establish those facts itself. Moreover, in one of the present cases, the Supreme Court had held that the relevant facts had already been established by the lower courts, thus ruling that the substantive law had been correctly applied (paras. 150-151). This meant that the domestic legal system instituted and correctly applied adequate machinery to overcome the inconsistencies in the case-law of the second-instance courts (para. 152).

According to the ECtHR, there was nothing to suggest that the above-mentioned Supreme Court's decisions had not had any consolidating effect for the case-law of the second-instance courts. Although those judgments had been issued before the publication of the Supreme Court's guidelines regulating the processing of similar unjustified enrichment cases, and thus could not have been reasonably decided in accordance with those guidelines, that circumstance was not sufficient in itself to violate the principle of legal certainty (paras. 153-154).

Given the above, the ECtHR did not focus on the alleged inconsistencies in the case-law of the Supreme Court itself, as they did not concern the application of substantive law rules on unjustified enrichment. Once the Supreme Court had provided relevant guidelines as to how a certain group of similar cases should be dealt with to achieve the uniform application of the law, it did not have to do so in every future such case (para. 155).

Therefore, the Court considered that all the cases lodged by the applicant had been properly examined on the merits within the domestic judiciary, thus unanimously considering the complaint manifestly ill-founded, as there has been no violation of Article 6 (1) ECHR.

The Joint Partly Dissenting Opinion

The present ruling deserves special attention insofar as, albeit the ECtHR's case-law on public broadcasters' *locus standi* is rather well-established, it is the first time ever that the admissibility decision had attracted criticism from almost half of the bench. Judges Paczolay, Wojtyczek and Polackova have indeed appended a partly dissenting opinion, objecting that the applicant broadcasting company should not have been granted standing in the present case.

Taking into account the State's sovereign power to outline its domestic organisation, the dissenting judges firstly recalled that the State can freely establish entities providing public services, granting them various legal status and a variable degree of autonomy, and determining whether and to what extent such entities should be able to enjoy some fundamental rights.

The dissenting judges expressed scepticism towards the Court's approach, endorsed by the majority, whereby if the State establishes a public entity operating in a competitive market with guarantee of autonomy, the same entity will automatically become a holder of ECHR rights. This understanding has been criticised insofar as, by doing so, the Convention 'pierced the veil' of State's domestic organisation, *de facto* predetermining the status of public entities. To this end, the minority judges recalled that the Convention system is based on a distinction between institutional autonomy, on one side, and the status of ECHR rights-holder, on the other side. That said, the ECtHR had thus over blurred the above distinction, nullifying the 'dogma' that human rights cannot pertain to the State, much less to public entities too tied up with the State.

Analysis

On the one hand, the present ruling added 'another *brick*' in the rock-steady *wall* of decisions concerning public entities' *locus standi* before the Court, as it further consolidated the *special* status accorded by the ECHR to public broadcasters, despite the fact that domestic judgments had repeatedly refused to grant them constitutional rights. On the other hand, in an unprecedented way within the ECtHR's *jurisprudence constante* on the topic, the dissenting opinion attempted at 'deconstructing' the Court's reasoning.

The ECtHR's case-law is consistent in denying *locus standi* to legal entities carrying out governmental tasks under the responsibility of the State or other public authorities. The Court's approach is coherent with the Convention's main objective of the protection of the fundamental rights of human beings against possible abuses of power by public institutions. This rationale has been echoed also by the dissenting judges, who pointed out that 'the status of Convention right-holder stems from the nature of an entity as a grouping of individuals, and derives ultimately from human nature and human dignity' (para. 4 of the dissenting opinion). Nevertheless, Article 1 of Protocol No. 1 – the latter being adopted less than two years after the Convention – significantly expanded the 'catalogue' of individual claimants under Article 34 ECHR, specifying that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions […]'. As a result, it was clear from the beginning that the High Contracting Party accepted that legal persons could be rights-holders under the Convention.

Therefore, the Court has progressively accepted that *private* legal entities can claim the protection of *some* of the fundamental rights enshrined in the Convention, i.e., the right to a fair trial, the right to respect for the home, the right to freedom of expression, the right to freedom of assembly and association, and the protection of property. This extensive approach seems to be consistent with the case-law developed by its 'troubled sister', the European Court of Justice, when applying both the European Charter of Fundamental Rights and the ECHR as reflective of general principles of European Union law.

The Court's jurisprudence has developed a well-nuanced 'grey zone' where it accorded a preferential treatment to public broadcasters by recognizing them the status of ECHR rights-holders, as is the case for private companies. Just like private entities, broadcasting institutions cannot reasonably benefit from *all* fundamental rights accorded to individuals. Indeed, there are some rights, such as the prohibition of torture and other ill treatments, which are by definition inapplicable to legal entities. Public broadcasters are nevertheless entitled to enjoy 'qualified' rights, which are not absolute, as they can be limited insofar as such limitations are legal, necessary and proportionate. For instance, one can consider the right to freedom of expression (*Österreichischer Rundfunk v. Austria*), the right to a fair trial – albeit, to date, the Court has not yet found any violation of Article 6 ECHR (*Radio France and Others v. France*) –, the right to an effective remedy (*MacKay and BBC Scotland v. United Kingdom*) and the right to property (*The Holy Monasteries v. Greece*).

Recalling, *inter alia*, the Recommendation No. R (96) 10 of the Committee of Ministers of the Council of Europe on the guarantee of the independence of public service broadcasting, the ex-Commission and the ECtHR had affirmed that public service broadcasting, as long as it is granted sufficient independence from the State, plays an important role in democratic societies, being an essential factor to ensure pluralistic communication accessible to everyone at both national and regional levels. Broadcasting organisations' independence from political and other undue influences should be then expressly guaranteed at the national level by means of a body of rules dealing with all aspects of its functioning.

Given the above, the Court's decision to recognize Croatian Radio Television's *locus standi* under Article 34 ECHR seems reasonable, as the ECtHR observed that all the activities carried out by the applicant had been constantly scrutinised by the Electronic Media Council, an independent regulatory authority whose main task was to ensure the compatibility of its activities with the relevant domestic legislation. Despite its characterization as a public legal entity, Croatian Radio-Television should then correctly be qualified as a non-governmental organisation, as it performed a public service while enjoying institutional autonomy under domestic law.

By adopting a rather narrow interpretative approach, the dissenting judges considered institutional autonomy as a feature of public entities attributed to them by the State solely and exclusively for domestic organizational purposes. For this reason, according to the dissenting opinion, the majority would have incorrectly 'eradicated' institutional autonomy from its domestic environment, conceiving it as a 'vehicle' for Convention rights. In other words, the minority of the bench doubted about the appropriateness of the Court's choice of granting an ECHR rights-holder status *by default* to each public entity endowed with institutional autonomy under domestic law.

Nevertheless, under the definition of 'institutional autonomy', the ECtHR's case-law has reiterated a distinction, already made clear in *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, between two separated and yet intertwined concepts: institutional independence and operational independence. Whereas *institutional* independence relates to the extent of State's ownership of an entity, *operational* independence considers the extent of State's supervision and control over the activities performed by the same entity (*Ljubljanska Banka D.D. v. Croatia*).

Within this framework, while it is true that the institutional independence of a public entity can be an important (albeit not decisive) criterion for affirming its non-governmental nature, it is equally true that operational independence is regarded as the key criterion for 'chopping off' the legal nexus between the State and the public entity, at least for the purpose of the Convention. For instance, in *Islamic Republic of Iran Shipping Lines v. Turkey,* the ECtHR considered the applicant, a State-owned company, as a non-governmental organisation, as it was ruled by ordinary corporate law and was legally and financially independent from the State. Conversely, the applicant in *Novoseletskiy v. Ukraine*, albeit being an educational

entity completely separated from the State, has been recognised as a governmental organisation, tasked with the management of the institutional housing stock belonging to the Ukrainian Ministry of Education, thus carrying out public activities under its direct supervision.

Conclusion

Albeit the majority of judges granted *locus standi* to Croatian Radio-Television, the dissenting opinion represents a significant step backwards not only *vis-à-vis* the previous ECtHR's case-law on the matter, but especially in view of future possible judgments on the topic. Indeed, it considered only one 'face' of public entities' institutional autonomy – namely, their institutional independence –, without even calling into question the operational independence of the applicant institution, which seems to be the ultimate 'litmus test' in order to affirm public entities' *locus standi* under the Convention.