The ECHR at 70:
The central european narrative

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Edited by
Nóra Béres
Renáta Hrecska-Kovács

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AUTHORS

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Foreword

The 70th anniversary of the European Convention on Human Rights: Central European perspectives on jurisprudence and challenges

Nóra Béres and Renáta Hrecska-Kovács

The year of 2023 marked the 70th anniversary of the entry into force of the European Convention on Human Rights (ECHR). For this reason, the Central European Academy and the Ferenc Mádl Institute of Comparative Law co-hosted an academic conference in Budapest on 15–16 June 2023 entitled 'The ECHR at 70: The Central European Narrative' where both renown scholars and legal practitioners of the region (i.e. the Czech Republic, Croatia, Hungary, Poland, Romania, Serbia, the Slovak Republic and Slovenia) discussed what are those special features of the case law of the European Court of Human Rights (ECtHR) that can be identified as characteristic issues of the Central European countries. This volume is the written manifestation of the oral presentations delivered at this conference.

The significance of the ECHR and the ECtHR, the crown jewel of the whole system of the Council of Europe, cannot be overemphasized. The ECHR entered into force on 3 September 1953, and since then, the 'Old Continent' has gone through countless changes and faced scores of challenges: the dissolution of the Soviet Union and the end of the Socialist era in the Central and Eastern European states, the concerning presence of terrorism in modern societies, overwhelming migration flows aiming Europe, the outbreak of the of the COVID-19 pandemic, the full extension of the Russian-Ukrainian war, developing environmental problems, the conquest of

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the internet and artificial intelligence, current challenges of civil and criminal court proceedings, etc. No wonder, in the era of ever changing and evolving societies, one might easily raise the question: how can a 70-year-old treaty provide effective protection for human rights in the 21st century and how can it still work as a living instrument? In the same vein as the conference, this book seeks to demonstrate the indisputable reactivity and modernity of the Convention highlighting the ECtHR's interpretation techniques while focusing on the Central European region.

The essays in the volume not only analyse the content and jurisprudence of the Convention, but also shed light on how human rights are implemented in the specific historical, social and legal context of these countries. Organised into thematic units, the studies guide the reader through seven parts on the key issues of the Convention. The first section discusses the delicate balance between national sovereignty and judicial practice. The second section focuses on trafficking and modern-day slavery. The authors then discuss the interpretation of personal liberty, due process and the right to privacy and family life, with particular reference to Central European practice.

The volume also addresses the issues of freedom of expression, freedom of religion and the right of assembly, before devoting a separate section to the domestic possibilities for the enforcement of human rights, including constitutional complaints, minority rights and gender equality. The final chapter examines the challenging aspects of the right to property as well as the difficulties of migration, with a particular focus on the former socialist countries.

The authors of this volume have mapped the practice of the European Court of Human Rights with impressive thoroughness: the analyses are based on more than one hundred and fifty specific cases, each of which provides a window on the complex world of enforcement and interpretation. The diversity of the cases, with their matching human fates, dilemmas and Central European specificities, not only illuminates the nuances of the Court's role, but also highlights how the principles of the Convention are shaped to fit the realities of the Member States. This wealth of case law is one of the volume's greatest assets: it is at once a resource, a mirror and a discussion starter for the legal community in the region.

The contributors to this volume – distinguished scholars, practitioners and judges – represent several countries from the Central European region, which allows for a presentation of a diverse yet common historical and institutional experience. The studies offer a deeper understanding of the evolution of ECHR practice, the challenges facing the region and how international human rights protection can become an effective instrument in each Member State.

The Editors of this book would hereby like to grab the opportunity to say thank you to the management of the Central European Academy as well as of the Ferenc Mádl Institute of Comparative Law for supporting the idea of this conference and this volume, and for considering the perspectives of Central European scholars to worth an outspoken publishing. The Editors also owe sincere gratitude to all of the excellent colleagues who participated in this project and contributed to the publication of this book.

Part I

JUDICIAL PRACTICE AND NATIONAL SOVEREIGNTY

Chapter 1

The European Convention on Human Rights and Central Europe: What is Left to the States' Margin of Appreciation?

Péter Paczolay

Abstract

The assessment of the functioning of the Strasbourg Court is two-faced. On the one hand, the Court is criticised for its activism in interpreting the Convention. The activism of the Court is proved by interpretations and other tools developed by the Court itself, such as the living instrument doctrine, the evolutive interpretation, setting positive obligations for the States, or the use of interim measures. On the other hand, it is recognised that the Court is aware of the limitations of its powers and tries to respect the decisions of domestic authorities and courts. Besides the restrictions and limitation provided by the Convention itself (like reservations and derogations), the Court has developed several doctrines and principles serving self-restraint. The most important are the European consensus, the principle of subsidiarity, and the emphasis on the fact that the Strasbourg Court is not a fourth instance court. The most often used argument is the margin of appreciation principle. When the Court respects the power of appreciation of the States, it exercises judicial self-restraint in that it does not use to the full extent its powers of supervision or review. Nevertheless, the Court has emphasised that the power of appreciation is not unlimited. The domestic margin of appreciation thus goes hand in hand with a European supervision. Despite all the advantages of the broad use of the margin of appreciation principle, several criticisms have been raised against the way the Court applies it. The doctrine is often considered controversial. A systematic and open

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debate on the advantages and the contradictions in the application of the margin of appreciation would improve the use of this tool.

Keywords: margin of appreciation, principle of subsidiarity, European consensus, judicial activism and self-restraint

1. The Impact of the Enlargement of the Council of Europe

The Convention and its Protocols are agreements under public international law; their observance and the protection of fundamental rights are primarily the tasks of the domestic legal mechanisms and national judicial systems. This is reflected in the Convention system's so-called 'subsidiary' character: the Court exercises its jurisdiction of review only after the exhaustion of domestic remedies. The Convention governs forty-six States, and there is no doubt that the entire legal framework of the Europe-wide protection of human rights – to quote Ronald St. John Macdonald, former judge of the Court – "rests on the fragile foundations of the consent of the Contracting Parties".[1]

The accession of former socialist countries to the Council of Europe and to the Convention led to a comprehensive reform of the Convention system and the ECtHR.

"The changes in East and South-East European countries are setting new tasks for the Council of Europe. They are forcing the Organisation to redefine the boundaries of Europe, to recall the fundamental preconditions for membership, to consider co-operation with non-European states, and to adapt the working methods inter alia of the Parliamentary Assembly to the new situation. (…) The Statute of the Council of Europe provides that the fundamental prerequisite for accession is that the candidate state be based on the rule of law, guaranteeing human rights and the fundamental freedoms."[2]

In 1998 Protocol No. 11 replaced the original two-tier structure comprising the Court and the Commission on Human Rights, sitting a few days per month, by a single full-time Court. This change put an end to the Commission's filtering function, and enabling applicants to bring their cases directly before the Court has radically transformed the system. The establishment of the right of individual petition and the – at last – compulsory nature of the Court's jurisdiction indisputably rank among the benefits of the reform. The fact that the mechanism is now purely judicial in nature is an undeniable improvement on the former system. The right of individual petition

1 Macdonald, 1993, p. 123.

2 Doc. 6629 1403-12/6/92-1-E, 16 June 1992 Information Report on the enlargement of the Council of Europe (Rapporteur: Mr Reddemann, Germany, Christian Democrat). Debated by the Assembly in Budapest on 30 June 1992. Hungary joined the Council of Europe on 6 November 1990.

and the compulsory jurisdiction of the Court no longer depend on decisions of the States – as underlined by the former President of the Court, Jean-Paul Costa.[3]

One of the strengths of the 1998 reform was to open access to the Court directly for individuals, which is unique in the case of international courts.[4]

2. Activism of the Court

The assessment of the functioning of the Court is two-faced. On the one hand, the Court is criticised for its activism, but on the other hand, it is recognised that the Court is aware of the limitations of its powers and tries to respect the decisions of domestic authorities and courts.

Arguments most often put forward to demonstrate the Court's activism are as follows.

The living instrument doctrine is a judicial interpretation method developed and applied by the Court to interpret the Convention in the light of contemporary conditions. As it was formulated: "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."[5]

A later formulation repeats the same more concisely: "The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today."[6]

A subsequent activist approach developed by the Court is the evolutive interpretation (or integrated approach). Here the Court integrates the interpretation of civil and political rights with the interpretation of economic, social, and cultural rights that are enshrined not in the Convention but in the European Social Charter. The *Sidabras and Džiautas v. Lithuania* case[7] dealt with the imposition of employment restrictions on former employees of the KGB and found violation. The Court cited and relied on Article 1 § 2 of the European Social Charter that provides: "With a view to ensuring the effective exercise of the right to work, the Parties undertake to protect

3 Costa 2009, 11–12.

4 ARTICLE 34 Individual applications: The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

5 *Tyrer v the United Kingdom*, 25 April 1978, § 31, Series A no. 26

6 *Bayatyan v Armenia* [GC], no. 23459/03, § 102, ECHR 2011

7 *Sidabras and Džiautas v Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII

effectively the right of the worker to earn his living in an occupation freely entered upon." This provision, retained word for word in the revised Charter of 1996, has been consistently interpreted by the European Committee of Social Rights (ECSR) as establishing a right not to be discriminated against in employment. The non-discrimination guarantee is stipulated in Article E of the revised Charter.[8]

Another proof of the Court's activism is how the Court gradually extended the negative obligations of the State to restrain interference to individual rights in the direction of putting positive obligations on the States. Positive obligations are when the State is required to act in order to secure for persons within its jurisdiction the rights protected by the Convention. In determining the scope of a State's positive obligations, says the Court, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual.[9]

Although it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made. Determining that question is especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention.[10]

In the first so-called 'pilot judgment' (*Broniowski v Poland [GC])* the claim aimed for compensatory land in respect of property abandoned because of boundary changes following the Second World War; the Court found violation, stating that by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. As regards the relation and the boundaries between the State's positive and negative obligations, according to the Court the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community.[11]

Furthermore, not an interpretational method but a specific procedure that might irritate the Member States is the application of interim measures under Rule 39 of the Rules of the Court. This special tool that does not have any ground in the Convention is a source of conflict with the States. In the relation of the Strasbourg Court and the national authorities an especially sensitive field is the use of interim measures that in the meantime might be of vital importance for the persons effected. Even though

8 "The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status."

9 *Özgür Gündem v Turkey*, no. 23144/93, § 43, ECHR 2000-III

10 *Ilaşcu and Others v Moldova and Russia* [GC], no. 48787/99, § 332, ECHR 2004-VII

11 *Broniowski v Poland* [GC], no. 31443/96, § 143, ECHR 2004-V

there are no provisions in the Convention on this subject, the *limited nature* of the scope of Rule 39 can be clearly seen from the Court's case law. It is only where there is an *imminent risk of irreparable damage* that the Court applies Rule 39.[12]

3. Restraints and Self-restraint

The Convention itself offers restrictions and limitations to the protection of human rights and this understandably affects the court's scope and limits its activism.

Article 57 of the Convention regulates the possibility of reservations: *"Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.*"

Article 15 makes possible derogations in emergency situations: *"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*"

No derogation is allowed from Article 2 (right to life), except in respect of deaths resulting from lawful acts of war, or from Articles 3 (prohibition of torture), 4 (paragraph 1: prohibition of slavery) and 7 (*nullum crimen sine lege*). These non-derogable rights are considered core rights. The other, non-absolute rights are equivalent, and may be limited, if necessary, but only in proportion to the need, and in the event of conflict with another fundamental right, they must be weighed (balanced) against one another.[13] In general, Article 2 and 3 cases are not part of the margin of appreciation discussion, as in these cases generally it is not the State which bears the burden of proof.

Furthermore, the activist interpretation of the Convention is counter-balanced by the European consensus doctrine, the principle of subsidiarity, and the margin of appreciation. The two latter are now formally recognised by Protocol No. 15 amending, among others, the Preamble of the Convention that now reads as follows: "*Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.*"

12 *Mamatkulov and Askarov v Turkey* [GC], nos. 46827/99 and 46951/99, § 108, ECHR 2005-I
13 Izquierdo-Sans, 2021, p. 280.

As the Explanatory Report describes, "a new recital has been added at the end of the Preamble of the Convention containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law."[14] The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

Not only does the text of the Convention rest on the consent of the Contracting States, but the principles and standards applied by the Strasbourg Court also rely on a judge-made doctrine: the European consensus doctrine. This doctrine means that, in the case of consensus among the States, less discretion is left to the States; or, conversely, the less consensus there is, the wider the margin of appreciation left to the States. To maintain a balance between the European supervision of domestic violations human rights and respect for State sovereignty, the Strasbourg Court has developed the consensus doctrine. The autonomous interpretation of the Convention by the Court means that Convention concepts are to be regarded as parts of a self-governing legal system that must be interpreted independently from the legal systems of the Contracting States. Consensus should not necessarily mean the consent of all the parties affected. In the context of the Convention, it means rather "common ground" or "common denominator".

In performing this role, but especially as regards applications under Article 34, the Court has repeatedly emphasised that it is not a further court of appeal from the rulings of national courts, i.e., it is not a fourth instance court simply examining whether the rulings of those courts were in some respect in error.

An example of this approach and effort is: "The Court has said on numerous occasions that it is not called upon to deal with errors of fact or law allegedly committed by the national courts, as it is not a court of fourth instance, and that it is not called upon to reassess the national courts' findings, provided that they are based on a reasonable assessment of the evidence."[15]

And in a Hungarian case: "The Court (…) is not competent to rule formally on compliance with domestic law, other international treaties or EU law (…). It is

14 Explanatory Report to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213) § 7.

15 *Dimitar Yordanov v Bulgaria*, no. 3401/09, 6 September 2018, § 47

therefore primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary, in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (…). Furthermore, the Court should not act as a fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (…)."[16]

4. The margin of Appreciation – Doctrine and Practice

Margin of appreciation has also been referred to as power of appreciation, legal discretion, deference, and latitude. The fields of latitude allowed to the States under the margin of appreciation doctrine can be classified in two main groups, depending on their justifications.

Firstly, differing local circumstances may justify it (originally mostly in matters of morals). The main argument was that national authorities are in principle in a better position than the international judge to decide.

Secondly, lack of European consensus enlarges the sphere of action of the States. It became a consistently used doctrine in the jurisprudence of the Strasbourg Court that the Convention leaves a power of appreciation to the Contracting States.

The margins doctrine initially responded to the concerns of national governments that international policies could jeopardise their national security. This may explain the initial application of the doctrine in the context of derogations from treaty obligations due to self-proclaimed states of national emergency. In such circumstances, the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation. This rationale was later expanded to allow each country wide discretion to select policies that would regulate potentially harmful activities, such as incitement to violence or racist speech.[17]

As Judge Macdonald summarised, "the margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention."[18]

The principle of subsidiarity and the margin of appreciation accorded to national authorities are necessarily interlinked. They call for shared responsibility with the

16 *Somorjai v Hungary*, no. 60934/13, 28 August 2018, § 53
17 Benvenisti, 1999, p. 843.
18 Macdonald, 1993, p. 123.

national judiciary.[19] The legal concept of the margin of appreciation was first expressly defined in the *Handyside* case (authorities confiscated a book aimed at schoolchildren with allegedly obscene content).

The Court pointed out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. The Court notes at this juncture that the adjective 'necessary' is not synonymous with 'indispensable'. It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.

Nevertheless, the Court emphasised that the power of appreciation is not unlimited. The domestic margin of appreciation thus goes hand in hand with European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every person. In the concrete free speech case, the Court underlined that, subject to paragraph 2 of Article 10 (Art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance, and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued. The margin of appreciation is linked to the idea of democracy, emphasising that the Convention system must respect the democratic systems of the Contracting States.[20]

19 Izquierdo-Sans, 2021, p. 277.

20 *Handyside v the United Kingdom*, 7 December 1976, § 48, Series A no. 24

The principle of subsidiarity gives primacy to the implementation of Convention rights by national authorities. The latter entails a degree of deference to their assessment as to whether measures affecting rights that are not absolute are consistent with those rights.

"The object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".[21] The emphasis on rights and freedoms being practical and effective is designed to ensure that their object and purpose is realised and this may also make it is essential to be prepared to look beyond the text of individual provisions in order to establish their meaning.

The margin doctrine sits halfway between the uniform application of the Convention and domestic protection of human rights. In other words: European supervision is combined with the national margin of appreciation. When the Court respects the power of appreciation of the States, it exercises judicial self-restraint in that it does not use to the full extent its powers of supervision or review.

The doctrine has a territorial and a temporal scope. Under the 'territorial' scope, the Court allows room for a margin of appreciation because of the territorial relativity of public morals. Under the 'temporal' scope of the doctrine, the Court recognised the significance of legislative evolution within the States, like the changing attitudes of the States towards questions of morals.

"There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide (…). There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision."[22]

Two risks relate to the interlinked doctrines. The first risk is *minimalism*. International law and international judicial organs based on the consent of the Contracting States determine the minimum level of human rights protection. This applies to the Court as well. Lack of a European consensus and the consequent discretion or margin-of-appreciation doctrine open the way for the minimum-level approach. However, well-established democracies have also failed on a number of occasions to comply with these 'minimum-level standards'. The problem to be discussed here is how a 'minimal standard' Strasbourg jurisprudence influences the national courts, including constitutional courts.

The second risk is *relativism*. The question that lies beyond the balancing of European standards and domestic particularities is whether the protection of human rights may vary from country to country as public morals vary? How far does the

21 *Magyar Helsinki Bizottság v Hungary* [GC], no. 18030/11, 8 November 2016, § 155
22 *Hirst v the United Kingdom (no. 2)* [GC], no. 74025/01, 6 October 2005, § 61

influence of cultural relativism and the shifting nature of what we call contemporary values stretch?

In *Rasmussen v. Denmark*, the Court showed its flexibility regarding application of this doctrine: "The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States."[23]

The conceptualisation of human rights cannot be independent from cultural traditions and is determined by the given historical context. Although the standards used by courts necessarily vary when decisions are taken on the grounds of differing circumstances, the excessive flexibility of those standards undermines the credibility of judicial decisions. This might be the case when, at the interplay of consensus and discretion, the common ground and margin of appreciation criteria are both flexible and varying.

5. Margin of Appreciation and National Jurisprudence: An Example

The influence of an international human rights court is basically inspirational for the national courts. This can be well exemplified by the impact of the Court on the then newly founded Hungarian Constitutional Court.

The Convention influenced the constitutional review and the interpretation of the Hungarian Constitution. The Constitutional Court referred to the Convention even before its ratification by Hungary. "In the first, formative period of constitutional jurisdiction in Hungary, however, referring to a given provision of the Convention was much more a demonstration of considering and searching for 'European standards', it was aimed more at linking up Hungarian legal thinking to 'European norms' than to use this international instrument in its proper role in the course of constitutional review."[24]

For the contrary effect of permissive Court decisions, one can refer to cases such as *Rekvényi v Hungary*.[25] In *Rekvényi*, the Court "showed understanding for the transitional period of consolidation of democracy" – as Luzius Wildhaber, at the time President of the Court stated in a comment on the judgment.[26] The Court accepted that in Hungary members of the armed forces, the police and security services were prohibited from joining any political party and from engaging in any political

23 *Rasmussen v Denmark*, 28 November 1984, § 40, Series A no. 87
24 Sólyom, 2000, p. 1317.
25 *Rekvényi v Hungary* [GC], no. 25390/94, ECHR 1999-III.
26 Wildhaber, 2006, p. 35.

activity. Unfortunately, the case did not have an evolving but an erosive effect on the jurisdiction of the Hungarian Constitutional Court. In the following years, the Constitutional Court, referring to the judgment of the Court in several consecutive decisions, definitely relaxed the domestic constitutional standards. This went against the original philosophy of the Hungarian Constitutional Court regarding transition. It had firmly stated in that connection that the unique historical circumstances of the transition and the given historical situation could be taken into consideration, but that "the basic guarantees of the rule of law [could not] be set aside by reference to historical situations …"[27]

The Hungarian Constitutional Court, departing from its earlier interpretation, in 2000 set the limits of freedom of expression[28] and freedom of assembly according to *Rekvényi*:[29] "The Court determined the social causes justifying the restriction by taking into account the particular features of Hungarian history, as did the European Court in *Rekvényi v Hungary.*"[30]

In its earlier decisions, the Constitutional Court had consistently assessed the historical circumstances (most often the change in the political regime taken as a fact) by acknowledging that such circumstances might necessitate some restriction on fundamental rights, but it had never accepted any derogation from the requirements of constitutionality based on the mere fact that the political regime had changed. Legislation justified by the change in the political regime and the restrictions contained in such laws had to remain within the limits of the Constitution in force. In the decision in question, the Constitutional Court adopted the terms used by the ECtHR in *Rekvényi*: "Regard being had to the margin of appreciation left to the national authorities in this area, the Court finds that, especially against this historical background, the relevant measures taken in Hungary in order to protect the police force from the direct influence of party politics can be seen as answering a 'pressing social need' in a democratic society."[31]

Thus, the decision of the Court – unintentionally – had an impact that lowered the standards the Constitutional Court had previously applied.

Therefore, a caveat must be suggested, a warning on the use of international standards: while respect for national or other communities' distinct legal traditions on the part of a European court should be welcomed as an instance of judicial self-restraint, reducing the level of protection afforded by domestic courts on the grounds of lower minimum standards in the absence of consensus is not acceptable.

There is another danger of the double-edged consensus concept to be mentioned. It is doubtful whether consensus means unanimity, or a practice accepted by a large

27 Hungarian Constitutional Court decision no. 11/1992. Reproduced in English in Sólyom & Brunner, 2000, 221.

28 Hungarian Constitutional Court decisions nos. 13/2000 and 14/2000 (the latter extensively citing the *Rekvényi* judgment).

29 Hungarian Constitutional Court decision no. 55/2001.

30 Hungarian Constitutional Court decision no. 13/2000.

31 Hungarian Constitutional Court decision no. 14/2000. The cited part of Rekvényi is paragraph 48.

majority of the States. As mentioned earlier, in the context of the Convention it means rather 'common ground' or 'common denominator'. Even if application of the Convention does not require acceptance of the universal character of the human rights protected therein, a certain 'hard core' of human rights should be defended even against the majority or the consensus – like the unalterable basic rights (*unabdingbarer Grundrechtsstandard*) in Germany.

6. Exhaustion of Domestic Remedies as an Essential Part of Subsidiarity

Article 35(1) of the ECHR clearly defines the admissibility criteria for the applications submitted to the Court: "*The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken.*"

According to the principle of subsidiarity it is the responsibility of the contracting States to remedy violations of the ECHR. Therefore, all domestic remedies should be exhausted, including the constitutional complaint if it is considered by the ECtHR to be an effective remedy. The rule of exhaustion of domestic remedies assumes – reflected in Article 13 of the ECHR, with which it has close affinity– that there is an effective remedy available in respect of the alleged breach. The rule is therefore an indispensable part of the functioning of this system of protection.[32] The ECtHR applies the rule with flexibility and without 'excessive formalism'. The effectiveness of a domestic remedy such as the constitutional complaint is not an eternal category, but for the sake of legal certainty the case law of the ECtHR should be consistent. The available remedy should be practical and effective, not theoretical or illusory.[33]

In more general terms, it is a principle of international law that the protection of human rights should be carried out by national governments. National remedies are perceived as more effective than international ones because they are easier to access, proceed more quickly and require fewer resources than making a claim before an international body. The range of domestic remedies is quite broad, from making a case in court to lodging a complaint with administrative agencies.

Applicants are only required to exhaust domestic remedies that are available and effective. In determining whether any remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case. Account must be taken not only of formal remedies available, but also of the

32 *Vučković and others v Serbia (preliminary objection) (GC)*, Nos. 17153/11 and 29 others, 25 March 2014, § 69

33 *Airey v Ireland*, 9 October 1979, Series A no. 32

general legal and political context in which they operate as well as the personal circumstances of the applicant.

As regards the burden of proof where the Government claims non-exhaustion, the defendant State bears the burden of proving that the applicant has not used a remedy that was both effective and available at the relevant time. The availability of any such remedy must be sufficiently certain in law as well as in practice. According to the terminology used by the ECtHR it should offer reasonable prospects of success.

Once the Government has proved that there was an appropriate and effective remedy available to the applicant, it is for the latter to show that the remedy was in fact exhausted. Alternatively, the applicant may prove that the domestic remedies were inadequate and ineffective in the circumstances of the case or that there existed special circumstances absolving the applicant from the requirement. In these cases, there is no need to first address the national mechanisms if it can be convincingly demonstrated that there are, in effect, no local remedies available.

The ECtHR examines the accessibility and effectiveness of the domestic remedy following a case-by-case approach. Based on the Court's own requirements as to effectiveness of national remedies in protecting these rights, substantive access to justice requires that such justice is delivered in a timely, transparent, independent, and flexible manner (that is, without excessive formalism), and with sufficient legal certainty.

There is an ongoing debate within the ECtHR itself and in the academic literature on the application of the exhaustion principle and its constitutive elements such as accessibility and effectiveness.

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7. Challenges for the Application of Margin of Appreciation

Despite all the advantages of the broad use of the margin of appreciation principle, several criticisms have been raised against the way the Court applies it. The doctrine is often considered controversial. A review of the critical observations follows.

Some commentators argue that the principle is applied almost automatically, without carrying out a substantive assessment of the fundamental rights involved.

Although the margin of appreciation doctrine is a very useful tool used by the Court when balancing between rights and weighing up individual rights against public interest, it is a method that other international courts consider, in general, irrelevant. It is not by accident that international courts and tribunals not only do not accept but refuse to apply a margin of appreciation. Critics of the Strasbourg Court

propose rather to conduct an objective analysis of the Member States' responsibility based on the provisions of the Convention.[34]

Further critics describe it as an 'empty rhetorical device'[35], creating legal uncertainty that is overly dependent on the context.[36] All these features contribute to the unpredictability of the Court's jurisprudence. The definition, meaning, and the 'justifiability' of this doctrine are questionable. The doctrine impairs universal and European standards and aspirations for the protection of human rights. Despite its regular use by the Strasbourg Court, there is inconsistency and incoherence in its application, and this complicates the need to balance uniform human rights standards and respect for diversity, which is the hallmark of the said doctrine.[37]

The analysis of the margin's practice has recently focused on the connection between the margin of appreciation and the quality of the decision-making of the national authority. This argumentation emphasises that in case of deference it is a wrong way of arguing by proceduralism instead of balancing. The *Animal Defenders* case[38] (a very controversial 9 to 8 ruling) is based on the allegation of violation of Article 10 (freedom of expression) of the Convention, regarding a statutory prohibition of paid political advertising on radio and television. The case was brought to the ECtHR after one of the TV campaigns from Animal Defenders International (a non-governmental agency) was banned by the Broadcast Advertising Clearance Centre in the United Kingdom and its attempts to have this administrative decision revoked in the national courts (both the High Court and the House of Lords) were dismissed. The Court not only praised the extensive deliberation and its quality, but also asserted that the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation. Chagas rightly assumes that the reasoning of the ECtHR while applying the margin of appreciation lacked precision in explaining the use of all factors and how they influence the intensity of the Court's review (it was not clear if they were reasons explaining the margin or the merits of the case). "The impact of such inconsistencies is perceived even more from the clear mismatch between granting a narrow margin and not thoroughly analysing the merits by being deferential to the national authorities' interpretations."[39] The Court makes an external assessment of the procedure without or instead of addressing the merits of the case.[40]

Unfortunately, these concerns proved to be well-founded. In a Grand Chamber judgment, the Animal Defenders approach was applied in reverse. In the case of *L.*

34 Born et al., 2020, p. 77.
35 Gerard, 2018.
36 Garcia Roca, 2021, p. 273.
37 Ainoko, 2022, pp. 91–111.
38 *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts)
39 Chagas, 2022, p. 10.
40 Izquiedro-Sans, 2021, p. 284.

B. v Hungary[41] the Grand Chamber of the Court applied the general measures doctrine developed in *Animal Defenders* to find that the Hungarian legislative policy of publishing the personal data of taxpayers who were in debt violated Article 8 of the Convention. The Court criticised the quality of the parliamentary review conducted at the domestic level and the balance struck by national authorities between the competing individual and public interests. The dissenting judges (Judges Wojtyczek and Paczolay) disagreed with both the Court's approach and the outcome of the case, deploring that finding a violation was based on alleged shortcomings in the Hungarian Parliament's review of the measure. In his concurring opinion, Judge Kūris was highly critical of the approach taken by the Grand Chamber, who invalidated the measure based not on an analysis of its merits, but because it had not been preceded by proper parliamentary debate. As Judge Kūris rightly underlined the use of the 'quality of the parliamentary review' yardstick substituted the examination of the issue raised by the applicant. In *Animal Defenders* the quality of parliamentary and judicial review served as an additional argument in favour of a finding of no violation, while in *L.B. v Hungary* it became the decisive factor in finding violation. It can just be hoped that the *Animal Defenders* approach will not be extended further.

8. Conclusions

The decisions of the Strasbourg Court have the potential not only to set European standards for the protection and enforcement of human rights, but to set universal standards.

Finding balance between the evolutive interpretation of the Convention and limitations on judicial powers, the Court could use margin of appreciation as an important argumentative framework. It makes it possible to have a balanced relationship with the sovereign Member States. The use of this tool is not accepted without criticism: uncertainty regarding the function, the scope, consequences and, moreover, inconsistencies of the margin of appreciation principle has been pointed out. However, the ECtHR could make broad use of it, due to the context of the Convention, and the historical and legal setting of the Strasbourg Court. To further develop this principle, it would require addressing systematically and openly the uncertainties and contradictions in the application of the margin of appreciation.

41 *L.B. v Hungary* [GC], no. 36345/16, 9 March 2023

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Chapter 2

Challenges of Procedures Before the ECTHR From a State Agent's Point of View: Stocktaking of the Last 25 Years

The Functioning of the Representation of the Government before the European Court of Human Rights

Zoltán Tallódi

Abstract

The Chapter presents the functioning of the representation of the Government before the European Court of Human Rights. It presents the establishment of the Agency of the Government in 1994. In connection with the organisation and tasks of the Agency it shows all forms of the activity of the Agency, focusing the 'Strasbourg Proofing', the enforcement of judgments and the promotion of human rights. The Chapter presents the whole procedure of the European Court of Human Rights, from the beginning (submitting an application) to the final phase (enforcement of judgments). The procedure of submitting an Application to the Court is a crucial point in the proceedings before the Court. The biggest challenges of the last several years are also illustrated. In connection with the prison overcrowding almost 9,000 applications had been submitted by the applicants. The domestic remedy introduced by the authorities was found effective which met the criteria set out in the pilot judgment given in the case of Varga and Others v Hungary. The problem of length of proceedings is an ongoing challenge.In 2021, a new domestic compensatory remedy was also introduced for civil court proceedings (Act no. XCIV of 2021). The judgment of 30 March 2023 in the case of Szaxon v Hungary held, that Act no. XCIV of 2021 set out an effective

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remedy for protracted civil proceedings. The Chapter also gives a description about the Baka Case. The role of the Parliament in the implementation of ECtHR judgments which is a lesser-known aspect of the implemtation of the judgments is also part of the Chapter. The chapter intends to demonstrate the complexity of the activities of the Agency of the Government in the European Court of Human Rights proceedings.

Keywords: Agency of the Government before the European Court of Human Rights, prison overcrowding, length of proceedings, effective domestic remedy, implementation of ECtHR judgments, Strasbourg Proofing

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1. Introduction

Hungary ratified the European Convention on Human Rights (the Convention) on 5 November 1992.[1] The document was promulgated by Act XXXI of 1993 and so became part of Hungarian domestic law. This act was perhaps the most important step in the European integration process in the field of human rights. In this way, Hungary joined what was in practice the only effective complaints mechanism that allowed citizens to take their human rights grievances to an international legal body for a substantive decision. The importance of this step cannot be overstated. By this act, both Hungarian legislation and the application of Hungarian law underwent a decisive change. It must be said, however, that accession did not come to the Hungarian legal system unprepared. In 1990–91, the Ministry of Justice had already begun preliminary legal harmonisation work, during which the Ministry's staff, with the involvement of external experts, examined whether certain elements of Hungarian law were in line with the Convention and, if not, how and in what way domestic law should be changed. Once the amendments they identified had been made, the Hungarian legal system could be said to be in a mature state for accession to the Convention.

The Convention, which now has the 46 member states of the Council of Europe, entered into force in Hungary on 5 November 1992. The Convention established an international court in Strasbourg to judge violations of the rights it contains. The European Court of Human Rights (the Court) is an international body which, under certain conditions, may receive applications from persons claiming a violation of their rights under the Convention and its Protocols. These applications are made by citizens against the States which they accuse of having violated their human rights. If, on the basis of the information available to it, the Court considers that the application is admissible, it calls the Government of the State concerned to submit

1 European Convention on Human Rights as amended by Protocols Nos. 11 and 14 – Council of Europe Treaty Series, No. 5

observations on the existence of a violation. In its judgment at the end of the proceedings, it may order the State to pay compensation besides finding a violation or reject the application.

The Committee of Ministers of the Council of Europe regularly monitors a state's compliance with its obligation to remedy the violations identified in the Court's judgments, which may include not only compensation for human rights violations, but also possible legislative amendments or specific measures taken by public authorities.

2. Establishment of the Agency of the Government

The first application to the Court, sent for comments, was received by the Ministry of Justice on 1 December 1993, and at that time the practical necessity of establishing an Agency of the Government (Kormányképviselet) was raised. Therefore, the Government, by Government Decision 2004/1994 (I. 21.), ordered the establishment of the Agency of the Government within the framework of the Ministry of Justice.

According to point 1 of the Decision, the Agency of the Government organised in the Ministry of Justice represents the Government of the Republic of Hungary in proceedings before the European Commission of Human Rights[2] and the European Court of Human Rights. The Minister of Foreign Affairs had informed the Council of Europe of the above through diplomatic channels. Prior to its decision, the Government had assessed the professional and non-diplomatic nature of the representation, and therefore, unlike the practice in some European countries, the body was not set up in the Ministry of Foreign Affairs but in the Ministry of Justice. The Decision specifically states that the Agency of the Government operates under the authority of the Minister of Justice (point 2). It is a better solution, because the legal aspects of the management of a case are in focus.

Point 3 of the Decision contains an important safeguard rule, stating that the Minister of Finance is obliged to take action on the financial obligations of the Government (compensation and reimbursement of the applicant's legal costs) arising from the decisions of the Commission and the Court. The sums to be paid under this heading are to be paid on behalf of the Government from other sundry expenditures of the Ministry of Finance.

In order to enforce the decisions of the Court, the Decision specifically authorises the Agency of the Government, through the Minister for Justice, to take the initiative on:

– remedying the infringements found by the Court,

2 Under Protocol No. 11 to the Convention, which entered into force on 1 November 1998, the Commission has since ceased to exist.

– of the necessary legislative amendments, bringing the legislation into conformity with the Convention and developing appropriate law enforcement practices.

At the same time, the Decision took into account the fact that the Agency can only be effective if the various public bodies cooperate with the new organisation. Therefore, at the initiative of the Agency of the Government, Point 5 of the Decision stipulated that the competent ministers and the heads of the government agencies are obliged to cooperate with the Agency in the proceedings before the Commission and the Court in order to establish the facts and to promote the defence of the Government. At the same time, the Government also asked the president of the Supreme Court (Kúria) and the Attorney General to cooperate with the Agency of the Government. By the Decision the conditions for the Agency's activity were established.

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3. Organisation and Tasks of the Agency of the Government

3.1. The Activity of the Agency

In proceedings before the Court, the Agent of the Government, who has the rank of Head of Department, is responsible for representational activity, among other duties. The preparation of the documents required by the Agency of the Government is carried out by the Human Rights Department of the Ministry of Justice (hereinafter referred to as the Agency of the Government) employing five lawyers, formerly a separate department within the Ministry of Justice. The activities of the Agency of the Government are linked to different stages of the procedure: it is responsible for drafting the observations necessary to represent the Government's position in cases before the Court, for preparing any friendly settlement, and for organising the implementation of the Court's decisions (translation, registration, publication of judgments and important decisions, action for paying compensation, reporting to the bodies of the CoE, informing other bodies, initiating any possible amendment of the law, etc.).

Another task is to represent Hungary in the CoE Human Rights Committee (CDDH) and its subcommittees and other working groups dealing with procedural and substantive issues related to the Convention, with the aim of asserting the Hungarian position in the further development of the Convention.

3.2. 'Strasbourg Proofing'

Upon request, the Agency of the Government gives its opinion on draft legislation that may affect human rights, so that the international requirements arising from the

development of the case law of the Court can also be implemented in domestic legislation (so-called 'Strasbourg-proofing'), and draws attention to new developments in case law that may require legislative amendments (e.g. the establishment of the institution of a court objection to prevent excessive length of proceedings).

The Agency of the Government gives its opinion on all draft legislation affecting human rights, drawing on the experience of the Court's case law. This task is particularly important because it provides those drafting with information on the human rights aspects of each proposal or draft legislation at the preparatory stage. Therefore, when it enters into force, the legislation should not contain provisions contrary to the Convention or its practice.

The role of the Agency of the Government also includes promoting consistency between domestic legislation and Strasbourg law interpretation. When examining this question, it is appropriate to start with basic cases, i.e. when the Court finds that a piece of domestic legislation is not in conformity with the European Convention on Human Rights and calls on the State concerned to take the necessary measures to bring its domestic law into line with international law. In such cases, it is up to the State to implement the necessary legislative amendments in accordance with the Court's 'order'. However, the jurisprudence of the Court is not only applicable to Hungary with regard to decisions in Hungarian cases. Here, the focus of the analysis is on the legislative monitoring of case law. It is the task of the Agency of the Government to study the vast body of law and draw the necessary conclusions. It is also the task of the Agent of the Government and staff to act, after continuous monitoring of the judgments, if they detect that an element of the Hungarian legal system is not in line with a judgment of the Strasbourg Court. In this case, the relevant authority must take the necessary measures to bring domestic legal standards into line with case law. There is a third type of case concerning the consistency of Strasbourg case law with domestic law that needs to be examined, and that is the issue of draft legislations under preparation. 'Strasbourg proofing' allows the Ministry's staff dealing with the matter to comment on draft legislation sent to them during its preparation and, if inconsistencies are already apparent at this stage, send the necessary signals to the competent authorities. This preventive function is more effective than taking the necessary measures to amend legislation already in force or to implement cases that have been lost.Proactive behaviour is always more effective than passive, sometimes backward, behaviour following unsuccessful cases.

The task is certainly far from easy, as all the circumstances of the Court's decision have to be taken into account. A good example in this regard is the case of Hirst v the United Kingdom[3], in which the European Court of Human Rights found that the British rule automatically depriving all convicted persons of their right to vote regardless of the length of their sentence or the offence was contrary to Article 3 of the First Additional Protocol to the Convention. Since Hungarian domestic law contained a similar solution to that of the United Kingdom, it seemed appropriate

3 Hirst v The United Kingdom (No. 2), Application no. 74025/01, judgment of 6 October 2005

for the Agency of the Government to draw the attention of the relevant law-drafting departments to the 'shortcomings' of Hungarian law. It is perhaps unfortunate to use the term 'legislative constraint' in this case, as this type of situation could be used in the case of a decision in a specific Hungarian case. However, it cannot be in the interest of either Hungary or committed human rights advocates that a decision condemning the Hungarian state should be taken in a case similar to a decision in the case of another country. Therefore, in order to avoid such situations, it is advisable to carry out preventive legislative amendment work. If the Hungarian State anticipates events, it spares itself from a possible unsuccessful position and its consequences. So, once again, it is worth emphasising the justification for proactive state behaviour, and the fact that it is in the interest of both the state and the citizen to avoid a possible unlawful situation.

3.3 Enforcement of Judgments

In implementing this task, all Hungarian-related judgments are translated and published on the website of the Government. The Agency of the Government also informs the competent ministries and other individuals concerned about the judgments by direct request. At the same time, individual or general measures are taken in the event of a conviction of the State. In the context of individual measures, the Agency of the Government initiates pardon procedures, proposes a lighter sentence, requests a retrial or a review, or takes care of paying compensation. In the context of general measures, it may, inter alia, propose legislation or issue case-law guidelines.

3.4. Promoting Human Rights

In order to ensure the effective enforcement of human rights, the Agency of the Government has prepared an information leaflet for clients acting as plaintiffs in proceedings entitled *How to apply to the European Court of Human Rights*. The increasing number of clients who turn to the Agency also receive verbal information on the human rights rules and the practice of the Court. The staff of the Agency of the Government give presentations at conferences and human rights events, prepare summaries, publish judgments in journals, where appropriate, publish analyses and studies, and pass on their experience in university teaching.

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4. Submitting an Application to the Court

All Strasbourg proceedings start with the submission of the application to the Court. As regards the conditions of representation of complainants, it may be noted that the fact that legal representation is not compulsory contributes greatly to the

popularity of the Strasbourg system. Many people, due to their financial situation, do not use a lawyer when submitting an application. At the same time, there is also a significant demand from applicants for legal representation with expertise in international law. It can be observed that some lawyers specialised in this field are willing to assist citizens seeking redress for violations of their human rights. It can be also noted that there are lawyers who provide legal assistance to a large number of cases for the people who turn to the Court.

There are very important advantages of a Court procedure:

- the applications can be submitted in the applicant's native language,
- the legal representation is not obligatory (this is a good solution which makes the proceedings more democratic),
- the costs of the procedure are minimal (only the postal fee).

5. Procedure of the Agency of the Government

The role of the Agency of the Government begins when the Court sends the application for comments, setting a deadline. In its letter, it asks the questions to which it expects an answer. The staff first request the file(s) of the underlying case(s) from the courts and other authorities involved in the case about the content of the application. At this stage of the procedure, the courts and other authorities receive information on the Strasbourg case and have the option to make any comments they may have to the Agency of the Government. This option has been used by the courts in several cases. There is not much time to process the documents and make comments, as the Court gives 8–12 weeks to reply. The requesting and processing of documents and the preparation of any observations (in English and in Hungarian) need to be done during this time. If, for some reason, the deadline cannot be met, a 30-day extension can be requested once from the Court, which is usually granted. In cases concerning the length of proceedings and the length of detentions, the Court sets an amount which appears reasonable, on the basis of previous decisions, as the basis for a friendly settlement. If both parties accept the amount offered, the Court approves the settlement by decision. If not, the procedure continues, but the option of a friendly settlement remains open to the parties throughout.

The documents submitted by the parties during the procedure are forwarded by the Court to the other party, setting a time limit for the communication of observations. In the absence of a friendly settlement, the case 'waits' 1.5 years for a decision, which means that it takes 3–5 years from the date of the application to reach a judgment in a given case. It should be noted, however, that complaints concerning procedural delays and the length of detentions, which in the Court's practice are 'clone cases', are dealt with under a kind of fast-track procedure from the moment they are sent for comments. If a party asks for referral to the Grand Chamber against

the Chamber's judgment, the proceedings continue and, if the Grand Chamber accepts the case (because it considers that it raises important questions concerning the interpretation and application of the Convention), a final decision is taken after a further 1–2 years.

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6. Enforcement of Judgments in Hungarian cases

6.1. Background

When Hungary acceded to the Convention in 1992, the system of jurisdiction in Strasbourg was different from the current one. This task was originally entrusted to three institutions: the European Commission of Human Rights (the Commission), the European Court of Human Rights, and the Committee of Ministers of the Council of Europe (the Committee of Ministers), which is still composed of the foreign ministers of the Member States and their representatives.

Protocol No. 11 to the Convention, which entered into force on 1 November 1998, abolished the former structure of the Commission and the Court and replaced the two bodies by a single permanent Court. During the transitional period of one year, which lasted until 31 October 1999, the Commission continued its activities in cases which it had previously declared admissible. It was during this period that the Rekvényi and Dallos cases[4], which were among the first Hungarian judgments in which no violation of the Convention was finally found, were brought before the Court.

In the Rekvényi case the applicant, Mr László Rekvényi, was a police officer and the Secretary General of the Police Independent Trade Union. On 24 December 1993 Act no. 107 of 1993 on Certain Amendments to the Constitution was published in the Hungarian Official Gazette. This Act amended, inter alia, Article 40/B § 4 of the Constitution to the effect that, as from 1 January 1994, members of the armed forces, the police, and the security services were prohibited from joining any political party and from engaging in political activities. In a circular letter dated 28 January 1994, the Head of the National Police demanded, in view of the upcoming parliamentary elections, that policemen refrain from political activities. He referred to Article 40/B § 4 of the Constitution as amended by Act no. 107 of 1993. He further indicated that those who wished to pursue political activities would have to leave the police. In a second circular letter dated 16 February 1994, the Head of the National Police declared that no exemption could be given from the prohibition contained in Article 40/B § 4 of the Constitution. On 9 March 1994, the Police Independent Trade

4 Rekvényi v Hungary, application No. 25390/94, judgment of 20 May 1999; Dallos v Hungary, application No 29082/95, judgment of 1 March 2001.

Union filed a constitutional complaint with the Constitutional Court claiming that Article 40/B § 4 of the Constitution, as amended by Act no. 107 of 1993, infringed the constitutional rights of career members of the police, that it was contrary to the generally recognised rules of international law, and that it had been adopted by Parliament unconstitutionally. On 11 April 1994, the Constitutional Court dismissed the constitutional complaint, holding that it had no competence to annul a provision of the Constitution itself.

Relying on Articles 10, 11 and 14 of the European Convention of Human Rights, the applicant complained that the impugned constitutional provision had amounted to an unjustified interference with his rights to freedom of expression and association and was of a discriminatory nature.

The Court rejected the applicant's argument that the general constitutional ban on political activities by police officers failed to meet the requirement of foreseeability and that this was not rectified by any subsequent legislation including the 1994 Police Act. The Court was satisfied that the legal framework as a whole, including the contested constitutional prohibition and other legal rules partly permitting – occasionally subject to authorisation – and partly restricting the participation of police officers in certain kinds of political activities, was comprehensive enough to enable the applicant to regulate his conduct accordingly, if necessary after having sought advice beforehand from a superior or clarification of the law by means of a court judgment. In the light of these considerations, the Court found that the interference was 'prescribed by law' for the purposes of paragraph 2 of Article 10.

As regards the legitimate aim of the contested restriction, the Court accepted that it was intended to depoliticise the police force and thereby to contribute to the consolidation and maintenance of pluralistic democracy in Hungary. The Court was convinced that members of the public were entitled to expect that in their dealings with the police they would be confronted with politically-neutral officers who are detached from the political fray. In the Court's view, the desire to ensure that the crucial role of the police in society is not compromised through the corrosion of the political neutrality of its officers is one that is compatible with democratic principles; this objective takes on a special historical significance in Hungary because of that country's experience of a totalitarian regime which relied to a great extent on its police's direct commitment to the ruling party. Accordingly, the Court concluded that the restriction in question pursued legitimate aims within the meaning of paragraph 2 of Article 10, namely the protection of national security and public safety, and the prevention of disorder.

Further, having recapitulated its case-law on the basic principles concerning Article 10, the Court went on to conclude that, in view of the particular history of some Contracting States, the national authorities of these States might, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve the aim of the police force's political neutrality by restricting the freedom of police officers to engage in political activities. Having regard to the margin of appreciation left to the national authorities in this area, the

Court found that the relevant measures taken in Hungary – a country that, between 1949 and 1989, was ruled by one political party and where, within the police force, membership of that party was expected as a manifestation of the individual's commitment to the regime – could be seen as answering a 'pressing social need' in a democratic society. Moreover, an examination of the relevant laws showed that police officers had in fact remained entitled to undertake some activities enabling them to articulate their political opinions and preferences. Therefore, the Court concluded that the means employed to achieve the legitimate aims pursued had not been disproportionate. Accordingly, the impugned interference with the applicant's freedom of expression was not in violation of Article 10.

In the Dallos case the applicant alleged that criminal proceedings against him had been unfair, in breach of Article 6 of the Convention, in that – since he had been prosecuted for, and at first instance convicted of, embezzlement – the appeal court's reclassification of the offence as fraud had prevented him from exercising his defence rights properly.

The Court observed that the possibility of filing a petition for review was undisputedly available to the applicant (see Article 284/A § 1 (I) of the Code of Criminal Procedure, paragraph 26 above). Neither was it disputed that the review proceedings were capable of providing redress in respect of the applicant's complaints about shortcomings in the lower courts' procedure (see Article 291 §§ 1 and 3 of the Code of Criminal Procedure, paragraph 30 above).

As regards prospects of success, the Court observed that the Supreme Court in fact entertained the applicant's petition for review, held a review session and, in its decision, addressed the defence counsel's arguments in detail. In these circumstances, it cannot be said that the review as such did not offer the applicant any reasonable prospects of success. Having regard to these considerations, the Court concluded that the applicant's petition for review was an effective remedy in the circumstances. Its exhaustion was therefore necessary to meet the conditions laid down in former Article 26 of the Convention. Consequently, the applicant cannot be considered to have failed to observe the six-month time limit. The Government's preliminary objection must accordingly be dismissed.

The Court was, therefore, convinced that the applicant's rights to be informed in detail of the nature and cause of the accusation against him and to have adequate time and facilities for the preparation of his defence were not infringed. Therefore, Article 6 of the Convention was not violated.

6.2. Types of Decisions

The Permanent Court, which has been in operation since 1998, formally takes two types of decision: decisions and judgments. Both types are capable of bringing the procedure to a close.

The procedure up until the decision consists of two main stages: an examination of the admissibility of the application and a substantive examination. The Court first

decides on admissibility by means of a decision. It then examines the conditions of submission: whether the application was submitted by the victim of the violation, within the prescribed four-month time limit, after exhaustion of effective domestic remedies, in relation to the rights set out in the Convention, etc.

Decisions declaring the application inadmissible or removing it from the list (by friendly settlement or other reason, e.g. death) terminate the procedure without further substantive examination. They are not subject to appeal. Then the substantive examination of the application declared admissible is taken, at the end of the proceedings the Court notices its judgment.

The judgments containing substantive opinion may, according to their content, declare that the Contracting State has not violated the articles of the Convention complained of, or they may declare a violation of the Convention. Some of the latter judgments do not impose any further requirement on the State other than a declaration of violation, while others – and this is the majority – award compensation as just satisfaction, and may even, exceptionally, contain a provision for specific action to be taken.

6.3. Measures to Speed up the Procedure

The legal instrument of friendly settlement and its special case, the practice in cases of length of proceedings, which aims to speed up proceedings in Strasbourg, are different from the general procedure in part.

A friendly settlement can be initiated at both the stages of admissibility and substantive examination.[5] A decision striking the application due to a friendly settlement between the parties at the admissibility stage must include the relevant part of the agreement signed by the parties on the amount to be paid to the applicant, and the three-month payment deadline must start from the date of the decision. A friendly settlement is advantageous for both parties because the procedure is significantly shorter, the applicant receives the compensation sooner, and the decision is not based on the infringement but on the agreement of the parties. It can be said that friendly settlement is one of the most important legal instruments of the Convention, a form of mediation. Its aim is to 'prevent' a judgment and to speed up the procedure. The Court draws attention to this option as early as the first communication of the application. In the author's experience, it has the advantage of shortening the procedure. It saves time for both the applicant and the state, who can rest assured that they will not be convicted.

It is important to note that the technical management of the settlement is by the coordination of the Court (written requests, forwarding of claims). This means that it is not the Agency of the Government that negotiates directly with the applicant, and so misunderstandings can be avoided. The proposal for the amount of the settlement

5 Article 38 of the European Convention on Human Rights

is made by the applicant or the Court, to which the Agency always responds in substance. The amount to be paid is determined on the basis of previous decisions.

Recent experience has shown that the number of settlements is increasing, which is important for the Court as well, as its workload can be partly reduced. Therefore, in fact, there is a general expectation that governments should be prepared to settle in all appropriate cases. 429 friendly settlements were made in respect of Hungary in 2019, 263 in 2020, 221 in 2021, 170 in 2022, and 235 in 2023.

In a specific area, to speed up the handling of cases of so-called 'length of proceedings', the Court has introduced the concept of not taking a separate decision on admissibility and so it decides on admissibility and on substantive questions together, and also encourages friendly settlements. By default, the parties first simply state whether they wish to conclude a friendly settlement agreement and the amount is determined in subsequent exchanges of correspondence. More recently, the Court has aimed to speed up the procedure further, in order to facilitate a friendly settlement, by attaching the draft declaration to the letter sent to the Government for its observations, in which it indicates the amount of compensation or costs which it considers fair on the basis of the facts available and, if the parties sign it, deletes the case from the list by decision.

The friendly settlement procedure is confidential, so there is no public information on whether, in the event of a failure to reach a friendly settlement, in some cases, the Court has awarded damages lower or higher than the amount not accepted by one of the parties. In any event, without prejudice to confidentiality, two factors may be mentioned which must be considered when assessing the reasonableness and justification of the amounts accepted by the Government for friendly settlements:

a) Friendly settlements can usually be reached in cases where the Strasbourg case law is clear and does not require further clarification in the circumstances of the case. In cases involving delays in proceedings and the length of detentions, this also means that it is clear to the Agency of the Government that there is no chance of reducing the extent of the State's liability or the likely amount of compensation by reference to the applicant's conduct or other factors. The increase in the number of friendly settlements is also due to the fact that the case law has become fully established in Hungarian procedural systems, and even if the judgments themselves are not always clear, it is now clear from a comparison of the Government's observations and the judgments themselves, which arguments the Government can successfully rely on and which arguments are (or would be) unnecessary to repeat, what conduct can be imputed to the applicants, what circumstances can excuse the authorities' delay, what procedural acts constitute substantive acts of litigation for the purposes of assessing inactive periods, etc.
b) It very often happens that at the time of the conclusion of a settlement agreement (or even at the time of the Strasbourg judgment), the protracted domestic proceedings complained of in the application are still ongoing and may not be concluded in the short term.

6.4. The Composition of Judgments in Hungarian cases

The number of judgments against Hungary has been increasing in recent years. 40 in 2019, 31 in 2020, 33 in 2021, 35 in 2022, and 37 in 2023. This is due to several reasons. Since the vast majority of cases are condemned because of the length of Hungarian judicial proceedings, as time goes on more and more lengthy litigation is liable to give rise to a breach of the Convention.[6] Another reason is that the Strasbourg procedure is becoming better known through the press, although it is commonly seen as just another forum for review, a fourth level of court, and is therefore wrongly referred to the Court.

The increase in the number of applications is not specific to Hungary. The Court has become a 'victim' of its own success by being the only international human rights forum at European level that can provide a truly effective remedy to those who have suffered harm and are unable to obtain adequate redress or assistance in their home country.

The vast majority of applications originate from Eastern Europe (Poland, Turkey, Romania, Ukraine). Compared to complaints from these countries, the number of Hungarian applications is significantly lower in proportion and the composition of the complaints is largely procedural in nature. The majority of the judgments condemning Hungary relate to violations of Article 6 of the Convention (the right to a fair trial within a reasonable time) due to the length of court proceedings.

The violation of human rights of a substantive nature, which accounts for a smaller proportion of cases, is also due in many cases to a failure to respect procedural requirements. Among these, it is worth mentioning a few Hungarian cases (Kmetty, Balogh, Barta)[7] relating to Article 3 (prohibition of torture, inhuman and degrading treatment), in which the applicant referred to Strasbourg on the grounds of ill-treatment by the police. When examining Article 3, the Court assesses, on the one hand, whether ill-treatment, cruel or degrading treatment or punishment has occurred and the extent of the suffering caused (the substantive aspect of the Article) and, on the other hand, whether the investigation of the case was thorough and effective (the procedural aspect of the Article). The Court found a breach of the substantive content only in the Balogh case, while in the other cases it found that the investigation of complaints of police ill-treatment was not sufficiently thorough and effective, i.e. that procedural requirements were breached.

6 In the first few years after the entry into force of the Convention, while the Commission was still practically in existence, it was often the case that no infringement was found because much of the otherwise lengthy judicial proceedings took place before the Convention entered into force.

7 Kmetty v Hungary, application No. 57967/00, judgment of 16 December 2003; Balogh v Hungary, application No. 47940/99, judgment of 20 July 2004; Barta v Hungary, application No. 26137/04, judgment of 10 April 2007.

6.5. Compensation Paid Not on the Basis of a Judgment

The obligation to pay compensation may be imposed by the Court not only in a judgment but also in a decision approving friendly settlement. For the sake of completeness, reference should also be made to the obligation to pay provided for in those decisions. This type of friendly settlement is essentially the subject of cases involving a breach of convention (Article 6(1)) due to delay in domestic judicial or administrative proceedings.

6.6. Enforcement of Judgments

The execution of judgments requires the Agency of the Government to take a variety of measures. The Court's decision usually includes:

a) an indication of a violation of an Article of the Convention or that no violation has occurred;
b) the definition of just satisfaction, which most often means the obligation to pay compensation for pecuniary and non-pecuniary damage and the reimbursement of costs;
c) a reference to the solution of a general problem in the legal system or to the adoption of a measure specifically related to the case.

6.6.1. Declaring a Breach of the Convention

The case law of the Court gives substance to each article of the Convention, and it is through these decisions that the limits of each right and the main principles governing its enforcement are outlined. In this context, the Agency of the Government has the task of making the content of the judgments known to as wide a professional and public audience as possible. Translating judgments, publishing them on the Government website and, in many cases, sending them directly to the bodies concerned are the measures taken by the Agency of the Government to raise awareness of the most important developments and trends in case-law.

6.6.2. Just Satisfaction

The Court notifies the parties when the decision becomes final. The decision becomes final when three months have elapsed since it was given and no party has asked for referral to the Court's Grand Chamber of 17 judges, which, exceptionally, deals only with specific cases on points of principle and of interpretation of the Convention. In cases in which the Court has well-established case law, the Grand Chamber does not accept applications against a judgment of the Chamber of the Court.

The measure contained in the final decision is implemented by the Agency of the Government. In doing so, it asks the applicant to provide the bank account number

or, failing that, the address to which the Ministry of Justice can make the payment, in a signed letter, for payment of the amount of just satisfaction awarded to them. The payment must be made within the time limit (three months) set by the Court's decision from the date on which the decision becomes final.

When the Agency of the Government receives the decision, it translates the judgment, asks for the applicant's bank account number, and sends the necessary documents to the paying department, which makes the payment within the time limit and sends the proof of payment to the Agency of the Government, which informs the Committee of Ministers of the Council of Europe of the implementation. The payment of the compensation and the other measures taken is subject to verification by the Committee of Ministers at least every six months. Detailed information on the status of specific cases and the measures taken are provided and the Committee of Ministers keeps the case on its agenda until a satisfactory reply has been received on its settlement.

One of most complex and difficult activities of the Agency is to organise the payment of just satisfactions and to contact hundreds and thousands of applicants and lawyers.

6.6.3. Other Measures

Among the obligations to take specific measures resulting from the judgments, it should be highlighted that in the information provided to the Committee of Ministers, the Agency of the Government regularly reports on circumstances such as whether the underlying case or trial has been completed or is pending, and whether the applicant is in detention or has been released. The National Office of Judiciary provides assistance in this respect.

The judgments may also contain provisions on the release of the detained person or on the remedying of a legal system problem. However, the Court has not yet imposed such obligations on Hungary.

The Agency of the Government not only has the judgments translated and published in various forms, but also gives presentations and provides training on them at events and conferences on request, and in continuous cooperation with the National Office for the Judiciary (Országos Bírósági Hivatal) investigates the reasons for delays in court proceedings and reports on the necessary measures, the documents received, and the shortcomings encountered.

7. The biggest Challenges of the Last Several Years

7.1. Prison Overcrowding

On 10 March 2015, the Court delivered a pilot judgment in the case of Varga and Others v Hungary resulting mainly from a detected structural problem of widespread overcrowding in Hungarian detention facilities.[8] The Court concluded that the limited personal space available to all six detainees in the case, aggravated by the lack of privacy when using the lavatory, inadequate sleeping arrangements, insect infestation, poor ventilation and restrictions on showers or time spent away from their cells, had amounted to degrading treatment as per Article 3 of the Convention. The Court also found that the domestic remedies available in the Hungarian legal system to complain about detention conditions, although accessible, were ineffective in practice and as a result also established the violation of Article 3 in conjunction with Article 13 of the Convention.

Therefore, the Court held that the Hungarian authorities should produce a timeframe, within six months of the date of the judgment becoming final, for putting in place an effective remedy or combination of remedies, both preventive and compensatory, to guarantee genuinely effective redress for violations of the European Convention originating in prison overcrowding.

In order to present a full picture of the subject, the Government noted that previously the Court had already found violations of Article 3 on account of similar conditions and had underlined the seriousness of the problem and the need for the authorities to 'react rapidly in order to secure appropriate conditions of detention for detainees' (István Gábor Kovács group of cases).[9]

The necessity to remove the prison conditions defined by the Court's decision as inhuman or degrading in violation of Article 3 of the Convention had been acknowledged by the Government. Accordingly, the Government presented both the individual and general measures already executed and those to be executed in the near future in compliance with the expectations arising from the judgment and at the same time wished to express its goal of considering further legislative actions in the near future to remedy the problems identified.

As regards overcrowding in prisons, a series of action plans and reports were submitted by the Government to the Committee of Ministers on the wide range of general measures aimed at decreasing the number of prisoners while increasing the

8 Varga and others v Hungary, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, judgment of 10 March 2015

9 List of applications concerned: Varga and Others v Hungary (Appl. No. 14097/12, final on 10/06/2015), István Gábor Kovács v Hungary (Appl. No. 15707/10, final on 17/04/2012), Engel v Hungary (Appl. No. 46857/06, final on 20/08/2010), Csüllög v Hungary (Appl. No. 30042/08, final on 07/09/2011), Juhász and Others v Hungary (Appl. No. 6467/13, final on 07/01/2016), Magyar and Others v Hungary (Appl. No. 16599/12, final on 07/01/2016)

capacity of prison facilities, thereby reducing overcrowding in prisons. Effective domestic remedies of both preventive and compensatory nature were also introduced to deal with complaints concerning prison conditions at national level.

In 2018 the number of prison places grew by 1.6%, whereas the number of inmates decreased by 3.7%. As a cumulative result of these measures the average prison occupancy rate decreased by 7 % compared to the previous year. On 31 December 2018, the prison occupancy level was 113%. In order to reduce the number of inmates in prisons, the applicability of the 'reintegration custody' introduced in 2015 has been gradually broadened in the light of its practical results. Reintegration custody allows prisoners to spend the last six to twelve months of their sentence at home, using a specially designed electronic locating device. In this way, the prisoners can be given assistance in establishing the conditions required by civic life, thereby developing their family and micro-social relations, their ability to reintegrate into the labour market, and their competence at personally taking care of aspects their life. Furthermore, recourse to pre-trial detention is gradually decreasing as the application of alternative measures, such as house arrest, was facilitated by more flexible rules and the development of the technical conditions. The entry into force of the new Code of Criminal proceedings in July 2018 also significantly reduced the number of persons in pre-trial detention. On 4 March 2019, 2676 persons were in 'pre-trial' detention, which was about 50 % less than in 2014.

The system of domestic remedies was improved by Act no. CX of 2016 amending the Act on the enforcement of punishments. A new complaint mechanism was introduced as a preventive legal remedy. The prison governor has to examine and determine complaints about the conditions of detention within 15 days. In the case that relocation is impossible within the framework of the Occupancy Level Balancing Programme, mainly because of the overriding interests of the prisoner concerning their right to family life, the head of the institution is legally obliged to take other specific measures to improve the complainant's situation.

This new compensation procedure was introduced as of 1 January 2017. Prisoners are entitled to compensation for the grievances caused by overcrowding and any other placement conditions violating the prohibition of torture or cruel, inhuman or degrading treatment, in particular unseparated toilets, lack of proper ventilation or lighting or heating, and disinsectisation. Compensation is granted at a daily tariff for the number of days spent in placement conditions violating fundamental rights. Compensation claims can be submitted within six months from the termination of the placement conditions violating fundamental rights, provided that the inmate has filed a preventive complaint. Inmates can also claim additional damages under the rules of civil law governing infringement of personal rights.

Applications already registered by the Court could also be re-filed before the domestic authorities thereby easing the workload of the Court which, in the case of Domján v Hungary[10] subsequently found that the newly introduced legal institutions

10 Domján v Hungary, Application No. 5433/17, decision of 23 November 2023

are able to guarantee genuine redress. Accordingly, they are considered to be effective remedies and they meet the criteria set out in the pilot judgment given in the case of Varga and Others v Hungary. At that time almost 9,000 applications had been submitted by the applicants.

In the light of the experience concerning the application of this domestic remedy, the applicable rules were reviewed in 2020. The legislative amendments strengthening the rights of the victims of the crimes committed by the detainees obtaining compensation for overcrowding (improving the victims' chances of obtaining compensation from the perpetrators) were adopted by Parliament on 16 December 2020.

7.2. Length of Proceedings

This group of cases concerns the excessive length of civil and criminal proceedings and the lack of an effective remedy in this respect (violations of Articles 6 § 1 and 13).

In the case of Barta and Drajkó v Hungary (Appl. No. 35729/12, judgment of 17/12/2013), the Court identified, under Article 46, the length of criminal proceedings in Hungary to be a systemic problem and ruled that "[t]o prevent future violations of the right to a trial within a reasonable time, the respondent State should take all appropriate steps, preferably by amending the existing range of legal remedies or creating new ones, to secure genuinely effective redress for violations similar to the present one."

In the case of Gazsó v Hungary[11] the Court noted the Government's Action Plan and welcomed the Government's commitment to deal with this issue and encouraged them to continue these efforts. The Court ruled that Hungary must introduce, without delay, and at the latest by 16 October 2016, a remedy or a combination of remedies in the national legal system in order to bring it into line with the requirements of the Convention.

As regards the length of proceedings, legislative efforts in recent years have focused on the prevention of excessive length of the proceedings and a series of new codes of procedure were adopted.

A new Code of Civil Procedure (Act No. CXXX of 2016) entered into force on 1 January 2018. It is expected to accelerate civil proceedings by introducing a double-phase procedure before first-instance courts in which the trial (oral) phase is preceded by a preparatory (written) phase aimed at clarifying the scope of the case and fixing the claims of the parties. Contrary to the former rules of procedure which allowed parties to modify their claims up until the closing of the hearing stage, under the new rules the action cannot be modified and new claims cannot be raised after the first hearing or a relevant order of the court, unless it is justified by exceptional circumstances. Failure by the respondent to submit reaction to the plaintiff's

11 Gazsó v Hungary Appl. No. 48322/12, judgment of 16 July 2015

claims properly may result in a default judgment. The parties' duty of facilitating the proceedings is also emphasised as a principle, and representation by legal counsel is required in all cases other than before the District Courts. The rules of evidence are also more elaborate, with special emphasis on expert opinions, leaving more room for the initiative of the parties in mandating forensic experts without a need for appointment by the court. At the appeal stage, the reasons for quashing first instance judgments are more limited, and the reformatory power of the appeal court is strengthened. In cases where the pecuniary value of the action does not exceed HUF 5 million, the right to file a petition for review to the Kúria is also restricted.

Administrative proceedings are no longer covered by the Code of Civil proceedings. The Code of Administrative Proceedings (Act No. I of 2017) entered into force on 1 January 2018. The most important provisions that are expected to contribute to the timely conclusion of administrative proceedings are the ones relating to default judgments in cases when the administrative authorities fail to observe time limits for their decisions.

A new Code of Criminal Proceedings (Act No. XC of 2017) entered into force on 1 July 2018. As was expected, the enhanced rights of the defence in the course of the investigation contributes to the expediency and effectiveness of the proceedings. After an initial stage of information gathering (quasi 'pre-arrest investigation'), the defence has access to the case file as from the first questioning as a suspect. At the trial phase, a preparatory hearing is held to fix the scope of the case and, in order to prevent prolonging tactics, a new motion for evidence can thereafter be submitted only in exceptional circumstances. There is more room for holding trials in absentia or hearings without the presence of the defendants. At the appeal stage, the reformatory power of the appeal court is strengthened.

In 2021, a new domestic compensatory remedy was also introduced for civil court proceedings that last in excess of the time limits that are objectively presumed to be reasonable. The issue of effectiveness of this compensatory remedy is currently being examined by the Court in the cases before it. The judgment of the Court in the case of Szaxon v Hungary held, on 30 March 2023, that Act no. XCIV of 2021 set out an effective remedy for protracted civil proceedings.[12]

In total, according to the HUDOC Execution database, Hungary has 216 pending cases, which is fewer than one year ago (265) or two years ago (276). Among these there are 71 friendly settlement cases, 43 leading cases, and 105 repetitive cases. The high number of friendly settlement cases shows that Hungary's attitude towards settlement is very positive, as it can reduce the backlog of the Court.

7.3. The Baka Case

The Baka case concerned the premature termination of the mandate of the President of the Supreme Court in the context of the reform of the judiciary in 2012.

12 Szaxon v Hungary, Application No. 54421/21, decision of 30 March 2023

The ECHR found violation of Article 6 of the Convention because Mr Baka did not have access to a court to dispute the reasons for his dismissal from his position as a court executive (whereas his position as a judge at the supreme judicial forum, the Kúria, was not affected).[13]

The Court also inferred from the chain of events that Mr Baka's mandate had been terminated in violation of his freedom of expression (Article 10) on account of his criticism of the legislative measures concerning the judiciary, whereas in fact Mr Baka had become ineligible for re-election as President of the Kúria due to a legislative provision proposed by a judicial association, as he had not had five years domestic judicial service.

It should be mentioned that in accordance with the Committee of Ministers' former decision, no further individual measures are necessary.

There are some issues of execution which have been unresolved for years. The implementation of these judgments is hindered either by the complexity of the issues raised by them or by the ambiguities of the judgments concerned, resulting in disagreements as to their correct interpretation and, consequently, as to the general measures that are necessary for their implementation.

The Agency has stated that the measure was strictly related to a one-time constitutional reform of the judiciary and no such further measures have been envisaged. The impugned measures resulted from the adoption of the Fundamental Law of Hungary, which ended an interim period characterised by the suspension of the historical constitution, the tyrannical rule based on the communist constitution of 1949 deemed invalid by the Fundamental Law, and a subsequent transitional constitutional order.

At the meeting of the Committee of Ministers in 2021, the Hungarian Minister of Justice clearly stated that Hungary would fully abide by the Convention requirements as set out in the Baka and Erményi judgments, so that no similar violations of the Convention would occur in the future. The measures which were found to be in violation of the Convention were taken in the context of a one-time constitutional reform and no similar measures were planned in the future.

In March 2022, the Committee of Ministers adopted Interim Resolution CM/ResDH(2022)47. The document underlined that the declaration made by the Hungarian Minister of Justice at its ordinary meeting must be interpreted to the effect that Hungary will fully abide by the Convention requirements as set out in the Baka and Erményi judgments, so that no similar violations of the Convention will occur in the future.

As regards the 'chilling effect' of the violation of Mr Baka's rights under Article 10, the Government first noted that it is difficult to see how any judge would be prevented from expressing their opinion by their fear that the mandate of the President of the Kúria might be terminated without judicial review, when such judicial review is available to them as judges. Furthermore, the Government pointed out that the

13 Baka v Hungary, Application No. 20261/12, Grand Chamber judgment of 23 June of 2016

existence of the 'chilling effect' is effectively disproved by the heated debates within the judiciary as it was presented by the earlier NGO submissions. The Government also pointed out that no complaints had been brought before the Court by judges concerning the allegations submitted by the reports feeding the concerns of the Committee of Ministers.

The National Assembly adopted the act on 3 May 2023. Act X of 2023 amending, with regard to the Hungarian Recovery and Resilience Plan, certain Acts governing justice (hereinafter referred to as the 'Act') was promulgated on 10 May 2023. It is hoped that the adoption of the act will put an end to the debates on the independence of the Hungarian judicial system, not only within the European Union but also within the Council of Europe

8. The role of the Parliament in the Implementation of ECtHR judgments

By Parliamentary Decision No. 23/2007. (III.20), the Parliament of Hungary asked the Minister of Justice to inform the committee dealing with cases concerning the constitutionality and the committee dealing with human rights once a year about the implementation of the judgments of the European Court of Human Rights (hereinafter referred to as the 'Court') by the national authorities and about the activities of the Agency of the Government before the Court.

In accordance with the aforementioned decision, the Minister of Justice submitted reports on all relevant aspects of the judgments of the Court, including statistics and case descriptions annually since 2007 which were adopted by the competent parliamentary committees after a session of debate at which the Members of Parliament could raise their questions.

The systems are working. The relationship and the communication between the Human Rights Department and the Department for Execution of Judgments of the ECHR is very good and cooperative.

9. Evaluation of the Activities of the Agency of the Government

Proceedings in Hungarian cases before the Strasbourg Court are a multi-directional, complex task. Generally speaking, the implementation of the Court's rulings is always accurate and timely.

It is difficult to assess the activity of the Agency of the Government on the basis of single judgments. This is particularly true of the judgments handed down in recent years in length of proceedings cases, which contain a rather concise statement of reasons by the Court and similarly summarise the Government's position. It is therefore only in the light of all the Strasbourg judgments that the activities of the Agency of the Government can be properly assessed, taking into account the most recent judgments and the decisions declaring certain applications inadmissible. The scope for manoeuvre of the Agency of the Government in preparing its defence is determined by the circumstances of the particular case, Hungarian law and Strasbourg case law taken together.

The Government representation is also greatly influenced by the fact that the Court has recently been rather terse in its judgments in length of procedure cases. It must be recognised, however, that an international judicial forum cannot be expected, either because of its subsidiary role or because of its overburden, to give the same elaborate judgments in a mass of cases which are as irrelevant to the interpretation of the Convention (not to the enforcement of individual rights) as it does in cases which are important for the development of case law. In view of all the above, besides the measures taken in individual cases, the Agency constantly defends the sovereignty of the state and draws attention to the need to respect the requirements of the Convention in both legislation and the application of the law, in order to ensure the effective enjoyment of human rights.

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Chapter 3

Ill-Treatment Formulas Sensu Largo and the Jurisprudence of the ECtHR with Special Regard to Central Europe

Barbara Janusz-Pohl

Abstract

This study is not intended to be purely descriptive; rather, it delves into the intricate standards established by the European Court of Human Rights (ECtHR) regarding the prohibition of torture and other forms of ill-treatment. These standards are well articulated and form a crucial foundation for human rights protection in Europe. In this paper, we will focus specifically on the prohibition of torture and related forms of ill-treatment as interpreted and applied in the case law of the ECtHR. Our analysis will encompass definitional challenges and will trace the significant legal advancements that have emerged from this case law, allowing us to identify areas of concern where Article 3 is being violated across various countries, along with the corresponding legal repercussions. We will begin by examining general statistics that illustrate the prevalence of Article 3 violations, followed by a detailed analysis of individual cases from Poland and Hungary that exemplify these violations. The discussion will culminate in an examination of two significant judgments related to Article 3 that address the handling of evidence in criminal proceedings. In these cases, the Court emphasises the necessity of excluding unlawfully obtained evidence, drawing on Article 3 in conjunction with Article 6 of the Convention. It is noteworthy that the standards for excluding evidence in criminal proceedings exhibit considerable variation across national legal systems and, in many instances, are not explicitly regulated. As such, the Court's guidelines serve as a vital reference point for both legal practitioners and policymakers. Finally, the discussion will conclude with insights that highlight the evolving trends in the case law of the ECtHR, particularly

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concerning Central and Eastern European countries. The interpretations and findings presented in this study carry significant implications for the ongoing struggle against torture and ill-treatment in the region.

Keywords: Prohibition of torture, ill-treatment, Article 3 ECHR, admissibility of evidence, violation of the ECHR

1. Introduction

The assessment of the Strasbourg standard under Article 3 of the ECHR in relation to selected Central European states is the focus of this study. It is, therefore, necessary to determine whether this standard remains in certain (and if so, in which) relations to the global standard and to the national standards. The first part of this analysis will define in general terms the boundaries of the Strasbourg Court set out in Article 3 of the ECHR. Then, based on selected, publicly available quantitative data, it will be verified whether there are differences in the ECtHR's claims on the prohibition of torture and other ill-treatment formulas in relation to, on the one hand, Central and Eastern European states and, on the other hand, Western European states. In order to provide an overview of the ECtHR jurisprudence in which violations of Article 3 have been set out and, at the same time, to illustrate a variety of issues that have reflected this Strasbourg standard, two countries have been selected for a closer analysis: Hungary and Poland. In the last section of the study, a further specific issue concerning the ill-treatment formulas in the framework of the admissibility of evidence in criminal proceedings has been researched. The considerations in this respect complement the findings of the second section, i.e. the quantitative analysis, and cover two judgements of the ECtHR in the cases Gäfgen v. Germany and Ćwik v. Poland. It must be emphasised that the concept of constitutive rules – rooted in the philosophy of law – is a basis for this part of the research[1].

The purpose of the detailed discussion is to indicate that the ECtHR seems to recognise a greater risk of violation, albeit already *in abstracto*, of the rights and freedoms covered by the ECHR regarding Central European countries than Western European countries. In this author's opinion, the presumption of a higher risk of violation of rights and freedoms is similar to a factual presumption based on empirical probability. As a consequence of such a presumption, it is possible to formulate a prudential hypothesis that the Strasbourg Court is prone to rule more firmly against Central European states than against Western European states – this tendency will be discussed based on the two cases in the last part of this study. Additionally, it seems that such a state of affairs might be perceived as a reflection of

1 On the concept of constitutive rules see: Janusz-Pohl, 2017.

the 'deterrence principle'[2] according to which 'deterrence measures' have to be contextually programmed.

The above-mentioned structure and scope of analysis hint at the methodology of this study, which is consequently based on a 'map and magnifying glass' mode. Therefore, most of the issues are sketched in general terms (Sections 1, 2, and 3), and only certain details – selected to illustrate a general pattern – are reviewed more closely (Section 4).

2. Prohibition of Torture and Other Forms of Ill-Treatment: Global Standard and Strasbourg Standard

'No one shall be subject to torture or cruel, inhuman or degrading treatment or punishment' – although this canonical formula is historically driven, at the international level, it was codified only in the 20th century, and was subsequently

2 Ashworth, 1977, 723–735.

reproduced in many international conventions and domestic constitutions[3]. While not entering deeper into the historical grounds of this institution, it must be remembered that internationally this claim for the elimination of torture has been expressed primarily in the Universal Declaration of Human Rights (1948), and then proclaimed in 1975 by the UN Declaration against Torture, before finally being codified in the United Nations Convention of 10 December 1984 against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OJ of 2 December 1989)[4].

For this study, of core importance is the definition of torture provided by the UN convention; for now, it is the only legal definition of the term 'torture' proclaimed at the international level. Consequently, the term 'torture' means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other

3 Reconstructing national standard – one should observe that in the countries of Central and Eastern Europe, a prohibition on ill-treatments is expressed in all constitutions of the countries of the region. Nevertheless, the wording of this prohibition varies among them. For example: In Albania: Art. 25, Bosnia and Herzegovina: Art. II (3) (c), Bulgaria: Art. 29(1)), Croatia: "No one shall be subjected to any form of ill-treatment [...]" (Art. 23), Czech Republic: "No one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Art. 7 para. 2 - Charter of Rights and Freedoms),Estonia: § 18; Latvia: "The State shall defend the honour and dignity of human beings. Torture or other cruel or degrading treatment of human dignity is prohibited. No one may be subjected to punishment cruel or degrading treatment of human dignity" (Art. 95), Georgia: "Torture, inhuman or cruel treatment or punishment or treatment and punishment that violates dignity or honour is prohibited" (Art. 17(2)), Macedonia: "All forms of torture are prohibited, inhuman or degrading treatment and the application of such punishments" (Art. 11, sentence 2), Romania: "No one shall be subjected to torture or any kind of punishment or inhuman or degrading treatment" (Art. 22(2)), Serbia: "No one shall be subjected to torture or inhuman or degrading treatment or punishment [...]" (Art. 25, sentence 2), Slovakia: "No one may be tortured or subjected to cruel, inhuman or degrading treatment or punishment" (Art. 16 para. 2), Slovenia: "No one shall be subjected to torture, inhuman or degrading punishment or treatment" (Art. 18(1)), Ukraine: "No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment" (Art. 28, sentence 2), Hungary: "No one shall be subjected to torture or to inhuman or degrading treatment, punishment or detention. Trafficking in human beings is prohibited." (Art. III (1)). For the full wording of the prohibition of torture in the national constitutions: see: Szmulik 2012. What must be emphasised is that the level of the protection of fundamental rights provided by the Constitution cannot be lower than the level of rights protection provided internationally in any case whatsoever, typically by the European Court of Human Rights. It is worth mentioning at this point that Protocol No. 15 to the ECHR Convention recently inserted the principle of subsidiarity into the Preamble to the ECHR. This principle imposes a shared responsibility between the States Parties and the Court as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto – see: Grzęda v. Poland [GC], 15 March 2022, no. *43572/18*.

4 Hereafter referred to as the 'UN Convention'.

person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions" (Article 1.1).

Researchers rightly note that while the axiological legitimacy and the 'absolute dimension' of the ban on torture nowadays does not raise any doubts, the entire prohibition encompassing not only torture but also inhumane or degrading treatments or punishments requires interpretation. It is, therefore, beyond doubt that the entire collection of behaviours falling within the scope of the prohibition of other forms of ill-treatment is hardly compatible with the essence of the punitive nature of the criminal justice and, particularly, with the use of a legally applicable system of coercive measures in criminal proceedings[5]. Without analysing the complexity of the prohibition of other forms of ill-treatment, it should be noted that the universal standard arising from Articles 1 and 15 of the UN Convention is the one which should have a limiting effect on the development of the European standard of a fair trial in terms of admission of evidence obtained as a result of all formulas of ill-treatment. In fact, the Strasbourg Court should interpret the ECHR with regard to universal standards due to the lack of a legal definition of torture in the Convention of the Council of Europe. Moreover, the ECtHR is entitled to assume a higher level of protection against ill-treatment than the one set out in the universal human rights protection system. As already mentioned, even a basic analysis of the ECtHR's judgments in terms of the state's positive obligations to ensure protection against ill-treatment leads to a conclusion that the relevant Strasbourg standard is currently more protective and, in the specific circumstances, applies directly to the acts of private individuals (see section 4) what is excluded *expressis verbis* by the cited Article 1 of the UN Convention[6].

Just to summarise, as is commonly known, the Strasbourg standard is granted by Article 3 of the ECHR[7], which states: *'No one shall be subjected to torture, inhuman or degrading treatment, or punishment'*. It is worth mentioning that the European standard is accompanied by the mechanism ensuring its implementation, namely a system of individual complaints to the ECtHR. Additionally, the European standard is supported by the mechanism based on the European Convention of 26 November 1987 for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and regarding the EU states by the Charter of Fundamental Rights that explicitly stipulates, in Article 4, the banning of ill-treatments: *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'*.

Given that this study is not of a descriptive nature and that the characteristic of the so-called European standard set by the ECtHR concerning the prohibition of torture and other ill-treatment formulas is well established, a deep analysis seems

5 See: Greer, 2015, 1–37; Mayerfeld, 2008, 109–128; Pattenden, 2006, 1–41; Thienel, 2006, 349–367.
6 Wąsek-Wiaderek. 2021, 343–374.
7 Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950 and hereafter referred to as the 'Convention' or 'ECHR'.

to exceed the scope of this work.[8] However, selected elements will be briefly summarised. As indicated at the outset, the broad range of prohibited behaviours under Article 3 of the ECHR impacts the issue of determining the legal consequences of the ban's infringements concerning prohibited behaviours that are not acts of torture.

The initial remark when describing the ill-treatment formulas concerns the terminology. This study will operate on the notion of 'ill-treatments *sensu largo*' containing all unlawful infringements that interfere with human physical and psychological integrity[9]. In this view, ill-treatment is perceived as a consequence of an intentional act. Therefore, the ECtHR clarified that bodily injuries and physical and mental suffering experienced by an individual following an accident, which is merely the result of chance or negligent conduct, cannot be considered as the consequence of 'treatment' to which that individual has been 'subjected' within the meaning of Article 3.[10] Accordingly, the ill-treatment formulas *sensu largo* contain several forms of behaviours: torture, inhuman or degrading treatments, or inhuman or degrading punishment. It must be remembered that in order to determine whether a particular form of ill-treatment should be qualified as torture, the Court will have regard to the distinction embodied in Article 3 between torture (perceived as the qualified formula of ill-treatment) and other forms of inhuman or degrading treatment or punishment. Consequently, as can be read in the ECHR jurisprudence, the threshold of intensity must be observed. The distinction between torture, inhuman treatment or punishment, and degrading treatment or punishment derives principally from a difference in the intensity of the suffering inflicted (see section 4). Generally, it may be said that treatment is considered to be 'degrading' when it humiliates or debases an individual, showing a lack of respect for, or diminishing, their human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance. What is stressed is that it may suffice that the victim is humiliated in their own eyes, even if not in the eyes of others[11].

But at the same time, in order for ill-treatment to fall within the scope of Article 3 it must attain a minimum threshold of severity, including a special stigma for deliberate inhuman treatment that causes very serious and cruel suffering. Nevertheless, Article 3 does not relate to all instances of ill-treatment[12][13]. Consequently, the assessment of that level of severity is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[14] Nonetheless, to de-

8 See: Nowicki, 2003, 98–135; Erdel & Bakirci, 2006, 207–229; Hassanová, 2023, 51–73.

9 Guide on Article 3 of the European Convention on Human Rights, First edition August 2022, available at: Guide on Article 3 - Prohibition of torture (coe.int)

10 Nicolae Virgiliu Tănase v. Romania [GC], 25 June 2019, no. 41720/13.

11 Ireland v. the United Kingdom, 18 January 1978, no. 25; Selmouni v. France [GC], 1999 no. 25803/94; Ilaşcu and Others v. Moldova and Russia [GC], 2004 no. 48787/99, ECHR 2004/VII.

12 Savran v. Denmark, [GC], 7 December 2021, no. 57467/15.

13 See: Ast, 2011, pp. 1393–1406.

14 Muršić v. Croatia [GC], 2016 no. 7334/13.

termine whether the threshold of severity has been reached, subsequent factors must be reconsidered: (a) the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3; (b) the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; and (c) whether the victim is in a vulnerable situation[15]. Consequently, these three elements must reflect subjective and objective features of the alleged behaviours.

As mentioned before, in addition to the severity of the treatment, there is a purposive element, as recognised in the Universal Convention against torture, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information or a confession, inflicting punishment or intimidation. It can be observed, therefore, that the ECtHR has not ruled out that a threat of torture can also amount to torture, as the nature of torture covers both physical pain and mental suffering (see consideration in section 4). Nevertheless, in describing what the threat of torture means, it is necessary to refer to the notion of mental torture, for instance, the fear of physical torture itself. However, it should be stressed that the classification of whether a given threat of physical torture amounts to psychological torture or to inhuman or degrading treatment depends on the circumstances of a given case and cannot be based on isolated fact, so it must be decided *in concreto* (case by case).[16] The Court further reiterates that a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision.

The last section of this work will inquire about the consequences of the breach of the ban on ill treatments when performing evidentiary actions in criminal trials. The perspective for this part of the research is linked with the concept of constitutive rules, i.e. the rules of validity for legal actions – a very innovative approach that could be seen as a comprehensive substitute for the exclusionary rule theory[17]. Although, as a general consideration in this part, it should be underlined that the prohibition of ill-treatments is absolute in the sense that there is no derogation of it in terms of Article 15 § 2 of the ECHR – even in the case of a public emergency threatening the life of the nation or in the most difficult circumstances, including the fight against terrorism and organised crime or influx of migrants and asylum-seekers, irrespective of the conduct of the person concerned or the nature of the

15 Khlaifia and Others v. Italy [GC], 2016, no. 16483/12.

16 See: Gäfgen v. Germany [GC], 2010 no. 22978/05; Selmouni v. France [GC], 1999, no. 25308/94; Salman v. Turkey [GC], 2000, no. 21986/93; Al Nashiri v. Poland, 24 July 2014, no. 28761/11; Petrosyan v. Azerbaijan, 4 November 2021, no. 32427/16.

17 As a first scholar on this path: Mittag, 2006, 637–645.

alleged offence committed by such a person[18]. As mentioned previously, however, there are some limits to this ban – especially when it comes to criminal justice purposes and the consequences of evidentiary actions performed with the breach of Article 3 of the ECHR in the light of the fairness of the whole procedure[19].

Additionally, the ban on ill-treatment formulas in criminal justice is associated with a very specific perception of the burden of proof in this sphere that is underlined by the guarantees-oriented bias. Following the jurisprudence of the ECtHR, the principle of *affirmanti incumbit probatio* (who alleges something must prove that allegation) is not uniformly accepted. Moreover, a strong presumption of fact is accepted. As a result, the burden of proof is reversed. When the alleged events lie wholly, or in large part, within the exclusive knowledge of the authorities (custodial situations, interrogations), strong presumptions of fact will arise in respect of i.e. injuries occurring during short-term deprivation of liberty. If the accused imputes that they were subject to ill-treatment by the criminal justice bodies, i.e. during interrogation, only a certain level of probability is required to prove that such an event occurred. Due to this interpretation, and as a result of factual presumption, the burden of proof of the legality of legal actions exercised with/against the accused is reversed upon the law enforcement authorities. The burden of proof is then on the government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim.[20]

In the jurisprudence of the ECtHR, based on this reverse burden of proof, there are more abstract obligations imposed on the states, i.e. primarily, negative obligation and two positive obligations. The former demands States to refrain from inflicting serious harm on persons within their jurisdiction.[21] The latter comprises two more detailed obligations. The state has a duty: a) to put in place a legislative and regulatory framework of protection; and b) to take operational measures to protect specific individuals against the risk of treatment contrary to that provision (under specific circumstances) and to investigate arguable claims concerning the infliction of such treatment effectively.[22] As a consequence, the prohibition of torture, inhuman or degrading treatment or punishment, inflicted or facilitated by State agents entails the duty to investigate allegations of torture, inhuman or degrading treatment or punishment. However, as mentioned before, the ECtHR jurisprudence covers the protection from torture, inhuman or degrading treatment or punishment administered

18 A. and others v. the United Kingdom [GC], 2009, no. 3455/05; Mocanu and Others v. Romania [GC], 2014, no. 10865/09; El-Masri v. the former Yugoslav Republic of Macedonia [GC], 2012, no. 39630/09; Ramirez Sanchez v. France [GC], 2006, no. 59450/00; Gäfgen v. Germany 2010, no. 22978/05; Labita, V. v. the United Kingdom [GC], 2006, no. 24888/94; Saadi v. Italy [GC], 2008, no. 37201/06.

19 Greer, 2015, pp. 1–37; Mayerfeld, 2008, 109–128; Pattenden, 2006; Hassanová, 2023, 51–73; Thienel, 2006, pp. 349–367; Ashworth, 1977, pp. 723–735; Mittag, 2006, pp. 637–645.

20 See: Salman v. Turkey [GC], 2000, no. 21986/93; Bouyid v. Belgium [GC], 2015, no. 23380/09.

21 See: Hristozo v and Others v. Bulgaria, 2012, nos. 47039/11 and 358/12.

22 See: X and Others v. Bulgaria [GC], 2 February 2021, no.22457/16.

also by non-State actors (see Section 4). States' obligations remain in line with the content of the deterrence principle. In this sense, the state's duty also includes actions oriented to the future, and consequently, the decisions of the Court are directed towards the effects designed to safeguard rights and freedoms in the future.

3. Central and Eastern Europe and Western Europe – Statistical Bias

The purpose of the above research is to describe the empirical tendencies of the ECtHR jurisprudence versus Central (and Eastern) European states and Western European states. The analysis is based on open data available on the website of the ECtHR. Two very insightful collections were identified. The first group covers national reports available at www.echr.coe.int (European Court of Human Rights, March 2023)[23]. These reports examine various aspects of the ECtHR jurisprudence during the whole 25-year perspective.

The second group contains the full statistical information about violations of the ECHR during the entire period of the functioning of the ECtHR (1959-2022), connected with 48 States under its jurisdiction (Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Rumania, the Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom).

Based on the first collection of data (national reports), a few elements were selected: 1) the rate of judgments against a country, 2) the rate of violation of Article 3 of the ECHR, and 3) the rate of violation of Article 6 of the ECHR and the nature of the violation under the fair trial standard. At the time of the analysis, data was available for the following Central and Eastern European countries: Albania, Armenia, Croatia, Czech Republic, Georgia, Greece, Hungary; and the following Western European countries: France, Germany, and Italy.

Regarding Hungary, in almost 94% of the judgments delivered in the described period, the Court has given judgment against the State, finding at least one violation of the Convention; over half of the findings of a violation concerned Article 6 (right to a fair trial), referring mainly to the length of the proceedings. Prohibition of torture and inhuman or degrading treatment amounted to 7.42% of all types of ECHR violations.

23 The ECHR in Facts & Figures (coe.int) The ECtHR's series of documents provides a global overview of the Court's work and the extent to which its judgments have an impact in each Member State.

In more than 80% of the judgments delivered concerning Albania, the Court has ruled against the State, finding at least one violation of the Convention. Almost half of the findings of a violation concerned Article 6 (right to a fair trial), relating mainly to the unfairness of the proceedings and failure to enforce final judicial decisions. The breaches of prohibition of torture and inhuman or degrading treatment were confirmed in 5.59% of cases.

Similarly, in about 81% of the judgments delivered by the ECtHR concerning the Czech Republic, judgments were given against the State by finding at least one violation of the Convention. Prohibition of torture and inhuman or degrading treatment (Article 3) amounted to 2.42% of the cases. Over 61% of the findings of a violation concerned Article 6. A further 13.22% concerned a violation of Article 5 (right to liberty and security).

In three-quarters of the judgments delivered concerning Georgia, the Court adjudicated against the State, finding at least one violation of the Convention. The right to a fair trial (Article 6) was jeopardised in 25.87% of the cases, and the prohibition of torture and inhuman or degrading treatment (Article 3) in 24.88%.

In almost 90% of the judgments delivered concerning Greece, the Court has given judgment against the State, finding at least one violation of the Convention, including the right to a fair trial (Article 6) in 50.32% of them and the prohibition of torture and inhuman or degrading treatment (Article 3) in 9.70% of all cases. In over 90% of the judgments delivered concerning Armenia, the Court has ruled against the State, finding at least one violation of the Convention. Prohibition of torture and inhuman or degrading treatment (Article 3) was found in 12.27%, and the right to a fair trial (Article 6) was confirmed in 23.47% of all cases. In about 80% of the judgments delivered concerning Croatia, the Court has adjudicated against the State, finding at least one violation of the Convention, including the prohibition of torture and inhuman or degrading treatment (Article 3) in 6.61% and violation of a right to a fair trial (Article 6) in 49.22% of cases.

This contrasts with the data on Western European countries. In more than 70% of the judgments delivered concerning France, the Court has ruled against the State, finding at least one violation of the Convention. Over 60% of violations found concerned Article 6 (right to a fair hearing), specifically the length or fairness of proceedings. Prohibition of torture and inhuman or degrading treatment (Article 3) was found only in 1.20% of the cases. Out of the total number of judgments concerning Germany, the Court found at least one violation of the Convention in over half of the cases and held the State responsible. About half of the violations concerned Article 6, mainly the length of proceedings, accounting for some 40% of the violations found by the Court. Prohibition of torture and inhuman or degrading treatment (Article 3) amounted to 2.31%. In more than 70% of the judgments concerning Italy, the Court has ruled against the State, finding at least one violation of the Convention, including over 60% of violations of Article 6 (right to a fair hearing), specifically the length or fairness of proceedings; violations of Article 3 (prohibition of torture and inhuman or degrading treatment) were found in 2.36% of cases.

In over 30% of the cases concerning Denmark, the Court gave a judgment against the State, finding at least one violation of the Convention. Nearly 40% of the violations concerned Article 6, and almost all of those are related to the excessive length of proceedings. Breach of prohibition of torture and inhuman or degrading treatment (Article 3) was established in 4% of cases.

In more than 62% of the judgments concerning Ireland, the Court has adjudicated against the State, finding at least one violation of the Convention. Prohibition of torture and inhuman or degrading treatment (Article 3) remained at 2.50% of ECHR convention infringements. In almost three-quarters of all its judgments concerning Finland, the Court found against the State for at least one violation of the Convention. Virtually 60% of the findings of a violation concerned Article 6 (right to a fair trial), mainly with regard to length of proceedings. The second most common violation of the Convention found by the Court concerned Article 8 (right to respect for private and family life at almost 15%). Violation of prohibition of torture and inhuman or degrading treatment (Article 3) remained at the level of 1.20%.

Referring to the second type of data titled 'Violations by Articles and States', it may be seen that during the given period of 1958-2022, violations of the prohibition of torture were established 188 times, and violations of the prohibition of other forms of ill-treatment occurred 3,135 times. The data presented in the table is automatically generated based on HUDOC, the official database of the ECtHR.[24]

Prohibition of torture was violated in cases versus Albania (1), Armenia (1), Austria (1), Azerbaijan (3), Belgium (1), Bosnia & Herzegovina (1), Bulgaria (4), France (2), Georgia (1), Italy (9), Moldova (9), Netherlands (1), North Macedonia (3), Poland (2), Romania (2), the Russian Federation (89), Slovakia (1), Sweden (1), Turkey (31) Ukraine (22), and the United Kingdom (2). However, the prohibition of another form of ill-treatment was found more often – in cases against Albania (4), Armenia (22), Austria (4), Azerbaijan (30), Belgium (29), Bosnia & Herzegovina (2), Bulgaria (91), Croatia (20), Cyprus (10), the Czech Republic (2), Denmark (1), Estonia (8), Finland (2), France (47), Georgia (30), Germany (5), Greece (125), Hungary (46), Ireland (1), Italy (36), Latvia (19), Lithuania (33), Malta (4), Moldova (114), Montenegro (4), Netherlands (10), North Macedonia (6), Poland (67), Portugal (4), Romania (380), the Russian Federation (1190), Serbia (7), Slovakia (6), Slovenia (21), Spain (1), Sweden (4), Switzerland (2), Turkey (348), Ukraine (383), and the United Kingdom (17).

Consequently, cases against the Russian Federation, Romania, Turkey, and Ukraine amounted to 2,301 cases out of a total number of 3,135 cases based on the violation of Article 3 when referring to the infringements of the prohibition of other forms of ill-treatment. When analysing the given data, it should be taken into account that the countries listed above accepted the jurisdiction of the Strasbourg Court at different periods of time, and with a certain simplification it can be considered that the Western European countries ratified the ECHR earlier than the

24 Violations by Article & by State (coe.int)

Central and Eastern European countries. Analysing the figures, it is clear that the empirical data supports the conclusion of a quantitative trend as regards violations of Article 3 of the ECHR. Based on the quantitative data, as indicated in the introduction, it should be pointed out that the Court, when adjudicating, considerably more often confirmed violations of Article 3 of the Convention in the case of Central and Eastern European States than in the case of Western European States. With a certain degree of caution, therefore, it may be concluded that this state of affairs results in a sort of presumption of a higher level of threat to the rights and freedoms protected by the ECHR when the Court rules on violations of the Convention regarding Central and Eastern European states. This could be observed as a symptom of the deterrence principle and, at the same time, as a factual presumption based on a probabilistic factor, i.e. the frequency of previous violations.[25]

4. Types of Cases: Poland and Hungary – Description

For a subsequent analysis two countries were selected, which were regarded as representative of Central Europe. Moreover, both countries have similar quantitative data in terms of judgment rate against the state and Article 3 violations. In the case of Poland, this amounts to two breaches of the prohibition of torture and 67 infringements of the prohibition of other forms of ill-treatment; in the case of Hungary, there were no violations of the prohibition of torture; however, in 47 cases there were breaches of other forms of ill-treatment. Accordingly, it was decided to compare the nature of the cases in which the Court had found a violation of Article 3, most often, we may add, as one of a number of other violations of the Convention. The examination of the cases allows the following areas to be selected:

1) Asylum cases, including push-back cases (Poland, Hungary);
2) Enforcement procedures – especially the condition of the imprisonment's execution (Poland, Hungary);
3) Application of preventive measures, especially detentions on remand and pretrial detentions (Poland, Hungary);
4) Punishment of life imprisonment without parole (Hungary);
5) Abortion rights (Poland);
6) Evidentiary issues (Poland, Hungary).

These six areas are further divided into two groups. The first group covers issues that concern both Hungary and Poland. The second group contains issues that concern only one of the countries. The latter area can be considered as a domestic specificity – with the exception, however, that while the issue of restrictive abortion

25 Janusz-Pohl. 2020, 37 et seq.

law has remained only a Polish domain, life imprisonment without parole has been the subject of study only in relation to Hungary, although it is also becoming a Polish focus. The Polish legislator recently introduced a similar institution into the Criminal Code.[26]

The first group of cases consists of abusive expulsions and the violation of asylum law. When it comes to Hungary, the so-called 'summary expulsions' were analysed in the case of Shahzad v. Hungary (8 July 2021, no. 12635/17). The applicant, a Pakistani national, had entered from Serbia to Hungary in 2016 with a group and had been subject to subsequent summary expulsion by the police. The Court stated the violation of Article 3 in conjunction with Article 4 of Protocol No. 4 to the ECHR (prohibition of collective expulsion of foreigners) and Art. 13 (right to an effective remedy). The Court found, in particular, that the applicant had been subject to a 'collective' expulsion as his individual situation had not been ascertained by the authorities who had not provided genuine and effective ways to enter Hungary, and the applicant's removal had not been a result of his conduct.

Another case of the violation of Article 3 regarding asylum cases refers to the case of Ilias and Ahmed v. Hungry and the Case of R.R. and Others v. Hungary. In the former, the case of Ilias and Ahmed (21 November 2019, no. 47287/15), the applicants, two asylum-seekers from Bangladesh, had spent 23 days in a border transit zone in Hungary before being expelled to Serbia after the rejection of their asylum applications. The Court ruled that the Hungarian authorities had failed in their obligation to assess the risks that the applicants might have been barred from the asylum procedure in Serbia or been expelled from country to country and sent back to Greece, where living conditions in the refugee camps had already been found incompatible with the Convention. Moreover, the court had decided on the violation of Article 3 of the ECHR concerning the applicant's expulsion to Serbia, but at the same time, no violation of Art. 3 concerning living conditions in the transit zone had been found. Additionally, the case of R.R. and Others (2 March 2021, no. 36037/17) concerned the confinement of the applicants, a family of asylum-seekers, in the Röszke transit zone near the Serbian border in April-August 2017. In this case, violations of Article 3 in conjunction with Article 5 § 1 (right to liberty and security) and Article 5 § 4 (lawfulness of detention) were established. The Court found, in particular, that the lack of food provided to R.R. and the conditions of stay of the other applicants (a pregnant woman and children) had led to a violation of Article 3. It also found that the applicants' stay in the transit zone had amounted to a *de facto* deprivation

26 As of October 1, 2023. The court, when imposing a sentence of life imprisonment or imprisonment for a term of not less than 20 years for an act committed by the offender already after a final conviction for a crime against life and health, freedom, sexual freedom, public security, or a crime of a terrorist nature, and combining it with the prohibition of conditional release. The same is to be the case when imposing life imprisonment (para. 4 of Article 77 of the Penal Code) if the court finds that the nature and circumstances of the act and the personal characteristics of the offender indicate that their remaining at liberty will cause a permanent danger to the life, health, freedom, or sexual freedom of others. See: Hermeliński & Nita-Światłowska 2018.

of liberty and that the absence of any formal decision of the authorities and any proceedings by which the lawfulness of their detention could have been decided speedily by a court had led to violations of Article 5.

Similarly, asylum cases concerning Poland were adjudicated by the ECtHR. There is a resemblance between the case of Shahzad v. Hungary and the case of D.A. and Others v. Poland, 8 July 2021, 51246/17. The Court confirmed the violation of Article 3 as far as the applicants were being denied access to the asylum procedure and exposed to a risk of inhuman and degrading treatment and torture in Syria and that there had been violations of Article 13 in conjunction with Article 4 of Protocol No. 4 to the Convention. The Court held that it is not necessary to examine whether there had been a violation of Article 3 of the ECHR on account of the applicants' treatment by the Polish authorities during border checks. In the court's opinion, Poland had failed to fulfil its obligations under art. 34 ECHR and, moreover, continued to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to remove the applicants to Belarus – if and when they present themselves at the Polish border.

Another famous asylum seekers' case refers to MK and the Others v. Poland 23 July 2020, nos. 40503/17, 42902/17 and 43643/17. This case concerned the repeated refusal of Polish border guards on the Belarus border to admit the applicants, who had come from Chechnya and had asked for international protection. The applicants alleged that the Polish authorities had repeatedly denied them the possibility of lodging an application for international protection in breach of Article 3 of the ECHR. They also invoked Article 4 of Protocol No. 4 to the Convention, alleging that their situation had not been reviewed individually and that they were victims of a general policy that was followed by the Polish authorities with the aim of reducing the number of asylum applications registered in Poland. The applicants stated that under Article 13 in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention, lodging an appeal against a decision denying someone entry into Poland did not constitute an effective remedy as it would not be examined quickly enough, would have no suspensive effect, and would not be examined by an independent body. Moreover, the applicants complained that the Polish authorities had not complied with the interim measures granted to them by the Court, in breach of Article 34 of the Convention[27].

The second collection of cases connected both with Hungary and Poland have references to the inhuman and degrading punishment in cases concerning a situation of widespread prison overcrowding. These cases present a systemic lack of protection during enforcement procedures in criminal cases.

27 A different case, but worth noting, is Liu v. Poland, 6 October 2022, no. 37610/18. The applicant complained that his extradition to China would violate Article 3 and Article 6 § 1 of the Convention as – if extradited and tried – he would be at risk of torture and inhuman and degrading treatment; moreover, he would be denied a fair trial. He also complained under Article 5 § 1 that his detention pending extradition was unreasonably long and, therefore, arbitrary.

The Hungarian example is linked with the case of Varga and Others (10 June 2015, no. 14097/12, 45135/12, 73712/12, 43001/12, 34001/13, 44055/13, 64586/13). The applicants alleged that their respective conditions of detention were or had been inhuman and degrading and that Hungarian law had provided no effective remedy to enable them to complain of the breach of their rights in this respect. The Court found that the applicants' conditions of detention amounted to degrading treatment and that they had no effective remedy to complain of that treatment. Nevertheless, the violations found in the prison overcrowding cases had originated in a general dysfunction in the Hungarian prison system, justifying the application of the pilot judgment procedure. The Court requested the Hungarian authorities to take action to resolve that issue. In the given cases, violations of Article 3 in conjunction with Article 13 (right to an effective remedy) were found.

On the other hand, in Polish cases, there were structural problems of prisoners, i.e. Orchowski v. Poland, no. 17885/04 and Sikorski v. Poland 22.10.2009 no. 17599/05, Szafrański v. Poland, 15 Dec 2015, no. 17249/12 (overcrowding in Polish prison, poor sanitary conditions). An issue of a paraplegic man suffering from severe chronic pain and detained for over two and a half years without adequate medication was adjudicated in case Kupczak v. Poland 25.01.2011 no. 2627/09 (access to medical procedures). In this collection, there are cases concerning a regime in Polish prisons for detainees who are classified as dangerous (Piechowicz v. Poland, 17 April 2012, no. 14943/07 and Horych v. Poland 17.04.2012 no. 13621/08).

Another layer of problems regarding guarantees for persons deprived of their liberty consists of structural problems in pre-trail detention in Poland[28]. An exemplary case in this group is Kuchta and Miętal v. Poland, 2 September 2021, no. 76813/16. Ill-treatment of the applicants during their arrest by police and the allegedly ineffective investigation into the circumstances surrounding the use of force against them were inquired by the ECtHR. The Court considered that the investigation was not carried out with due diligence. Against this background, given the lack of a thorough and effective investigation into the applicants' arguable claim that police officers had beaten them, the Court found that there has been a violation of Article 3. Regarding recourse to physical force during an arrest, the Court reiterated

28 The breach of Article 3 when it comes to inhuman or degrading treatment or punishment related to the short-term detention were confirmed by the Court in many cases against Poland, i.e. Kanciał v. Poland, 23 May 2019, no. 37023/13. The case concerned the applicant's allegations of police brutality during a raid by law-enforcement officers, in particular, the use of an electrical discharge weapon. The Government did not advance any additional argument that would allow the Court to establish that the applicant's conduct was of such character as to justify recourse to the considerable physical force that, judging by the relative seriousness of their injuries, must have been employed by the police. Similarly, in Dzwonkowski v. Poland, 12 April 2007, no. 46702/99. In the case of Iwańczuk v Poland, 2001, no. 15196/94, the applicant was subjected to a strip search in an inappropriate manner, such as the making of humiliating remarks by the prison guards; the courts did not act with expediency in the proceedings in which the conditions of the bail were determined and, consequently, his detention after the decision to release him was arbitrarily prolonged, and the criminal proceedings in his case exceeded a reasonable time.

that Article 3 does not prohibit the use of force for a lawful arrest. However, such force may be used only if indispensable and must not be excessive.[29] More importantly, the burden of proof in such a situation is reversed,[30] and the government must prove that the arrest was performed legally and the arrestee's rights protected under the ECHR were assured.

In a subsequent group of cases in which violations of Article 3 ECHR have been found, the ill-treatment formulas encompass inhuman or degrading punishments linked with the issue of a life sentence without parole. Cases versus Hungary fall into this category. Subsequently, examples include the case of László Magyar v. Hungary (20 May 2014) no. 73593/10. Having been found guilty of murder, armed robbery, and several other offences, László Magyar complained to the ECHR about the irreducibility of his life sentence without parole. The Court accepted that persons found guilty of a serious crime could be sentenced to imprisonment for an indefinite period where necessary to protect the population. However, the Court confirmed that Article 3 should be interpreted as requiring the reducibility of life sentences. The Court considered that this case pointed to a structural problem liable to give rise to similar applications and that Hungary should reform its life sentence review system. Consequently, violations of Article 3 and Article 6 § 1 were stated. Similarly, the court decided in the case of T.P. and A.T. (4 October 2016) no. 37871/14 and no 73986/14. The applicants were two prisoners sentenced to life imprisonment without parole. The case concerned new legislative provisions introduced in Hungary in 2015 to review life sentences. The Court deemed as overly long a waiting period of 40 years before a prisoner could begin to hope for a pardon, violating the prohibition of inhuman and degrading treatment and punishment. In this ruling, as in those discussed above, the Strasbourg Court found that life imprisonment violates the guarantee of Article 3 if the convicted person has no realistic possibility of applying for conditional early release, at the most, after serving 25 years in prison. The Strasbourg court reiterated the position that, from the perspective of the guarantee under Article 3, an act of presidential clemency is not sufficient because, due to its discretionary nature, the granting of release in such a case is not subject to any objective criteria or prerequisites depending on the convicted person's behaviour.[31]

The group of cases connected with the violation of Article 3 of the ECHR reflecting a severe abortion law are exclusively '"Polish cases'.[32] The most famous case is R.R. v. Poland, 26 May 2011, no. 27617/04.[33] As a result of the procrastination of the health professionals in providing access to genetic tests, the applicant, who was pregnant, had had to endure six weeks of painful uncertainty concerning the health of her fetus and, when she eventually obtained the results of the tests, it was

29 See: Ivan Vasilev v. Bulgaria, 12, April, 2007, no. 48130/90.

30 See also: Rehbock v. Slovenia, 28 November 2000, no. 29462/95 and Boris Kostadinov v. Bulgaria, 21 January 2016, no. 61701/11.

31 See: Hermeliński & Nita-Światłowska, 2018.

32 For comments on abortion law in Poland see: Janusz-Pohl & Kowalewska, 2023.

33 See also the case Tysiąc v. Poland, no. 5410/03.

already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to legal abortion. It was held that Poland must ensure women's access to legal abortion and ensure that the exercise of this right will not be jeopardised by medical professional refusals concerning the 'conscience clause'. In this judgment, the court issued its landmark decision stating that Poland violated Article 3 in conjunction with Article 8 (the right to respect for private life). Another example highlighting doubts about the interpretation of the restrictive right to legal abortion in the Polish system is the case of P. and S. v. Poland, 2012 no. 57375/08, which concerned the difficulties encountered by a teenage girl who had become pregnant as a result of rape in obtaining access to an abortion, in particular, due to the lack of a clear legal framework, procrastination of medical staff and also as a result of harassment. It must be mentioned that already the very unliberal law on abortion has been limited by the judgment of the Constitutional Court issued in 2020[34]. Problems related to abortion rights in Poland concern the collection of cases pending before the ECtHR, including K.B. v. Poland and 3 other applications (nos. 1819/21, 3682/21, 4957/21, 6217/21), K.C. v. Poland and 3 other applications (nos. 3639/21, 4188/21, 5876/21, 6030/21). Over 1,000 similar applications concerning the threat to abortion rights have been received by the Court.

Finally, the group of cases connected with evidentiary actions and the breach of Article 3 will be discussed. This type of case was more often adjudicated versus Poland than Hungary. Even though, in respect to Hungary, there is the case of R.S. v Hungary, 2 July 2019, no. 65290/14. The applicant had been stopped in his car and had refused to take a breath sobriety test. He had been forced to give a urine sample by catheter because he had been suspected of driving under the influence of alcohol or drugs. The Court held that the authorities had subjected the applicant to grave interference with his physical and mental integrity against his will, as the measure in question had not been necessary, since a blood sample had also been taken to establish whether he had been inebriated, and as a consequence the violation of the prohibition of inhuman or degrading treatment, through the application non-proportional methods, was found by the Court.

As mentioned before, Al. Nashir v Poland, 24 July 2014, no. 28761/11 and Ćwik v. Poland, 5 November 2020, no. 31454/10 are perceived as landmark cases capturing the link between the breach of Article 3 and the evidentiary actions. It is worth noting that in the first case, applicant Al. Nashir had enabled the CIA to detain him at the Stare Kiejkuty detention facility, thereby allowing the CIA to subject him to treatment that had amounted to torture, incommunicado detention, and deprivation of any access to, or contact with his family. The court has found that during his detention in Poland, the applicant was subjected by the CIA to treatment which amounted to torture within the meaning of Article 3 and that this occurred in the course of interrogations with the use of techniques specifically designed to elicit information or confessions or to obtain intelligence from captured terrorist suspects.

34 OTK ZU 2021, item 4.

Furthermore, as can be seen from the transcript of the applicant's recollection of what he endured in CIA custody, as recounted at a hearing before the Combatant Status Review Tribunal, which took place in Guantánamo Bay on 14 March 2007, he confirmed before the US authorities that he had been tortured into confessing. He also stated that he had made up stories during the torture in order to stop it, and that he had been tortured for "the last five years". In the case of Ćwik v. Poland , the Strasburg Court analysed the admissibility of evidence obtained through the ill-treatment of a third party by private individuals, without the involvement or acquiescence of State actors. The Court argued that the protection against conduct proscribed under Article 3 of the ECHR is a positive obligation on the state, even when inflicted by private individuals. The case of Ćwik v. Poland will be discussed in Section 4 of this work and juxtaposed with the cornerstone case in the frame of admissibility of evidence: the case of Gäfgen v. Germany.

5. Case study: Gäfgen v. Germany and Ćwik v. Poland: Article 3 of the ECHR as a Source of Constitutive Rules for Evidentiary Actions – Discussion

As Lord Bingham observed in A and others v. United Kingdom [GC], 2009 no. 3455/05, § 52, torture evidence is excluded because it is "unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice."

Regardless of the pertinence of this statement, the mere recognition of the inadmissibility of such evidence does not prejudge the question of the fairness of the entire proceedings. As a rule, the key in this regard is the response to the question of what are implications of evidence obtained in violation of Article 3 of the ECHR on the fairness of the trial. The ECtHR addressed the very same question in both cases: Gäfgen v. Germany and Ćwik v. Poland. These cases differed significantly from each other, both in terms of the facts and the rulings made. In Gäfgen v. Germany, a violation of Article 3 was committed by the trial authorities in connection with the act of interrogating the suspect. Still, the ECtHR found that this defective illegal procedural act was validated in the subsequent course of the proceedings, and the proceedings as a whole met the standard of fairness. Meanwhile, in Ćwik v. Poland, the violation of Article 3 concerned the conduct of private individuals, and took place outside of the criminal proceedings and not for its purposes. Nevertheless, in this second case, the Court found that there was a violation of the right to a fair trial. In these cases two issues are essential: a) verification of the legality (admissibility) of evidence gathered in violation of the law, and b) the impact of such evidence on the question of the fairness of the proceedings and, consequently, the outcome of the entire case.

In both cases the Court found a violation of Article 3 of the ECHR and stated that this had an effect on the legality of evidence. Consequently Article 3 of the ECHR should be challenged as a source for constitutive rules determining the validity of evidence.

As mentioned before, the first attempt in legal sciences to use the concept of constitutive rules for the interpretation of Article 3 of the ECHR was made in the example of the case of Gäfgen v. Germany, and M. Mittag has performed an in-depth study in this regard. This author has operated on the basic version of the constitutive rules concept by Searle. His conclusions have shown the potential of the concept but also its certain shortcomings. Meanwhile, in the last 20 years, especially from 1996 onwards, the idea of constitutive rules has been interpreted by Polish scholars. However, the purpose of this interpretation was to adapt the idea of constitutive rules to the demands of legal thinking. S. Czepita,[35] a Polish legal theoretician, formulated additional assumptions that enabled its application to private civil law considerations. In turn, the author of the present study has used this transformed concept for the interpretation of legal actions in the criminal proceedings.[36] These new optics enable a return to the considerations of M. Mittag. Naturally, a comprehensive presentation of this issue goes beyond the scope of this study. At the same time, in order to provide an outline of the conclusions – at least in a tentative way – it is necessary to examine the foundations of the concept of constitutive rules, briefly reporting on its evolution. What must be emphasised is a core assumption for this concept, which states that, undoubtedly, legal action is a pure example of conventional legal acts. At the same time, criminal procedure should be perceived as a sequence of legal actions. Consequently, the constitutive rules should be attributed to each legal action in this sequence.

Let us put the spotlight on the core acknowledgements.[37] It should be remembered that Searle's approach refers to the conception of performative utterances developed by Austin, specifically to locutionary, illocutionary and perlocutionary acts.[38] An illocutionary act is an intentional act performed by an individual uttering a performative sentence (locutionary act), the purpose of which is to create a new state of affairs unattainable in any other way.[39] Legal actions are an example of illocutionary acts. In the general theory of law, legal actions are also denominated as formalised conventional acts (actions). It means the set of specific rules attached to the given types of legal action could be distinguished.[40] These rules are divided by scholars into two groups: 1. a) constitutive rules and b) regulative rules (i.e. Searle); or 2. a) rules of conventionalisation and b) rules of formalisation (i.e. Czepita).

35 Cf. Czepita, 2016, pp. 138–139; Czepita, 1996, p. 146 *et seq*.
36 Janusz-Pohl, 2017a, pp. 23–24. and the literature referred therein; Janusz-Pohl, 2017b.
37 Description based on Janusz-Pohl, 2017a, pp. 23–24. and the literature referred therein; Janusz-Pohl, 2017b.
38 Austin, 1962, p. 311 *et seq*.
39 For more see: Janusz-Pohl, 2017a, 25.
40 See Janusz-Pohl 2017a, 26 *et seq*.; Janusz-Pohl 2017b.

Searle relied on performative utterances (i.e. illocutionary acts, distinguished by Austin), formulating an independent conception of constitutive and regulative rules. This conception distinguishes speech acts as uttering (muscle movements), propositional, and illocutionary acts. Its crux is the distinction of the so-called elementary illocutionary act.[41] Searle stressed that: "In our analysis of illocutionary acts, we must capture both the intentional and the conventional aspects, especially the relationship between them. In the performance of an illocutionary act in the literal utterance of a sentence, the speaker intends to produce a certain effect by getting the hearer to recognise his [sic] intention to produce that effect".[42] Furthermore, component acts can be distinguished in any act, not only intentional. A component of a given act is held to mean an act, the performance of which is a necessary albeit insufficient condition of performing a given act. A component of a given act is renowned based on another theoretical conception as the material substrate of a conventional act. In Searle's conception, it is crucial to observe that illocutionary acts are interpreted by opposing constitutive rules for given speech acts to regulative rules.[43] As regards the latter, Searle considered such rules regulate antecedently or independently existing forms of behaviour. In turn, constitutive rules not merely regulate but, above all, create or define new forms of actions (conventional forms); therefore, they create new beings, also in terms of legal beings. Searle introduced a pattern of the constitutive rule. The pattern ran as follows: X counts as Y in the context C. He emphasised that constitutive rules were thus rules of conventionalisation. It is worth mentioning that Searle analysed regulative rules on the example of the rules of etiquette, finding that their observation did not undermine the existence of specific acts but determined their form.[44]

It should be noted that Searle's concept was drafted in very general terms without going into detail about all the complexities. At the same time, Searle has inspired many scholars to follow up his steps, one of who was the Polish legal philosopher Stanisław Czepita[45]. The latter has developed the concept of constitutive and regulative rules by denominating them as constitutive rules (rules of conventionalisation) and formalisation rules. Both types have been divided into two other groups: constructive rules and consequential rules. The constructive rules (rules of construction) indicate how to perform a conventional act validly (constitutive rules)

41 Searle, 1967; Searle, 1987.

42 Searle, 1967, p. 45.

43 This constructed foundation for the interpretation in: Mittag, 2006, pp. 637–645.

44 Searle, 1967, p. 36. Disavowing the approach to regulative rules as second types of rules helped Searle discern a new approach to illocutionary acts. It inspired scholars to search for such conventional act rules, the breaking of which would not undermine the validity (existence) of a given act. In this sense, it appears that regulative rules inspired Czepita to distinguish the rules of formalisation of conventional acts and devise a related mechanism of formalisation. See: Janusz-Pohl, 2017a, p. 25 *et seq*.

45 Cf. Czepita, pp. 2016, 138–139; Czepita, 1996, p. 146 *et seq*.

and effectively (formalisation rules).[46] Consequential rules, therefore, show the consequences of the infringements of constitutive rules or the infringements of formalisation rules. Through this approach, the author of the present study has analysed the defectiveness of legal actions, starting with the sanction of 'non-existent legal action' and nullity *ex tunc* (in case of breach of constitutive rules) through inadmissibility (in case of breach of some constitutive rules) to nullity *ex nunc* and non-futility (in case of breach of formalisation rules).[47] Besides, it can be observed that many formalisation rules remain only the rules of construction and are not linked with consequential rules, or the so-called *lex imperfectae*. It means that any legal consequence is not connected with the breach of formalisation rules of this type.

Therefore, it could be asked, what is the main contribution of this concept to legal science? The separation of constitutive rules (rules of conventionalisation) and rules of formalisation indicates that the rules for the performance of legal acts are diversified. Only a few of them have the status of constitutive rules, and most are rules of formalisation, the violation of which – sometimes – does not cause any negative legal consequences. This concept also has two other important features relevant to the interpretation of legal actions: it allows imposing the sanctions of nullity and non-existence (in the legal sense) when it comes to legal systems that do not provide statutory sanction of nullity. This is critical, as the recognition that a rule has a constitutive status and a primary meaning enables the declaration of nullity of an act performed in violation of a constitutive rule, even when such a sanction does not exist at the level of statutory regulation. By all means, the discussion on how to determine that a rule has the status of a constitutive rule for a legal (procedural) act of a given type is beyond the scope of this discussion. This issue has been tackled by other studies[48]. It should be pointed out that constitutive rules, as rules of validity, refer to what (in the background of this concept) is called the material substrate for a given conventional action (legal action): the 'primary constitutive rules'. In addition, constitutive rules concern the existence of the competence of individuals to perform a legal action of a given type; in some cases, these rules may have the status of temporal rules. For further consideration, the two types of constitutive rules, i.e. rules on the material substrate and rules on the competence to perform a conventional act (legal action) of a given type, are pivotal.

Referring to the first type of constitutive rules, the initial assumption states that for any conventional act of a given individual (even though the conventional act may be attributed to many individuals when it comes to collective actions), a necessary condition to perform a given conventional act is performing a specific behaviour. This behaviour is called the 'material substrate' for the given conventional action[49].

46 Effectiveness is understood in a specific way and is linked with the typical purpose (result) for the given legal action. So, from this perspective, effective legal action is a valid action performed under formalisation rules for the given type, and its effect is described by law.

47 This approach is given by Janusz-Pohl, 2017b.

48 Ibidem.

49 Cf. Czepita, 2016, pp. 138–139; Czepita, 1996, p. 146 *et seq*.

It should be remembered that the material substrate, in Searle's initial conception, is denominated as an elementary act. Moreover, material substrates of conventional acts may vary (different behaviours, i.e. expression of knowledge and expression of intent, should be distinguished). In the present case, the material substrates consisting of the expression of knowledge are of core importance. In both cases (Gafgen and Ćwik), the alleged pieces of evidence were in some connection with the defendant's expression of knowledge.

Yet, it is worth recalling that, following the findings of the concept of conventional acts in law applied as an instrument for interpreting the criminal process, it is established that the subject performing a conventional action must carry out the material substrate of this act in a conscious manner. Exogenous coercive factors must not limit the will of such a subject. In previous research, the author of the present study established that the consciousness of the person performing the legal action in criminal proceedings must extend to the execution of the behaviour (being the material substrate of the given action). At the same time, its (the behaviour's) freedom means that the person's will, unfettered by any exogenous factors, necessarily prompts it.[50] It can also be mentioned that the impact of the use of deception has already been discussed.[51]

Assumptions on how to perceive the material substrate for a conventional act directly correspond with the ill-treatment *sensu largo* formulas. After all, it is not difficult to see that, regardless of whether the legal system employs the sanction of nullity, the performance of a legal act, including an act of interrogation in violation of Article 3, and therefore in violation of freedom of expression, is perceived as invalid (null and void). However, as indicated earlier, the criminal process represents nothing more than 'a certain sequence' from the point of view of this concept; the nullity of a legal act from this perspective is seen as an empty chain of this sequence. Subsequently, it is necessary to assess how this empty cell affects the entire process and, as a consequence, the (final) judgment that was passed (outcome of the process). In previous studies, it had been established that, as a principle, constitutive rules for legal (procedural) actions do not assume the automatism that can be observed in the case of constitutive rules for games (e.g., chess games). In the case of the latter, after all, a violation of a constitutive rule, thereby making an invalid move, nullifies the entire game. The issue of constitutive rules linked to the material substrate for a legal act will be relevant to the analysis of the Gäfgen v. Germany case.

The second type of constitutive rule relevant for further discussion is one that determines the competence (power, entitlement) of a given entity to perform a certain legal action. In light of the concept being discussed, the existence of such competence in the given legal system is a condition for the validity of the legal action.

50 See Janusz-Pohl, 2017a, p. 70.

51 Janusz-Pohl, 2017a, p. 80 *et seq*. and the literature referred therein. Although such practices are incorrect, it seems that their application in Polish law does not allow to invalidate in an unambiguous way the defendant's deceptive statement of intent.

Previous studies have shown that the issue of establishing competence (entitlement) is, however, very complex; for example, in the case of enforcement authorities in criminal proceedings, the competence does not always address specific actions but has the status of general competence, which is covert by *ex officio* principle and takes all investigative actions necessary to determine whether a crime has been committed. Meanwhile, in the case of private players, the performance of a legal (procedural) act generally requires an individualised competence (to file an appeal, take evidence, and attend a hearing). When analysing the entitlement to perform an act, it is also necessary to consider the assumption that a valid and effective procedural act can only be performed in a criminal trial, so that it cannot be performed outside the criminal proceedings. This finding will be relevant to the Ćwik v. Poland case analysis.

In an attempt to relate the indicated assumptions to the two cases examined by the ECtHR, the analysis will begin with the case of Gäfgen v. Germany. To briefly highlighting the facts: on 27 September 2002, Magnus Gäfgen (G.), a student in Frankfurt am Main, lured Jakob von Metzler (J.) into his flat, killed the eleven-year-old boy, and hid his dead body. Subsequently, he extorted the parents for a ransom. When G. picked up the ransom, he was under police surveillance. G. indicated that two kidnappers held the boy hidden in a hut by a lake. Concerned about the life of J., D., deputy chief of the Frankfurt police, ordered E., an officer, to threaten G. with considerable physical pain and, if necessary, to subject him to such pain to make him reveal the boy´s whereabouts. Because of E.'s threat, G. disclosed the whereabouts of J.'s corpse.

The applicant, in this case, alleged that the treatment to which he had been subjected during police interrogation concerning the whereabouts of the boy J. constituted torture prohibited by Article 3. He further alleged that his right to a fair trial as guaranteed by Article 6, comprising a right to defend himself effectively and a right not to incriminate himself, had been violated in that evidence obtained in violation of Article 3 had been admitted at his criminal trial.

In assessing the treatment to which the applicant was subjected, the Court noted that it was uncontested between the parties that during the interrogation that morning, the applicant was threatened with intolerable pain by detective Officer E., on the instructions of the deputy chief of the Frankfurt am Main police, D., if he refused to disclose J.'s whereabouts. The process, which would not leave any traces, was to be carried out by a police officer specially trained for that purpose, who was already on his way to the police station by helicopter. It was to be conducted under medical supervision. Indeed, this was established by the Frankfurt am Main Regional Court both in the criminal proceedings against the applicant and the criminal proceedings against the police officers. Furthermore, it is clear both from D.'s note for the police file and from the Regional Court's finding in the criminal proceedings against D. that D. intended, if necessary, to carry out that threat with the help of a "truth serum" and that the applicant had been warned that the execution of the threat was imminent. Having regard to the relevant factors, the Court reiterated

that according to its own case-law, a threat of torture could amount to torture. In particular, the fear of physical torture may itself constitute mental torture. However, the Court considered that the method of interrogation to which the applicant was subjected in the circumstances of this case amounted to inhuman treatment but that it did not reach the level of cruelty required to attain the threshold of torture. In the case, treatment was considered to be 'inhuman' because, *inter alia*, it was premeditated, was applied for hours at a stretch, and caused either actual bodily injury or intense physical and mental suffering. The Chamber considered that Detective Officer E. had threatened the applicant on the instructions of the deputy chief of the Frankfurt am Main police, D., with physical violence, causing considerable pain to make him disclose J.'s whereabouts. It found that further threats alleged by the applicant or alleged physical injuries inflicted during the interrogation had not been proved beyond reasonable doubt.

Moreover, the Court concluded that in the particular circumstances of the applicant's case, the failure to exclude the impugned real evidence, secured following a statement extracted by means of inhuman treatment, did not have a bearing on the applicant's conviction and sentence. As the applicant's defence rights and his right not to incriminate himself have likewise been respected, the whole trial must be considered fair. The Court stated that a criminal trial's fairness is only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings. In this case, the conviction was based exclusively on the new, full confession by the defendant. The Court, therefore, held that the causal link between the threat of torture and the conviction had been broken, as the breach of Article 3 in the investigation proceedings had no bearing on the applicant's confession at the trial, and the trial as a whole was fair in terms of Article 6. At the beginning of the proceeding, G. confessed voluntarily that he had murdered J., and the court instructed him on his rights. The judgment was primarily based on this confession. The impugned items of real evidence were only used to test their veracity. The ECHR concluded: "It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant´s conviction and sentence in respect of the impugned real evidence." A single 'unfair' procedural act is able to make the whole trial unfair but does not do so necessarily. The unfairness of the trial is not a matter of necessity or causation, but of an assessment of the trial as a whole.

Interpreting the Gäfgen case in accordance with the concept of constitutive rules, it can, therefore, be recognised that the ECtHR confirmed the constitutive nature of the interrogation rule, which has its source in the wording of Article 3 of the ECHR. It should be further noted that even if there had not been any legal source for this rule (as Article 3 is), such a constitutive rule would be adopted based on a general assumption for this concept in relation to the material substrate for a conventional act (the primary constitutive rule). This is due to the fact that for a given behaviour to be considered a material substrate its performance must be conscious and voluntary and therefore unfettered by external factors of a coercive nature. At the same time,

the interrogation of a suspect as a procedural act performed in violation of the indicated rule must be qualified as void. In addition, such qualification obtains under the applied concept regardless of whether the legal system in question operates the sanction of nullity *ex-lege*. In the case under discussion, this sanction arises due to the violation of a constitutive rule (primary rule) concerning the substantive substrate of a conventional act (interrogation act). However, as indicated previously, the nullity of such an action is only an empty chain in the sequence, and it depends on the assessment of its impact on the judgment handed down as to whether the entire process is considered defective. In conclusion, it should therefore be considered that in the Gäfgen case, the ECtHR applied an interpretation that coincides with the concept of constitutive rules. In the Court's perception, the nullity of evidence did not impact the validity and, in this sense, fairness of the trial.

Meanwhile, the second case, Ćwik v. Poland, differed significantly from the case of Gäfgen v. Germany (no. 22978/05, ECHR 2010). In contrast to Gäfgen, in the Ćwik case the violence had been used by private individuals and not towards the applicant but a third person outside of the criminal trial. Therefore, in this judgment the Court held that the sanction of nullity relating to one piece of evidence extends to the entire proceedings.

In the case of Ćwik v. Poland, the domestic court determined the facts of the case, inter alia, on the basis of a recorded 'interrogation' of K.G. who, together with the applicant (Ćwik), participated in the unlawful practice of smuggling cocaine from the USA to Poland. Both K.G. and the applicant (Ćwik) came into conflict with other members of the organised group. Consequently, K.G. was abducted and tortured by the other members of the group. During the 'private interrogation', K.G. disclosed information on the location of the smuggled cocaine and cash. K.G. was later released from the abductors by the police, who also entered into possession of the recording of the 'private interrogation'. What was crucial was that the recording was then used as a piece of evidence in the criminal proceedings against the applicant (Ćwik), who refused to give explanations during the trial and pleaded not guilty. In its judgment in Ćwik v. Poland, the Court pointed out that the prohibition outlined in Article 3 of the ECHR had previously been referred in the case law not only to public officials but also to private individuals. Particularly in cases concerning extradition or expulsion, the Court has examined whether transferring a person to another jurisdiction may expose him or her to a real risk of maltreatment by private persons. But it was only in the case of Ćwik v. Poland that the Court linked the prohibition expressed in Article 3 to the behaviours of individuals in connection to evidentiary proceedings.

The question before the Court, which had not arisen before, was whether information obtained from a third party as a result of ill-treatment inflicted by private individuals, even where there had been no evidence of involvement or acquiescence of State actors, should be excluded as pieces of evidence in criminal procedure. The Court said that the admission of evidence obtained from a third party due to ill-treatment proscribed by Article 3 when such ill-treatment was inflicted by private individuals, irrespective of the classification of that treatment, should be excluded. In

the judgment, the Court emphasised that the protection against conduct proscribed under Article 3 of the ECHR is the state's positive obligation also when inflicted by private individuals. This assertion was supported by reference to multiple rulings on the state's positive obligations, including procedural ones, arising from Article 3 of the ECHR[52].

To sum up: in the Court's view, the very admission of the impugned transcript into evidence in the criminal proceedings against the applicant rendered the proceedings as a whole unfair, in breach of Article 6 para. 1 of the ECHR.

In the context of the case law under discussion, a question arises of whether the use of evidence obtained outside criminal proceedings (prior to their instigating) by private individuals as a result of ill-treatment may be perceived as the establishment by the state of a legal framework for tolerating the collection of evidence by private individuals in violation of Article 3 of the ECHR, and therefore for tolerating such conduct in general. In the Ćwik case, evidence (recording of statements) was produced outside the criminal proceedings, before its initiation and, more importantly, for other purposes. As Wąsek-Wiaderek rightly observed, it had been secured in the course of lawful action of the Police (search), and its use in the criminal trial could not in any way reduce K.G.'s protection against torture or inhuman treatment.[53]

Applying the assumptions of the concept of constitutive rules to the case of Ćwik v. Poland, it can be observed that 'private interrogation' was not a legal action in the trial, and from this perspective, the use of ill-treatment methods must be observed separately as a criminal offence of the individual. From the perspective of the criminal process, therefore, private interrogation cannot be qualified from the angle of validity (nullity) of legal action, and so is excluded from the point of view of a violation of a constitutive rule. Nor is there any question of private actors' competence (legitimacy) to conduct interrogations. This 'private interrogation' (impacted by the violation of Article 3) in the legal sphere can only be assessed as another crime and consequently concerns the question of whether evidence in a criminal trial can be derived from a separate crime. In addition, it may be pointed out that the issue here is only the content of statements made under ill-treatment, not any material evidence obtained as a result of this private interrogation. Therefore, only a possible exclusionary rule in the framework of the statements' content comes into play. It should be mentioned that the question of the admissibility of such evidence is most often the subject of national regulations within the framework of the issue of evidentiary bans. The Polish system does not provide for an exclusion rule concerning evidence derived from a separate crime (not connected to the ongoing proceeding and not for the purposes of such proceedings) – the 'fruits of a poisonous tree' concept. Therefore, in the analysed case, there were no grounds for excluding this evidence as inadmissible in criminal proceedings conducted in Poland.

52 For more see: Wąsek-Wiaderek, 2021, pp. 343–374.
53 Ibidem.

From the perspective of the concept of constitutive rules, the assumption can be made that in the absence of clear indications of statutory sanctions of invalidity of proceedings *ex lege*, the assessment of evidence derived from a crime in the plane of its reliability is still permissible, especially taking into account the circumstances of the case and the incriminating nature of this evidence for the accused. Meanwhile, as indicated at the outset, the Court reiterated that the use in criminal proceedings of evidence obtained as a result of a person's treatment in violation of Article 3 – irrespective of whether that treatment is classified as torture, inhuman or degrading treatment – made the proceedings as a whole automatically unfair, in violation of Article 6. This is irrespective of the evidence's probative value and whether its use was decisive in securing the defendant's conviction. Yet applying the constitutive rules concept argues in favour of a less automatic rule of weighing the relevance of criminal evidence to the factual findings that form the basis of the decision in a case. Given this state of affairs, the court's stance should be critically assessed. Additionally, it can be observed that, in the case against Poland, a Central European country, the Court invoked a strong version of the deterrence principle by extending the effects of a violation of Article 3 ECHR to the extra-procedural actions of private individuals. The standpoint presented by the Court cannot be justified by appealing to the concept of constitutive rules and, in this sense, is methodologically incoherent with the approach expounded in the Gäfgen ruling. As lacking methodological justification, it also appears to be a weak argument for the protection of rights and freedoms covered by the ECHR.

6. Conclusions

The considerations presented in this study dealt with selected issues related to the interpretation of Article 3 of the ECHR. General issues concerning the directions of the ECtHR's interpretation of Article 3 were highlighted with a focus on its quantitative aspects and a more substantive analysis of cases against Poland and Hungary. The last part critically reviewed two cases of similar gravity in which the Court referred Article 3 to evidentiary proceedings.

This study seeks to bring out the perspective of Central Europe, noting that the Court has grounds for the adoption of probabilistically oriented factual presumption based, on the one hand, on frequency and intensity of the ECHR's violations and, on the other hand, on the level of guarantees of the law enforcement process in Central Europe. The analysed statistical data gave rise to the development of a cautious research hypothesis as to the general perception of the level of guarantees-bias of criminal proceedings in Central Europe. A certain proxy for these optics is made apparent by the analysis of the Gäfgen and Ćwik cases, in which the court showed a great deal of scepticism about the standards of fairness in the functioning of Polish

courts, tightening the paradigm for the elimination of evidence obtained under ill-treatment conditions and its influence for the evaluation of the whole procedure in question. The case study was presented with the background of the concept of constitutive rules. This is significant insofar as this concept enables the discovery of the very nature of legal actions, i.e its conventionality. In this sense, the concept of constitutive rules in conjunction with the whole idea of conventionality must be undeniably seen as an integrated and coherent approach (as it has been totally and scientifically proven). In turn, the inquiries presented in this study led to the conclusion that the Court used this concept intuitively in the Gäfgen case. Simultaneously, the Court did not apply it in the Ćwik case. Consequently, such optics have undermined the legitimacy of the decision made in the latter case, deeming it too far-reaching. By all means, the analysis presented here does not contain any hard conclusions, but only outlines some hypotheses that require follow-up research.

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Part II

PROHIBITION OF SLAVERY AND FORCED LABOUR

Chapter 4

The Digital Chains of Modern Slavery: A Study of Human Trafficking in Central Europe

Marcin Rau

Abstract

This comprehensive analysis explores the multifaceted issue of human trafficking in the digital era, with a special focus on Hungary and Poland. The article examines how traffickers exploit vulnerable groups, including economic migrants and ethnic minorities, by harnessing the power of artificial intelligence (AI) and social media. It contrasts the approaches of Hungary, which tends to prioritise criminal groups, with Poland's struggles with systemic inefficiencies in victim identification and prosecution. The article further delves into the sophisticated use of digital platforms and AI by traffickers to manipulate and control victims, and the challenges law enforcement faces in adapting to these new technological advancements. Emphasizing the need for international cooperation and a proactive approach, the article highlights the significance of educating the younger generation on the risks associated with social media and AI, underscoring the importance of cybersecurity awareness in combatting human trafficking.

Keywords: Human Trafficking, Digital Era, Hungary, Poland, Artificial Intelligence, Social Media

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1. Introduction: Framing Modern Slavery in the Digital Age and Central European Context

As of the second decade of the twenty-first century, the prevalence of modern slavery, which includes forced labour and forced marriage, is disconcertingly pervasive in contemporary society and violates the fundamental rights and dignity of human beings. Based on the alarming data from the 2021 Global Estimates, over 50 million persons worldwide are affected by these circumstances, equating to almost one in every 150 people.[1] This high figure highlights the enduring and widespread nature of contemporary slavery, a grave issue that frequently results in long-term (if not permanent) enslavement rather than a temporary condition. The digital era has reshaped the landscape of human trafficking, introducing new methods of exploitation. The internet and social media platforms have emerged as double-edged swords: while they offer unprecedented connectivity and opportunities, they also provide a fertile ground for traffickers to exploit vulnerable individuals. The transition from physical chains to digital ones represents a significant shift in the modalities of slavery, rendering it increasingly concealed and, ironically, more widespread. In recent years, a succession of crises has emerged, adding to the complexity of this environment. Prolonged armed conflicts, the COVID-19 pandemic, and the intensification of climate change concerns have collectively resulted in substantial disturbances to education and employment, substantial increases in pervasive extreme poverty, and forced and perilous migration. Alongside these difficulties, there have been more reports of gender-based violence, which increases the likelihood of becoming a victim of modern slavery in one way or another.

Considering the dynamic nature of the modern world, this article does not aim to analyze the effectiveness or ineffectiveness of international law. Rather, its purpose is to highlight that slavery, too, evolves with changing times and demands a shift in perspective. While this paper does not question the importance of creating new regulations to prevent all forms of sexual exploitation of women, human trafficking, and forced labour – as these initiatives are undoubtedly commendable – it emphasises the need for redefining the international community's approach towards cyberspace. A critical aspect of this redefined focus is understanding how platforms like WhatsApp, Facebook, TikTok and Instagram, traditionally viewed as tools for social interaction, are increasingly being exploited by human traffickers. As will be demonstrated in the third section of this article, the primary victims of this exploitation are individuals belonging to the Millennials and Generation Z. To counteract this, proactive measures are essential. This includes actions from social media platform providers, law enforcement agencies, and the users themselves. The issues described here are similar to performing open-heart surgery – they are complex, constantly evolving,

1 International Labour Organisation, 2022.

and require swift responses. This results in limited scientific source materials and reactive law-making. Although the theme of contemporary slavery will be discussed in a broader context, the fifth section of this article will be dedicated to a comparative analysis of the situations in Poland and Hungary, highlighting the unique challenges and responses observed in these two Central European countries.

2. Global Perspectives and Legal Frameworks: Defining Modern Slavery in the Context of the ECHR

It may seem unthinkable in the 21st century, but modern slavery exists worldwide, in every country, irrespective of its economic or political status. The forms and intensity of this threat vary across regions, but it is undeniably a global issue. It encompasses a wide range of practices, such as forced labour, human trafficking, child labour, forced marriages and sexual exploitation. Notably, these practices often overlap, complicating both the efforts to combat them and the identification of victims. Contrary to historical slavery, contemporary slavery often makes use of less obvious methods of control over its victims, such as debt manipulation, threats of violence, or coercion into forced labour under the guise of legitimate employment contracts. A common characteristic across all these scenarios is that the individual is unable to escape or refuse the exploitative circumstances due to various coercive tactics, including threats, assault, deceit and abuse of power. This backdrop sets the stage for understanding the role of social media in modern slavery, as these platforms have become a new battlefield in the fight against these heinous practices. The advent of digital communication has added a layer of complexity to the already intricate web of modern slavery, requiring new strategies and approaches to address its ever-evolving nature.

While every kind of slavery deserves careful examination, our primary emphasis will be put on forced labour and human trafficking, which manifest in different ways according to European nations' examples. The concept of forced labour, as outlined in the Article 4 of the European Convention on Human Rights, is central to this discussion.[2] It is defined as any work or service that is exacted from a person under the threat of penalty and without their voluntary consent.[3] Forced labor is characterised by the use of compulsion to make someone work against their will, regardless of the nature or industry of the employment. For a situation to be recognised as forced labour, both legally and statistically, it must include coercion into doing work against

2 Article 4 of the Convention – Prohibition of slavery and forced labour: 1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour, European Court of Human Rights, 1950. European Convention on Human Rights.

3 Guidelines concerning the measurement of forced labour, 2018.

one's choice, along with the threat of punishment.[4] Coercion refers to the imposition of work without voluntary consent and can manifest in two ways: directly – by means of verbal threats that detail particular aspects of coercion, or indirectly – by means of the coercion exerted over others. It may occur either in pre-employment, when candidates are coerced into accepting a position, or during their employment, when they are prevented from abandoning their job or are required to perform duties that were not initially included in their contract.[5]

It should be explained here that although Article 4 does not explicitly refer to human trafficking, it is necessary to analyze this phenomenon as it is an inherent element of modern slavery. According to the European Court of Human Rights, human trafficking is defined by three fundamental aspects with the following characteristics:

1) Action (recruitment, transportation, transfer, harbouring or receiving of persons): This refers to the act of traffickers physically moving or controlling victims in some way. The persons who fall victim to trafficking are recruited through a variety of methods, including bogus job advertising or love connections. Subsequently, they are transported to regions where they are exploited. The fact that this migration may take place either inside a country or internationally highlights the fact that human trafficking is a worldwide phenomenon.[6]
2) Mechanisms (including coercion, threat or use of force, fraud, deception, abuse of power or vulnerability): Traffickers make use of various strategies to exert control over their victims. Physical aggression, psychological manipulation, deception, and the exploitation of victims' weaknesses, such as their socio-economic situations, lack of information, or legal position, are all examples of this type of violence. Abuse of power or a position of vulnerability is especially crucial since it frequently involves taking advantage of the victims' disadvantageous situation in order to force them into exploitative circumstances. This is a particularly significant aspect of the abuse of power.[7]
3) Exploitative Purpose (including the exploitation of prostitution, sexual exploitation, forced labour, slavery, practicing acts that are similar to slavery, servitude or the removal of organs): The ultimate purpose of human trafficking is exploitation, which can take many different forms. Men are predominantly exploited in sectors like construction, agriculture and manufacturing.[8] On the other hand, the most common sectors where women are exploited are in the domestic service industry and the wider service sector.[9] Victims of

4 Guide on Article 4 of the European Convention on Human Rights: Prohibition of Slavery and Forced Labour, 2022.
5 Ibid.
6 Ibid., p. 6.
7 Ibid.
8 International Labour Organisation, 2022, p. 30.
9 Ibid.

> exploitation often find themselves trapped in circumstances that offer little chance for escaping, and they risk terrible consequences if they attempt to break free.[10]

The development of new international agreements is a vital stride in the ongoing fight against human trafficking. Nevertheless, the difficulty does not stem from a shortage of definitions or the creation of norms, but rather from the successful implementation of these rules. International human rights laws prohibit numerous modern techniques of human trafficking. However, the swift advancement of information and communication technologies has made certain international solutions outdated. The global community faces a huge difficulty in speaking with one voice across numerous dimensions, including collaboration between States and social media platform providers. To effectively combat human trafficking and address the rapid improvements in technology, it is crucial to adopt a proactive and collaborative strategy in updating legal frameworks to keep up with the changing reality.

3. The Role of Social Media in Modern Slavery

Within the contemporary context of modern slavery, social media platforms, including but not limited to Facebook, Instagram, TikTok, LinkedIn and WhatsApp, have emerged as critical instruments in the human traffickers' arsenal. These platforms have transformed from simple means of social interaction to sophisticated channels through which vulnerable individuals can be exploited and manipulated. The starting point to understand why social media have become a tool to facilitate modern slavery is to notice the social changes that have taken place in the last decade, in particular regarding the professional aspirations of people from Generation Z (born in 1997–2012). According to the annual Wearesocial.com study from 2023, 4.76 billion people (59.4% of the entire population of our planet) use social media, most of whom are people under 30 years of age.[11] Data from both developed and developing countries show that almost half of girls (48%) aged 10–15 consider running their own channel on social media, such as YouTube, Instagram or TikTok, as an attractive professional activity, in which they see themselves in the future.[12]

It should come as no surprise that teenagers are increasingly drawn to the idea of becoming influencers, a trend driven by a complex interplay of psychological and social factors. At the heart of this aspiration lies the adolescent need for identity formation and a sense of belonging, where social media platforms extend the realm

10 Ibid., p. 7.
11 We are social, 2023.
12 Lajnef, 2023.

of influence beyond family and friends to include online personalities.[13] This digital landscape offers a unique space for self-expression and comparison, crucial for teens in establishing their identities and sense of normalcy within their peer groups.[14] Additionally, the role of social media in enhancing self-esteem cannot be understated. Through both upward and downward comparisons with influencers, teenagers navigate their self-worth and competence, finding validation in likes, comments, and online engagement.[15] Moreover, the digital realm serves as a major source of entertainment and distraction, with platforms like Instagram and TikTok offering an escape from the mundane aspects of everyday life.[16] Another important factor is the appeal of mimicry and difference. Teenagers try to both look like and be different from influential people, combining the need to fit in with the need to stand out. Influencers also live ideal lives and have success stories that motivate and inspire young people to follow similar paths to fame and success. This makes becoming an influencer an appealing and seemingly possible goal. Because of this, many of them are unable to differentiate between the actual and virtual worlds, and social media platforms serve as the primary portal through which they may access the world as well as the primary source of information on it.

3.1. Analyzing Traffickers' Tactics in the Social Media Landscape

Because of their broad outreach and accessibility, social media platforms have become essential instruments for human traffickers. This is largely due to the fact that they provide criminals with access to millions of prospective victims all over the world at their disposal. Due to the inherent anonymity of these platforms, criminals find it simpler to create bogus profiles, enabling them to hide their identities and aims. By exploiting personal information shared on these platforms, it is now much simpler to target vulnerable individuals who may display indications of loneliness or who are in severe need of work. In order to successfully seduce and control their targets in a covert manner, traffickers make use of the direct and private contact channels provided by social media. It is also possible to take advantage of the quick diffusion of information on these platforms in order to distribute false information about employment or travel prospects, which can serve as fronts for those who engage in trafficking. The use of social media for trafficking operations is an enticing choice for criminals since, in comparison to traditional techniques, it is both efficient and inexpensive. Moreover, the challenge of monitoring and regulating the vast amount of information present on social media platforms causes the authorities' struggle to effectively resist and control potential trafficking activities. This emphasises the need for more watchfulness and stricter regulatory measures.

13 Ibid.
14 Ibid.
15 Weinstein, 2020.
16 Ibid.

It is uncontested that the increasing use of social media for job seeking and its growing reputation as a reliable information source have opened up new possibilities for exploitation. Traffickers and fraudulent recruiters target potential victims through social media business pages, recruitment ads, and direct outreach. Investigations reveal that some video-sharing platforms host unverified accounts posing as legitimate recruitment agencies, which significantly heightens the risk of trafficking.[17] These online frauds play a crucial role in enabling human trafficking and use a variety of deceitful strategies to trap victims. The deployed strategies are diverse and misleading, specifically created to take advantage of weaknesses and manipulate persons into exploitative circumstances:

1) False job advertisements: These ads offer attractive, often international job opportunities, which appear to be perfect for those seeking a better life. They can be especially alluring to persons facing severe economic circumstances, thus taking advantage of their need for better living conditions and financial security. Tech assistance, customer service agent and beauty salon technician are just a few of the many fields covered by the programmes.[18] Applicants are given enticing incentives, paid travel, accommodation and salary packages that are hard to beat. The listed location for the post is often changed throughout the process. Criminal actors seize passports and travel documents, threaten or use violence against job seekers and engage in various forms of coercion to convince them to participate in bitcoin scams when they arrive in the foreign country.[19]
2) Promises of high earnings: Scammers may lure victims with the prospect of high income for minimal work. The deception follows this pattern: a young lady who is actively seeking a career in modeling or acting receives an Instagram message. The sender, posing as a talent scout or agent, compliments her appearance and ability while proposing an exciting chance in the modeling or acting fields.[20] This offer includes glamorous photoshoots, travel opportunities, and the promise of exposure to influential personalities in the industry. Initially, the chat appears professional, with the fraudster expertly establishing contact and trust. To look respectable, they may even provide a fabricated portfolio of their work or statements from alleged previous clients. As the chat proceeds, the fraudster invites the lady to an in-person meeting or audition, which is often held in a different city or country. However, the truth behind this tempting offer is dangerous. The scammer is a trafficker attempting to persuade her into sexual exploitation. Once the woman arrives at the supposed meeting or audition location, she finds herself in a dangerous

17 Uren, 2022.
18 Homeland Security Today, 2023.
19 Ibid.
20 Stop the traffic, 2020.

situation, far from home and without support. The promised job options do not present, and instead she is pressured or coerced into sex labour.

3) Romantic deception: Scammers construct false profiles on dating platforms (Tinder) and social media (Instagram, Facebook) in this instance. A male individual establishes contact with a female under the guise of a successful, benevolent person seeking a committed romantic relationship. He creates a profound emotional connection with her through the exchange of intimate stories and his continued curiosity about her life. Over the course of their virtual correspondence, he progressively earns her confidence and affection. The fraudster proceeds to construct a storyline in which the woman is confronted with a personal or financial dilemma, skillfully exploiting her emotions in order to elicit empathy and help.[21] To take their relationship to the next level, he may propose a face-to-face meeting or may request funds to cover an unexpected expense. As soon as the woman agrees to meet, nevertheless, the circumstance rapidly deteriorates. Her expectation of a romantic encounter ends when she is captured by human traffickers. The emotional connection, carefully cultivated over time, was a ruse to manipulate and control her, ultimately leading her into a trap of sexual exploitation. This scenario illustrates a prevalent strategy employed by traffickers, referred to as "love bombing", wherein they establish a profound emotional connection with their victims in order to exert control and influence over them, ultimately luring them into circumstances involving sexual exploitation and human trafficking.
4) Educational frauds: In the given situation, a youthful individual, driven by a desire to further their education, encounters an online advertisement (e.g. on LinkedIn) that presents a prestigious scholarship for enrollment in a programme at an international university. The advertisement, which includes testimonials and a website with a professional appearance, guarantees a full scholarship that includes funding for tuition, housing, and a stipend to assist with daily expenses. Motivated by this prospect, the person submits an application via the online form that is made available to them, along with the requested nominal application fee and personal information. They subsequently receive a letter of acceptance accompanied by official-looking documents and travel instructions to the host country for the programme. But what one discovers upon arrival is an entirely different reality. No educational programme is available. Conversely, the person is encountered by traffickers who forcibly extract physical labour in exchange for their passport. The individual becomes ensnared in a trafficking scheme, which is concealed behind the promise of an academic opportunity. Threats, the seizure of their passport and the lack of a support system in a foreign country prevent them from escaping.
5) Travel-related frauds: A person from a country afflicted by poverty or violence encounters an online company that promises to provide help in

21 Geldenhuys, 2019.

acquiring travel documents and visas. By presenting itself as genuine and compassionate in light of the individual's critical situation requiring evacuation from a hazardous zone, this service offers a simplified way to obtain these documents in exchange for a payment or further support. Motivated by the desire for a better quality of life, the individual consents to the terms and makes the mandatory payments, potentially by contracting a loan or by committing to provide services upon arrival at the chosen location. The assistance and documentation that have been pledged seem to be an important lifeline, offering a chance to avoid risks or difficulties. However, upon entering the foreign country, the somber reality becomes evident. The individual is confronted by traffickers who reveal that the entire visa service was fraudulent, as opposed to encountering helpful agents. Following this, the criminals manipulate the victim into participating in either sexual or physical labour. The victim, left in a foreign country without legal papers and sometimes lacking the necessary language competence to seek assistance, ends up trapped in miserable conditions, being in a far cry from a comfortable life they had wanted to achieve.

Once recruiting is completed, social media continues to play a part in the trafficking operation. It is used to track and manage the movements of victims, as well as to record, market and spread information about forced commercial sexual exploitation. Furthermore, criminals regularly influence victims into transferring to platforms with end-to-end encryption, such as WhatsApp, complicating law enforcement operations in terms of monitoring and evidence collecting owing to considerable legal and technological barriers.[22]

3.2. Common Characteristics of Social Media Trafficking Victims

Victims of human trafficking scams often find themselves caught in a web of manipulation and vulnerability. Usually, these individuals are attracted by the prospect of quick and substantial profits, which is particularly enticing to those in desperate financial situations. They may also be blinded by the hope of a better life, failing to see the risks due to their aspirations. A critical factor in their entrapment is the lack of awareness about the cunning strategies used by traffickers, coupled with the trust they place in these criminals, who are skilled at forging seemingly authentic relationships. The profiles of those most at risk vary but share common threads of perceived vulnerability. Young adults and late adolescents are particularly vulnerable, often lacking the experience and judgment to spot these scams. Economic struggles also play a significant role, making individuals desperate for financial relief more likely to fall for lucrative but risky propositions. Migrants, in pursuit of improved job

22 Anthony, 2018.

prospects or living conditions, are also prime targets for traffickers who exploit their desire for stability, trapping them in exploitative situations far from home.

In the realm of labour exploitation, sectors such as construction, agriculture, and manufacturing disproportionately affect men. Around 22% of male individuals engaged in forced labour can be observed in the construction sector, frequently including migrant workers who are trapped in deceitful recruiting practices or subjected to high recruitment charges.[23] Within the agricultural sector, which comprises around 13% of cases of male forced labour exploitation, men often participate in farming and commercial agriculture, with seasonal migrant workers being particularly susceptible to abuse.[24] In contrast, women are predominantly subjected to exploitation in domestic work and the entire services industry. Female domestic workers, who experience isolation and power imbalances, are extremely vulnerable to exploitation, contributing to 17% of women's forced labour.[25] The services industry, excluding domestic employment, is a substantial contributor to the exploitation of adult women through forced labour. Women are significantly impacted in this sector, which includes many activities such as trade, transportation, hospitality and social services.

4. Artificial Intelligence: A Double-Edged Sword in Human Trafficking

Artificial intelligence (AI) is at the vanguard of a revolution in combating the complicated issues of human trafficking, forced labour and other kinds of contemporary slavery. AI, with its ability to discover patterns, discern correlations, process large databases and use machine learning, provides a strong weapon in the fight against these crimes. However, this same technology can also be harnessed by those perpetrating similar illegal activities, making AI a double-edged sword in the fight against contemporary forms of slavery.

In this section, we will look at numerous applications of artificial intelligence in the context of modern slavery. The capacity of AI to filter through enormous amounts of data can be beneficial to law enforcement and groups attempting to stop human trafficking. It can help to reveal hidden networks, anticipate trafficking hotspots, and identify possible victims using online activity and digital traces. Conversely, traffickers may also use AI to improve their ways of targeting and abusing vulnerable people, such as generating convincing fake identities and deploying confusing digital traps. It is important to note that the methods and examples described

23 International Labour Organisation, 2022, p. 30.
24 Ibid.
25 Ibid.

below represent the author's original predictions based on discussions with law enforcement agencies specialised in cybercrime. Given that the subject matter involves emerging technologies and a lack of extensive data, the examples provided should be considered as likely scenarios in the near future. This approach allows us to anticipate potential developments in the field, even as we acknowledge the limitations and evolving nature of our understanding.

Social media profile tracking and targeting

Method: Traffickers can use AI-driven software to analyze social media profiles. These tools can sift through vast amounts of data to identify potential victims based on specific criteria, such as age, location or certain vulnerabilities like financial hardship or emotional distress.

Example: A prospective model often shares her photoshoots on Instagram, hoping to gain recognition in the profession. Unknown to her, a trafficker utilizing the AI algorithm recognises her profile as a possible victim based on her distinct postings and interactions that reveal her ambitions and vulnerability. The criminal, assuming the role of a talent scout, contacts her with a captivating proposition for an international modeling opportunity. Unaware of the trap set by advanced social media profiling, the woman reacts, placing her trust in the offer.

Creation of false identities using advanced imaging and voice technologies

Method: Traffickers may use AI to create a synthetic image of a non-existent person for a social media profile. Coupled with voice alteration technology, they may engage in seemingly real-time conversations with potential victims, luring them into a false sense of security and trust.

Example: A young man from a non-English-speaking country is searching for a job abroad. He comes upon a profile on an employment platform for a man named "John" that was produced using "Midjourney". "John" speaks his language effectively owing to "HeyGen" and offers him a position at his firm in the United Kingdom. The man accepts to fly to the UK after being impressed by the realistic visual and native language contact. When he arrives, he discovers that not only is the job non-existent, but he has also been recruited into a trafficking network.

Manipulation through AI-enhanced video filters and overlays during video calls

Method: AI-driven filters and overlays are commonly used on video communication platforms. During a video conference, traffickers may use AI-powered filters to change their look or the background, posing as respectable employers or partners. This may lead victims to believe they are communicating with a legitimate person or organisation.

Example: A woman searches for remote work options and comes across a job posting that appears to be ideal. Throughout the Skype interview, the employer uses an "xpression camera" to seem as a new person each time, yet the scene is always

a busy, modern workplace. The victim, convinced that the position is legitimate, complies with certain basic demands, such as providing personal information and paying a nominal fee for training materials. Later on, she realises that there is no employment and that her personal information has been used for criminal purposes.

Criminals frequently implement novel technologies in a prompt and inventive manner, exploiting them for unlawful purposes prior to the effective response of law enforcement. The technological ability exhibited by traffickers stands in stark contrast to the methodical and frequently resource-limited approach adopted by law enforcement agencies. Regrettably, without sufficient financial resources, law enforcement agencies, including the police, will perpetually lag behind the perpetrators. Nevertheless, they can employ analogous techniques, but with the intention of aiding the victims.

1) Data analysis and machine learning in trafficking detection: To expose human trafficking networks, data analysis and ML are essential. Algorithms powered by artificial intelligence can spot signs of human trafficking that are often hard for humans to notice by compiling massive amounts of data from many sources. By utilizing predictive analytics, these algorithms are very skilled at anticipatorily recognizing potentially dangerous situations, enabling proactive measures to be taken. A practical implementation entails the use of natural language processing to extract unique phrases from digital content, thereby generating advertisement templates that can be matched across numerous websites. This method rates the likelihood of ad links to trafficking and finds networks involved in trafficking. By mapping out these networks, a single ad can lead to the discovery of an entire trafficking operation.
2) Monitoring social media with AI to fight against human trafficking: Because of the high potential for human trafficking recruitment on social media platforms, constant vigilance is required. Social media content is analyzed by AI tools that are outfitted with natural language processing in order to identify any indications of human trafficking. A combination of these technologies and picture recognition software can assist in identifying potentially exploitative chats and posts. This kind of AI monitoring makes it easier for authorities and assistance groups to step in at the right time, which could stop trafficking before it does any harm.
3) Using victim identification through facial recognition technology: The advancements in facial recognition technology offer a substantial asset in identifying and locating human trafficking victims. By comparing images from various sources, including public databases and law enforcement networks, this technology aids in matching potential victims' images, aiding in their identification and rescue. Moreover, real-time surveillance footage analysis using facial recognition can lead to the prompt action of authorities upon spotting a victim or suspect, significantly enhancing response times in critical situations.

Understanding the dual sides of artificial intelligence in modern slavery is essential for developing successful tactics to stay ahead of traffickers. Although the above-mentioned approaches constitute only a small number of the potential uses of AI in this subject, they deserve thoughtful consideration. By looking into these applications, we may acquire insight into both the possibilities and dangers posed by AI, allowing us to better predict and resist the traffickers' developing methods in the digital world. While the use of AI in human trafficking remains a largely theoretical consideration, the application of other digital technologies by traffickers is a tangible and escalating threat. According to Europol, human traffickers and smugglers are increasingly utilizing digital technologies to facilitate their illegal activities.[26] The shift of human trafficking into the digital realm is significant, as criminals adapt and evolve their methods to exploit changing technologies. The internet plays a critical role in this transformation, eliminating traditional geographical and physical barriers and allowing criminals easier access to a broader pool of potential victims. In the following section, we will focus on Poland and Hungary, two Central European countries where the incidence of this crime has intensified since 2020.[27]

5. Country-Specific Analysis: Human Trafficking Trends in Poland and Hungary

In Europe and Central Asia, the grim reality of 4.1 million people entrapped in forced labour spans across various sectors and affects both adults and children.[28] This includes domestic servitude, agricultural work, construction and commercial sexual exploitation. The region faces a large influx of migrant workers, both from within and beyond its borders, who are particularly vulnerable to debt bondage and exploitation. Factors such as conflict-driven displacement, climate change, political or economic instability contribute to the prevalence of forced labour.[29] Addiction, homelessness, unemployment, bad health and average IQ are common symptoms of the victim's powerlessness. Despite the fact that many of the victims are males from outside the country, research conducted in countries like Poland and Hungary has shown that no one nationality is more likely to be subjected to forced labour than any other.[30]. On the other hand, individual conditions, such as personal vulnerabilities

26 Europol, 2022.
27 See: Wieczorek, 2016; MSWiA, 2022.
28 Walk Free, 2023.
29 Ibid.
30 Dąbrowski, 2012.

and thenature of the work, have a significant influence, with dangers increasing in tandem with the amount of illegal immigration.

Figure 1. Prevelance of Modern Slavery in Selected European Countries[31]

The prevalence of modern slavery in Europe displays significant variation, with a stark contrast particularly noticeable between Eastern and Central European nations. Ukraine, although geographically situated in Eastern Europe, exemplifies the upper extreme with an estimated prevalence of 12.8 victims per 1,000 inhabitants. This figure serves as a benchmark for the severity of modern slavery impacts in the region. Turning our focus to Central Europe, particularly Poland and Hungary, the prevalence rates, while lower than in Ukraine, still underscore significant societal challenges. Poland's rate of approximately 5.5 per 1,000 translates into about 209,000

31 Source: own elaboration based on data by Walk Free, 2023.

individuals affected by modern slavery. To contextualise this magnitude, one might envision a population equivalent to that of Lublin, encapsulating the entire demographic in the grips of this grievous condition. Similarly, Hungary, with a prevalence rate of 6.6 per 1,000, sees around 63,000 individuals suffering under conditions of modern slavery, a number comparable to the population of Székesfehérvár. While the statistics provided are indeed striking, it is crucial to recognise that they do not fully capture the entire magnitude of human trafficking and forced labour, which together constitute modern slavery. The data, primarily sourced from non-governmental organisations, police and border security services, reflect only detected cases of these crimes. However, these figures do not necessarily represent the full scale of the issue due to the inherently covert nature of these crimes. In criminology, this discrepancy is known as the "dark figure" of crime, which refers to the significant number of offences that go undetected, unreported or unrecorded. The dark figure is particularly pronounced in cases of human trafficking and forced labour because these activities are often hidden and victims may be reluctant to come forward due to a fear of retribution, mistrust in authorities or a lack of awareness of their rights. This underreporting underscores the challenges in obtaining accurate measurements of the true scope of contemporary slavery and emphasises the need for more robust detection and reporting mechanisms to better understand and combat these grievous violations of human rights. However, regardless of the numbers, it is valuable to present the characteristic similarities and differences between these phenomena in Poland and Hungary.

5.1. Characteristics of the situation in Hungary

In Hungary, human trafficking is a significant issue, encompassing both domestic exploitation and the trafficking of Hungarians abroad. This problem touches diverse groups, including the extremely poor, undereducated young people, single mothers, asylum seekers, people with disabilities, the LGBTQ community, homeless men and particularly the Roma, Hungary's largest ethnic minority, representing a substantial part of trafficking victims.[32] Traffickers, typically operating in small groups often based on familial ties or shared interests, have been seen to target girls from their own families.[33] A common method used is the "lover-boy" approach, where young girls are romanced, isolated from society, and ultimately coerced into commercial sex. In recent years, the internet and social media have become increasingly vital tools for traffickers, used both to recruit victims and to advertise children for sex trafficking. Children in State-run institutions, especially girls, including those with moderate intellectual disabilities or special needs, are extremely vulnerable to sex trafficking. Of the approximately 23,000 Hungarian children in Sstate childcare, those with certain conditions, such as behavioral disorders or substance abuse issues,

32 Migration and Home Affairs, 2023.
33 Trafficking in Persons Report: Hungary, 2023.

are at the highest risk.[34] While the majority of identified trafficking victims are female and involved in sex trafficking, there is a growing recognition of Hungarian victims, including women, boys and girls, being exploited for both sex and labour trafficking within Hungary and across Europe.[35] Austria, Germany, the Netherlands, Switzerland, and the UK have been primary destinations, with a recent trend indicating a shift towards the Nordic countries.[36] In 2022, it was noted that nearly half of all trafficking cases involving Hungarians took place abroad.[37] Sex trafficking remains the most common form of trafficking in Hungary, but labour trafficking instances, involving exploitation in agriculture, construction, hospitality and factory work, are on the rise. This complex situation highlights the need for comprehensive strategies to combat human trafficking, considering the varied and evolving nature of this global issue.

5.2. Characteristics of the situation in Poland

In Poland, similarly to Hungary, human trafficking is a significant concern, with both domestic and foreign victims being exploited. Polish victims, including women and children, are subjected to sex trafficking within the country and across other European countries, particularly France and Germany. Additionally, Polish men and women are subjected to forced labour primarily in Western and Northern Europe, notably Germany, Norway, Sweden and the United Kingdom.[38] One notable difference from Hungary is the origin of foreign victims trafficked into Poland. Women and children from South America and Eastern Europe, especially from Bulgaria, Romania and Ukraine, are victimised in sex trafficking within Poland.[39] Labour trafficking is the predominant form of trafficking in Poland, with traffickers increasingly relying on coercion and fraud, rather than physical violence or threats. Victims come from various regions, including Europe, Asia, Africa and increasingly from Central and South America, with Colombia, Guatemala and Venezuela being particularly noted.[40]. Another distinct aspect in Poland is the exploitation of migrants in forced labour,especially among the growing Ukrainian, Belarusian, Filipino and Vietnamese communities. This exploitation is prevalent in sectors like agriculture, restaurants, construction, domestic work and the garment and fish processing industries.[41] Over eight million people transiting Poland from Ukraine, including more than 1.5 million refugees predominantly comprising women and children, are

34 Ibid.
35 Ibid.
36 Ibid.
37 Ibid.
38 Trafficking in Persons Report: Poland, 2023.
39 Ibid.
40 Ibid.
41 Ibid.

registered for temporary protection and are highly vulnerable to trafficking.[42] While there are similarities with Hungary in terms of the types of trafficking and the exploitation of domestic populations, the notable differences lie in the countries of origin of the victims trafficked into Poland, the higher prevalence of labour trafficking and specific targeting of certain migrant populations and vulnerable groups.

5.3. Final remarks

In Hungary, law enforcement generally prioritises the elimination of crime and criminal groups while dealing with human trafficking, placing less emphasis on providing help to the victims.[43] This preference for punitive measures over victim-centered solutions emphasises the need for more research, particularly on the treatment of victims in trafficking cases and other criminal processes involving underprivileged women. This approach suggests a potential lack of sensitivity to concerns such as violence against women, and points to a more system-oriented, rather than individual-centered, approach to dealing with these instances.[44]

In contrast, the situation in Poland regarding human trafficking presents different challenges. The fundamental issue is inefficiency in victim identification and criminal prosecution, indicating a systemic challenge with tackling the entire spectrum of human trafficking. This inefficiency is compounded by a social predisposition to ignore the problem. While sexual trafficking is acknowledged, forced labour, notably the vast exploitation of foreigners by Polish enterprises, is a far more serious and pervasive problem. This aspect of trafficking in Poland demonstrates a different dimension of the problem, where governmental efficiency in addressing forced labour trafficking is notably worse than in dealing with sex trafficking. Both Hungary and Poland have significant obstacles in fighting against human trafficking. However, whereas Hungary focuses on illegal activity with minimal victim support, Poland has systemic inefficiencies in discovering and prosecuting trafficking cases, particularly those involving forced labour.

Nevertheless, this chapter only briefly mentions the challenges Poland and Hungary are facing. The goal here was not to analyze legislation or the effectiveness of domestic policies, but to signal the ongoing changes happening right in front of our eyes. Perpetrators are already leveraging digital tools to deceive their victims, and the potential inclusion of AI could further escalate the scale of these phenomena. This chapter aimed to highlight both preventive measures and the vast potential that the use of AI by law enforcement agencies may offer. As we observe the increasing digitalisation of crime, it is crucial to keep pace with technological advancements, ensuring that preventive strategies and law enforcement capabilities evolve to effectively counteract these threats.

42 Ibid.
43 Katona, 2019.
44 Ibid.

6. Conclusions: Synthesizing Insights and Proposing Future Directions

As we conclude our examination of the intricate landscape of human trafficking, it becomes evident that the challenges within this sector are as varied and complex as a labyrinth. Human trafficking is an ever-evolving phenomenon, shifting and adapting like a chameleon in response to changing environments. This evolution is propelled by the exploitation of vulnerable groups, the sophisticated deployment of artificial intelligence, and the clandestine use of internet platforms by traffickers. Each country, from Hungary with its issues of victim identification and a focus on criminal groups over victim support, to Poland grappling with an upsurge in labour trafficking that paints a grim picture of modern slavery, faces unique challenges. The addition of digital technologies introduces a further layer of complexity to this already intricate issue. Traffickers expertly manipulate social media and AI to weave deceptive narratives that ensnare victims with false promises, exploiting the vulnerabilities of the young and desperate. This digital exploitation demands urgent and robust countermeasures, underscoring the dual role of AI as both a tool for and against trafficking activities. Based on these observations, it is suggested that future endeavours should adopt a comprehensive strategy:

1) Enhanced international collaboration and standardisation: Given the transnational nature of human trafficking, strengthening international cooperation is crucial. This involves harmonizing legal frameworks, sharing intelligence, and aligning strategies to combat trafficking. The European Commission's proposal for a forced labour ban is a step in this direction.[45] This legislation, once enacted, would prohibit products made with forced labour from entering the EU market, regardless of where they are produced or intended for sale. This comprehensive approach, applying to all sectors and stages of production, underscores the need for a unified, risk-based enforcement strategy across the EU.
2) Adoption of advanced technologies and training: With traffickers increasingly using digital platforms and AI, law enforcement and anti-trafficking agencies must keep pace. This includes adopting AI and machine learning for data analysis, social media monitoring, and the use of facial recognition technologies. Concurrently, there should be a focus on providing training to law enforcement and judiciary personnel in handling digital evidence and understanding the nuances of cyber trafficking.
3) Focus on victim support and rehabilitation: Prioritizing victim support is crucial. This includes not only providing immediate care and protection but also addressing long-term needs such as legal assistance, psychological counselling and reintegration support. Efforts should be made to understand and

45 Itineris, 2022.

address the specific needs of various vulnerable groups, including women, children, migrants and ethnic minorities.

4) Educating young people on cybersecurity and AI awareness: It is crucial to instruct young persons about the perils present in the online realm in today's era of digital technology. Comprehending the mechanics of artificial intelligence, engaging in thoughtful use of social media, and validating sources of information are fundamental components of this educational endeavour. Young people should be equipped with the knowledge and skills to recognise and avoid potential threats online, including those posed by sophisticated AI tools used in human trafficking. By fostering digital literacy and critical thinking, we can empower the younger generation to navigate the digital landscape safely and responsibly. This education must cover understanding the subtleties of online interactions, recognizing deceptive tactics used by traffickers, and being aware of the data privacy implications of their online activities.

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Chapter 5

See the Human behind the Law – The Court's Perception of Neoslavery

Renáta Hrecska-Kovács

Abstract

Forced labour is an economic activity that erodes human dignity. More than 300 cases on the prohibition of forced labour and slavery have so far been heard by the European Court of Human Rights (ECtHR), a number that suggests that fully topical human rights arguments can be made in this area. The relevant guidelines and legal texts of both the Council of Europe (COE) and the International Labour Organization (ILO) have served as a starting point for the present study, which has been supplemented with literature sources. This chapter presents the issue of the prohibition of forced labour in three major units. Firstly, the concept of forced labour is examined, then measures to combat the phenomenon, and finally the case law of the ECHR. The case law has been compiled to provide an overview of recent cases, mainly from the Central European region.

Keywords: forced labour, servitude, slavery, employment, freedom, equality, working conditions

1. Introduction: Forced Labour as Modern Slavery

Forced labour is a relatively broad topic, so it is necessary to narrow it down explicitly by excluding from the discussion possible social problems associated with the topic – the problem with this, however, is that, in practice, forced labour is always

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closely entangled with socio-related aspects. This study aims to detect and analyse the legal consequences which arise from the noted labour market phenomenon, but also to emphasise the person behind the legal protection. Forced labour can be imposed on adults and children, by state authorities, by private enterprises, or by individuals. It is observed in all types of economic activity – such as domestic work, construction, agriculture, manufacturing, sexual exploitation, forced begging, etc. – and in every country. As a result, the existence of the violation itself gives rise to many social problems, which the law is naturally obliged to deal with. At the same time, when examining the prohibition of forced labour, a strict distinction must be made between the persons involved and the legal value to be protected.

Maybe it is not a problem if there are blurred lines between 'legal' and 'social' attempts in analysing a legal area – according to an article about the reconstruction of the notion of social, "political and legal responses to human migration have broken down lines between immigration law, economic regulation, and criminal justice in complex and often troubling ways ... [and that] boundary dissolutions, notions about citizenship, sovereignty, illegality and rights (to name but a few) have all been complicated, challenging a number of long standing assumptions underlying legal scholarship concerned with law's relevance in shaping our global future".[1] And this completely fits here, when talking about the consequences of human trafficking.

Under the European Convention of Human Rights (ECHR, hereinafter referred to as 'the Convention'), forced labour is a condition that is absolutely unacceptable to the international community. In order to protect basic freedoms in this area, the instrument in Article 4 regulates the issue as follows:[2]

1) No one shall be held in slavery or servitude.
2) No one shall be required to perform forced or compulsory labour.
3) For the purpose of this Article, the term 'forced or compulsory labour' shall not include:
   a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention [i.e. regulation of lawful detention] or during conditional release from such detention;
   b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
   c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
   d) any work or service which forms part of normal civic obligations.

According to the 2021 Global Estimates, there are 27.6 million people in situations of forced labour on any given day, 3.5 people for every thousand people in the world. Women and girls make up 11.8 million of this total. More than 3.3 million

1 Nelked, 2013.
2 European Convention on Human Rights 2013.

of all those in forced labour are children. Forced labour has grown in recent years: there was a 2.7 million increase in the number of people in forced labour between 2016 and 2021, which translates to a rise in the prevalence of forced labour from 3.4 to 3.5 per thousand people.[3] These formulations are all associated with humankind. Humans are their starting point and they almost exclusively contain only social considerations. So why is it necessary to treat the issue of the prohibition of forced labour as a priority in international legal sources? Global profits made from forced labourers exploited by private agents or enterprises could reach US$ 44.2 billion every year, of which US$ 31.6 billion is from trafficked victims. The largest profits – more than US$ 15 billion – are made from people trafficked and forced to work in industrial countries.[4] And these are statistics from 20 years ago.

All in all, when analysing forced labour, those legally protectable values must be highlighted which are the focus of the different international legal sources: there are many basic – first and second generation – human rights involved in this case, and all of them point in the same direction. When it comes to work-related issues, it is necessary to be transparent both in terms of inter-human connections and state operations. There are legitimate interests both for the individuals and the state: on the side of the individuals (the workers) there is the right to life and liberty, freedom from slavery and torture, freedom of expression, the right to work in just and favourable conditions, and the rights to social protection, to an adequate standard of living and to the highest attainable standards of physical and mental well-being, and the right to equal treatment. On the side of the state, the rule of law must be maintained: the rule of law is a normative ideal that should be viewed in terms of its ends. The goal of the rule of law is to oppose the arbitrary exercise of power by setting boundaries on, and channelling the exercise of power through known legal rules and institutions that apply to all. The goal is to create restraints on government, as well as private power, together with channels for cooperative and coordinative activities, which provide security and predictability so that people can plan and organise their pursuits and do so without fear. As an ideal, the rule of law will never be fully attained given human failings, but that does not make the principle any less important.[5] In my opinion, it is not possible to maintain the rule of law if private individuals, legal entities, or the state itself can create exploitative working conditions without legal consequences. That is why it is important to discuss the concept.

1.1. The Notion of Forced or Compulsory Labour

As we have seen, Article 4 § 2 of the Convention prohibits forced or compulsory labour (see *Stummer v. Austria [GC], § 117*[6]). However, Article 4 does not define

3 ILO 2022.
4 Belser, 2005.
5 Shaffer & Sandholtz, 2024, pp. 393–438.
6 European Court of Human Rights 2011.

what is meant by "forced or compulsory labour" and no guidance on this point is to be found in the various Council of Europe documents relating to the preparatory work of the European Convention (see *Van der Mussele v. Belgium, § 32*[7]). Consequently, case law has recourse to ILO Convention No. 29 concerning forced or compulsory labour. The persistence of slavery and slavery-like practices has received renewed official attention, including from the UN Commission on Human Rights[8] and its Working Group on Contemporary Forms of Slavery. Most notable among the UN agencies, however, is the International Labour Organization (ILO),[9] which has launched a campaign against forced labour and, as part of that campaign, has ventured to estimate the extent of forced labour worldwide.[10] For governments and the public in the developed world, the focus on illegal immigration and transnational human trafficking has also led to a renewed interest in forced labour in the context of human trafficking.[11]

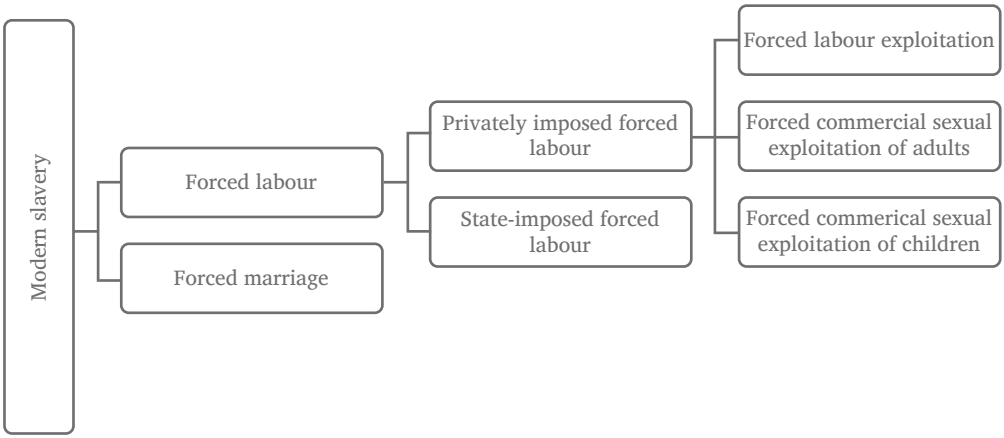

Figure 1. The system of modern slavery according to the ILO[12]

Privately-imposed forced labour refers to forced labour in the private economy imposed by private individuals, groups, or companies in any branch of economic of activity. 86 per cent of all forced labour is imposed by private agents – 63 per cent in forced labour exploitation and 23 per cent in forced commercial sexual exploitation.

7 European Court of Human Rights 1983.
8 See United Nations Human Rights Office of the High Commissioner.
9 See International Labour Organization. The ILO is the UN agency responsible for international labour standards and is the only international organisation that addresses labour rights issues at the international level. It has a tripartite constituency of governments, employers and workers, which helps to create overarching policies.
10 For detailed statistics see ILO 2022.
11 Lerche, 2007, pp. 425–452.
12 ILO 2022.

State-imposed forced labour accounts for the remaining 14 per cent of people in forced labour.[13] State-imposed forced labour refers to forced labour imposed by State authorities, regardless of the branch of economic activity in which it takes place. It includes labour exacted by the State as a means of political coercion or education or as a punishment for expressing political views; as a punishment for participating in strikes; as a method of mobilising labour for the purpose of economic development; as a means of labour discipline; and as a means of racial, social, national, or religious discrimination.[14]

While it is recognised that States have the power to impose compulsory work on citizens, the scope of these prerogatives is limited to specific circumstances, for example, compulsory military service for work of purely military character; normal civic obligations of citizens of a fully self-governing country and assimilated minor communal services; work or service under supervision and control of public authorities as a consequence of a conviction in a court of law; work or service in cases of emergency such as war, fire, flood, famine, earthquake, etc.

Patrick Belser emphasises in his earlier cited work that it is the type of engagement that links a person to an employer which determines forced labour, not the type of activity that a worker is actually performing. A woman trafficked and forced into prostitution is in forced labour because of the menace under which she is working, not because of the sexual duties that her job demands or the legality or illegality of that particular occupation. In some cases, the activity itself may not be an economic activity in the sense of national accounts. It is also worth noting that not all child labour is defined as forced labour. Child labour amounts to forced labour only when coercion is applied by a third party to the children or to the parents of the children, or when a child's work is the direct result of the parents being in forced labour. When forced labour is imposed on children, it represents – in ILO terminology – an 'unconditional worst form' of child labour.[15]

1.2. Distinctions

Louis Waite writes that the problem of human exploitation is as old as work itself. Yet despite development through the ages, and more recent industrial and technological advances in the modern era, extreme exploitation and resulting unfreedoms

13 Ibid. p. 25.

14 It is worth mentioning the use of child soldiers in armed conflicts, which is done mostly by armed groups but also sometimes by government forces. This is a persistent problem in approximately twenty countries and several conflict zones. In addition to taking direct part in fighting, children can also be forced into other roles in armed conflict situations that involve abhorrent abuses of their human rights. Reports from a variety of war contexts document children being used as human shields, in intelligence gathering, in mine clearance, as bodyguards, in planting improvised explosive devices, and as perpetrators of acts of terror. Girls may be forced into sexual slavery or forced marriages. Many children are abducted. In addition, they may be forced to perform extremely hazardous child labour in the production of conflict minerals.

15 Belser, 2005, p. 4.

remain doggedly persistent in contemporary global economies and societies. The author emphasises that the term exploitation is commonly heard in discussions of social injustices and human rights abuses, yet it remains semantically slippery and challenging to define in legal instrument.[16] I completely agree with the expert, but for the record I add: Although in our daily lives we unfortunately often encounter working conditions that do not meet the requirements of the law, in my view it is important to note that most of these cases do not fall within the scope of the prohibition of forced labour or slavery. In short, forced labour is different from sub-standard or exploitative working conditions.

Various indicators can be used to ascertain when a situation amounts to forced labour, such as restrictions on workers' freedom of movement, withholding of wages or identity documents, physical or sexual violence, threats and intimidation or fraudulent debt from which workers cannot escape.[17] Sub-standard working conditions or exploitative working conditions are sooner present in everyday practice – for example when the employer does not meet the ergonomical expectations,[18] does not pay overtime, or commits any form of abuse of rights. It is crucial that in addition to being a serious violation of fundamental human rights and labour rights, the exaction of forced labour is a criminal offence, while it may occur that sub-standard or exploitative working conditions result only in private liability.

It is also worth mentioning that forced labour and exploitative working conditions should also be interpreted in the context of situations where the parties do not subordinate dependent labour to an employment relationship (at the instigation of the employer), but use some other contract (e.g. independent contractor agreement) that may fulfil the characteristics of forced labour. This is also true in the event that an actual written contract between the parties is otherwise not in force, and the quality of the legal relationship can only be inferred from the nature and content of the relationship existing between them.

There are many fields which are well described and investigated in scientific articles dealing with the different forms of forced labour, but I believe that the focus should be on areas that have not yet been explored. For example, as a result of the digital transformation of the labour market, it is possible to discuss completely new phenomena, for example, the issues of agency employment, home working, and working through digital labour platforms. It is self-evident that in many cases these possibilities are not given due to the existing legal system: for example, it is not

16 Waite 2024.

17 ILO 2013.

18 The main factors of interest for ergonomics, as well as for occupational safety, include hygienic, anthropometric, physiological, psychophysiological and psychological factors that cause deterioration in the physical and mental health of employees. A significant number of them, due to limited financial and material resources in the organisations, require the introduction of a process for managing occupational and ergonomic risks, the purpose of which, inseparable from occupational safety, is not only to reduce injuries and occupational morbidity, but also the creation and protection of values, the main of which are the life and health of an employee. See more: Bazaluk et al. 2023.

possible to organise forced labour through a legally operating labour agency, but at the same time it is possible to cover up such activities. For this reason, it is worthwhile to deal in detail with similar forms of operation. When working at home, the exploitative or sub-standard working conditions tend to arise when the employer, for example, does not take into account the work schedule and assigns tasks that need to be completed urgently without extra compensation, or does not provide the appropriate technical or infrastructural background for the work.

2. Elimination of Forced Labour as a Human Right

As an international treaty, the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, under which the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn. Article 4 of the Convention, together with Articles 2 and 3 of the Convention, enshrines one of the fundamental values of democratic societies (*Siliadin v. France, § 112*[19]; *Stummer v. Austria [GC], § 116*[20]). Article 4 § 1 of the Convention requires that "no one shall be held in slavery or servitude". Unlike most of the substantive clauses of the Convention, Article 4 § 1 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2, even in the event of a public emergency threatening the life of the nation (*C.N. v. the United Kingdom, § 65*;[21] *Stummer v. Austria [GC], § 116*[22]).

In interpreting the concepts under Article 4 of the Convention, the Court relies on international instruments such:

- 1926 Slavery Convention (*Siliadin v. France, § 122*[23]),
- Supplementary Convention on the Abolition of Slavery,
- Slave Trade and Institutions and Practices Similar to Slavery (*C.N. and V. v. France, § 90*[24]),
- ILO Convention No. 29 (Forced Labour Convention) (*Van der Mussele v. Belgium, § 32*[25]),
- Council of Europe Convention on Action against Trafficking in Human Beings ('Anti-Trafficking Convention'), and

19 European Court of Human Rights 2005.
20 European Court of Human Rights 2011.
21 European Court of Human Rights 2013b.
22 European Court of Human Rights 2011.
23 European Court of Human Rights 2005.
24 European Court of Human Rights 2013a.
25 European Court of Human Rights 1983.

– Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime ('Palermo Protocol'), 2000 (*Rantsev v. Cyprus and Russia, § 282*[26]).

However, as the Court's jurisdiction is limited to the Convention, it has no competence to interpret provisions of international instruments, such as the Anti-Trafficking Convention, or to assess the compliance of respondent States with the standards contained therein *(V.C.L. and A.N. v. the United Kingdom, § 113*[27]). Taking this circumstance into account, I also note that although the court formally only deals with the Convention, it is not suitable in itself to serve as a full-fledged legal instrument. Human rights – and thus also the prohibition of forced labour – have such wide-ranging connections that the relevant international legal sources need to be taken into account by the decision-making body as a whole.

2.1. Elimination of Forced labour as a Human Right According to the ILO

The ILO has two forced labour conventions which enjoy nearly universal ratification, meaning that almost all countries are legally obliged to respect their provisions and regularly report on them to the ILO's standards supervisory bodies. Not being subject to forced labour is a fundamental human right: all ILO member States have to respect the principle of the elimination of forced labour, regardless of ratification.[28]

The ILO resources are the Forced Labour Convention, 1930 (No. 29)[29], the Abolition of Forced Labour Convention No. 105 (1957)[30], the Protocol of 2014 to the Forced Labour Convention, 1930[31], the Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), which supplement the Forced Labour Convention, 1930 (No. 29)[32]. According to the Forced Labour Convention, 1930 (No. 29) forced or compulsory labour is all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily. Therefore, forced or compulsory labour can be understood as *work that is performed involuntarily and under the menace of any penalty.*[33]

The definition refers to situations in which persons are coerced to work through the use of violence or intimidation, or by more subtle means such as manipulated debt, retention of identity papers, or threats of denunciation to immigration

26 European Court of Human Rights 2010.
27 European Court of Human Rights 2021.
28 ILO 1930.
29 ILO 1930.
30 ILO 1957.
31 ILO 1930.
32 ILO 2014.
33 See among other sources: ILO n.d.

authorities. The work or service itself means all types of work occurring in any activity, industry, or sector including in the informal economy. 'Menace of any penalty' refers to a wide range of penalties used to compel someone to work – this can include physical and psychological harm or threats. It should be noted that the punishment is not an objective category: it includes everything that causes a disadvantage for a given 'employee', of which they bend to the 'employer's' will because of their fear. The voluntariness refers to the free and informed consent of a worker to take a job and their freedom to leave at any time. This is not the case, for example, when an employer or recruiter makes false promises so that a worker takes a job they would not otherwise have accepted – in this case the work is done involuntarily.

The Abolition of Forced Labour Convention No. 105 adopted by the ILO in 1957 primarily concerns forced labour imposed by state authorities. It prohibits, specifically, the use of forced labour: as punishment for the expression of political views; for the purposes of economic development; as a means of labour discipline; as a punishment for participation in strikes; or as a means of racial, religious, or other discrimination.

2.2. Elimination of Forced Labour as a Human Right – Comparison

Types of exceptions	**ECHR**	**ILO**
Compulsory or replacing military service	✓	✓
Normal civic obligations	✓	✓
Prison labour (under certain conditions)	✓	✓
Work in emergency, situations (such as war, calamity, or threatened calamity e.g. fire, flood, famine, earthquake)		✓
Minor communal services (within the community)		✓

Table 1. Elimination of forced labour in different perspectives[34]

Based on the table, it seems that the bodies use the same concepts, with minor differences in emphasis, at most. That is why it is important for the Court to handle

34 The Author's own work.

the relevant international legal sources during the cases and, at the same time, this is why the simultaneous use of legal sources generally ensures a consistent result.

2.3. Slavery and Servitude

In considering the scope of 'slavery' under Article 4, the Court refers to the classic definition of slavery contained in the 1926 Slavery Convention,[35] which defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" *(Siliadin v. France, § 122*[36]). According to the ILO, modern slavery or neoslavery is the "very antithesis of social justice and sustainable development." The *2021 Global Estimates* indicate there are 50 million people in situations of modern slavery on any given day, either forced to work against their will or in a marriage that they were forced into. This number translates to nearly one of every 150 people in the world. The estimates also indicate that situations of modern slavery are by no means transient – entrapment in forced labour can last years, while in most cases forced marriage is a life sentence.[37]

For Convention purposes 'servitude' means an obligation to provide services that is imposed by the use of coercion, and is to be linked with the concept of slavery *(Seguin v. France*;[38] *Siliadin v. France, § 124*[39]). With regard to the concept of 'servitude', what is prohibited is a "particularly serious form of denial of freedom". It includes "in addition to the obligation to perform certain services for others ... the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition" (*Siliadin v. France, § 123*[40]).

3. Related Case Law of the European Court of Human Rights

There is an existing piece of research that suggests that countries that are more open to trade provide better economic rights to women and have a lower incidence of forced labour. This effect holds in a global sample as well as in a developing country sub-sample, and holds also when potential feedback effects are controlled via instrumental variable regression.[41] This is because being more open toward trade is likely to promote rather than hinder the realisation of two labour rights considered as core

35 SeeUnited Nations Human Rights Office of the High Commission 1926.
36 European Court of Human Rights 2005.
37 ILO 2022, p. 77.
38 European Court of Human Rights 2002.
39 European Court of Human Rights 2005.
40 European Court of Human Rights 2005
41 Neumayer & De Soysa, 2007, pp. 1510–1535.

or fundamental by the ILO, namely the elimination of economic discrimination and of forced labour.[42]

This is debatable: the breakdown of forced labour by national income grouping (of the country where the forced labour occurs) makes clear that forced labour is as much of a problem in rich countries as it is in poor ones. Indeed, more than half of all forced labour occurs in either upper-middle income or high-income countries.

The results showing a significant presence of forced labour in higher-income countries are supported by a range of other reports documenting the presence of forced labour in these countries in sectors including agriculture, domestic work, construction, fishing, and the commercial sexual exploitation industry, with many cases involving migrants in situations of vulnerability. Taking only the sexual exploitation element, in industrial countries, the victims are overwhelmingly foreign women who have been trafficked. While some are sold by their parents or kidnapped, the data shows that most victims are recruited by traffickers under false pretences. Traffickers often approach women in their countries of origin, promising jobs as waitresses, cleaners, or maids. Other women know that they are recruited to work in the sex industry but only find out upon arrival that they are forced to work off fraudulent debts. Some women even find out that they have several 'debts' – fees of travel agents, smugglers, labour contractors, and so on. Forced prostitution also exists in transition and developing countries. The modalities are similar to those in industrial countries. There are some distinctions, however. Firstly, more cases relate to intraregional trafficking rather than to inter-regional trafficking. This means that victims in Latin America, Asia or Sub-Saharan Africa are usually from within these same regions. They are often trafficked internally (i.e. within the same country). Secondly, forced child prostitution is more frequently reported in developing countries than in industrial countries.[43]

But, all in all, agriculture is probably 'host' to the largest number of forced labourers – regardless of geographical territories.[44] While numbers in industrial countries are a cause for concern, the problem of agricultural forced labour remains largest in developing countries. One particular problem is bonded labour in South Asia. Bonded labourers are people who lose their freedom of movement or their freedom of employment as a result of a debt and the obligation to reimburse this debt through labour. In some regions of Latin America, indigenous people are also held captive through the open use of violence. The *enganche* or *habilitación* labour systems, which are based on wage advances made to workers before the harvest in exchange for a commitment to work, are still used in some Andean countries. They often result in debt bondage and unpaid forced labour. Bonded workers are usually

42 More on geographical distribution: Strauss, 2012, pp. 137–148.
43 Belser, 2005, p. 8.
44 For other areas see e.g. Strating, Rao and Yea, 2024.

males, but often workers' wives and children[45] are also involved and expected to provide free labour.[46]

Additionally, developed countries can be connected to forced labour through global supply chains,[47] even if the actual forced labour occurs elsewhere. Reports suggest that forced labour can occur, in particular, in raw materials production in the lower tiers of supply chains of consumer goods bound for markets in the Global North.[48]

The detailed breakdown of results by region makes clear that no part of the world is spared from the presence of forced labour. Asia and the Pacific is host to by far the largest number of people in forced labour, 15.1 million, which is more than half of the global total and more than three times that of the region with the next highest number, Europe and Central Asia. But these numbers are driven by the size of the population in each region, and the regional rankings change considerably when forced labour is expressed as a proportion of the population. By this measure, forced labour is highest in the Arab States, at 5.3 per thousand people, compared to 4.4 per thousand in Europe and Central Asia, 3.5 per thousand in both the Americas and Asia and the Pacific regions, and 2.9 per thousand in Africa.[49]

3.1. Case Distribution and Some Significant Decisions

To summarise the case law of the Court (judgements/Grand Chamber, Chamber and Committee), the more specific issues in cases relating to the prohibition of forced labour can be divided as follows:[50]

(Art. 4) Prohibition of slavery and forced labour (315 cases)
(Art. 4) Effective investigation (25 cases)
(Art. 4) Positive obligations (63 cases)
(Art. 4-1) Servitude (61 cases)
(Art. 4-1) Slavery (45 cases)
(Art. 4-1) Trafficking in human beings (77 cases)
(Art. 4-2) Compulsory labour (122 cases)
(Art. 4-2) Forced labour (174 cases)

45 Over the years, the multilateral regimes have added specialised instruments to protect children. However, multiple levels of protections, no matter how relevant, run the risks of lack of cohesion. Where laws duplicate, overlap, overreach or under-present penalties, children suffer the brunt of structural ambiguities, and this negatively affects their economic ingenuity. When it comes to children, issues of economic exploitations fall under three legal schedules: Criminal Law, Children's Rights, and Employment Law. See Adegbite& Fatoki, 2024.
46 Belser, 2005, pp. 12–13.
47 For this topic see amongst others Wilhelm, Bhakoo, Soundararajan, Crane, & Kadfak, 2024, pp. 1–20.
48 ILO 2022, p. 28.
49 ILO 2022, p. 23.
50 European Court of Human Rights 2023.

(Art. 4-3-a) Work required of detainees (32 cases)
(Art. 4-3-b) Alternative civil service (6 cases)
(Art. 4-3-b) Service of military character (22 cases)
(Art. 4-3-d) Normal civic obligations (26 cases)

This chapter will present eight different cases which I believe have a significant effect on the practice of prohibition of forced work. There are cases which underline that remunerated work can also count as forced labour, so the *differentia specifica* does not lie in the question of rewards or compensations. It is also important how this aspect should be perceived in the context of the Adequate Minimum Wage Directive (2022/2041/EU):[51] as the instrument itself states, in-work poverty has increased over the past decade and more workers are experiencing poverty. During economic downturns, the role of adequate minimum wages in protecting low-wage workers is particularly important, as they are more vulnerable to the consequences of such downturns, and is essential for the purpose of supporting a sustainable and inclusive economic recovery, which should lead to an increase in quality employment.[52] This is also a social aspect that needs to be reinforced by law and the Court strives towards this in its practice.

The court also stated that prior consent is not enough: if there is any chance of coercion, the consent is not valid – certainly this is completely in line with general legal principles. It can also happen that a person is victim of human trafficking and starts working in relation of this action, but the labour in itself is voluntarily done and the circumstances do not establish forced labour.

This article focuses on Central-Europe-related cases, but regarding forced labour I am sure that one cannot look only at this region. Therefore, Romania, Croatia, and Austria are included in the compilation, but cases of fundamental importance from Belgium, Greece, and the United Kingdom are also presented.

Van der Mussele v. Belgium[53]

In Van der Mussele v. Belgium the Court accepted that the applicant, a pupil-advocate, had suffered some prejudice by reason of the lack of remuneration and of

51 See: European Union 2022.

52 See 2022/2041/EU Directive; Preamble paragraph (9). According to this directive Minimum wages are considered to be adequate if they are fair in relation to the wage distribution in the relevant Member State and if they provide a decent standard of living for workers based on a full-time employment relationship. The assessment might be based on reference values commonly used at international level such as the ratio of the gross minimum wage to 60 % of the gross median wage and the ratio of the gross minimum wage to 50 % of the gross average wage, which are currently not met by all Member States, or the ratio of the net minimum wage to 50 % or 60 % of the net average wage. The assessment might also be based on reference values associated to indicators used at national level, such as the comparison of the net minimum wage with the poverty threshold and the purchasing power of minimum wages. (Preamble paragraph 28 and Art. 5).

53 European Court of Human Rights 1983.

reimbursement of expenses, but that prejudice went hand in hand with the advantages the applicant enjoyed and had not been shown to be excessive.

It held that while remunerated work may also qualify as forced or compulsory labour, the lack of remuneration and of reimbursement of expenses constitutes a relevant factor when considering what is proportionate or in the normal course of business. Noting that the applicant had not had a disproportionate burden of work imposed on him and that the amount of expenses directly occasioned by the legal work he performed in question had been relatively small, the Court concluded that he had not been a victim of compulsory labour for the purposes of Article 4 § 2 of the Convention (§§ 34-41).

Chowdury and Others v. Greece[54]

The question of whether an individual offers themself for work voluntarily is a factual one which must be examined in the light of all the relevant circumstances.

The Court has made it clear that where an employer abuses their power or takes advantage of the vulnerability of their workers in order to exploit them, the workers do not offer themselves for work voluntarily. In this regard, the prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour.

The term 'forced labour' brings to mind the idea of physical or mental coercion. As for the term 'compulsory labour', it cannot refer to just any form of legal compulsion or obligation. For example, work to be carried out in pursuance of a freely negotiated contract cannot be regarded as falling within the scope of Article 4 of the Convention on the sole ground that one of the parties has undertaken with the other to do that work and will be subject to sanctions if the former not honour their promise.

What there has to be is work "exacted ... under the menace of any penalty" and also performed against the will of the person concerned, i.e. work for which the person "has not offered themself voluntarily" (see *Van der Mussele v. Belgium*, 23 November 1983; Series A no. 70, and *Siliadin*).

In the *Van der Mussele* judgment, the Court found that 'relative weight' was to be attached to the argument regarding the applicant's 'prior consent' and thus opted for an approach which took account of all the circumstances of the case. In particular, it observed that, in certain cases or circumstances, a given "service could not be treated as having been voluntarily accepted beforehand" by an individual. Accordingly, the validity of the consent had to be assessed in the light of all the circumstances of the case.

In order to clarify the concept of 'labour' within the meaning of Article 4 § 2 of the Convention, the Court would point out that any work demanded from an individual under the threat of a 'punishment' does not necessarily constitute 'forced or compulsory labour' prohibited by that provision. It is necessary to take into account,

54 European Court of Human Rights 2017a.

in particular, the nature and volume of the activity in question. (see *Mihal v. Slovakia, 28/06/2011*).

These circumstances make it possible to distinguish 'forced labour' from work which can reasonably be required on the basis of family assistance or cohabitation. In this regard, the Court in *Van der Mussele* (cited above, § 39) relied in particular on the concept of 'disproportionate burden' in determining whether a trainee lawyer had been subject to compulsory labour when required to act, free of charge, to defend clients as assigned counsel (see *C.N. and V. v. France*, no. 67724/09, §74, 11 October 2012).

Dănoiu v. Romania[55]

The applicants were three Romanian nationals. The case concerns a reduction in the applicants' fees ordered by the domestic courts, when they were acting as officially appointed lawyers on behalf of several thousand civil parties in criminal proceedings.

The Bucharest Court of Appeal capped the amount of the fees payable to each of the applicants at approximately 5,700 euros.

Relying on Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights, the applicants complained about the substantial reduction of their fees.

On the merits of the complaint, the Romanian Government stated that the allegedly discriminatory situation complained of by the applicants cannot be characterised as forced labour within the meaning of Article 4 of the Convention, since the persons concerned had registered of their own free will on the list of court-appointed lawyers and had carried out the legal activities without the threat of any penalty (see for the issue of consent in *Van der Mussele v. Belgium*).

The Court found that the applicants had provided no evidence capable of corroborating their assertions regarding discrimination. It did not have any information that would have enabled it to assess the level of remuneration of the various court-appointed lawyers who defended the accused in the criminal proceedings in question in order to ascertain whether any difference in treatment really took place in the species.

The same conclusion must be drawn with regard to the argument put forward by the applicants, namely the remuneration without reduction in salary of the judicial staff who took part in the same procedure (system of remuneration which is not, in any event, comparable to that court-appointed lawyers in this case). In summary, the Court did not see in this case any appearance of discrimination prohibited by Article 14 and 4 of the Convention.

55 European Court of Human Rights 2022.

V.C.L. and A.N. v. The United Kingdom[56]

According to the Palermo Protocol and the Anti-Trafficking Convention, in order to be considered a victim of human trafficking three constituent elements usually had to be present:

- the person had to be subject to the act of recruitment, transportation, transfer, harbouring or receipt (action);
- by means of threat of force or other form of coercion (means);
- for the purpose of exploitation, including, *inter alia*, forced labour or services (purpose).

The applicants were both discovered on or near cannabis factories in April/May 2009. "It was accepted that on the balance of probabilities there were grounds to believe that he had been trafficked into the United Kingdom. In its view, the account of the second applicant's recruitment and movement from Vietnam to the United Kingdom satisfied the definition of trafficking under the Anti-Trafficking Convention for the purposes of labour exploitation." However, the material did not support the contention that the applicant was a victim of forced labour. On the contrary, it suggested that *he chose to work* in the cannabis factory.

S.M. v. Croatia[57]

The applicant lodged a criminal complaint against T.M., a former policeman, alleging that he had physically and psychologically forced her into prostitution.

The policeman was subsequently indicted on charges of forcing somebody into prostitution, as an aggravated offence of organising prostitution. In 2013 the criminal court acquitted him on the grounds that, although it had been established that he had organised a prostitution ring in which he had recruited the applicant, it had not been established that he had forced her into prostitution.

He had only been indicted for the aggravated form of the offence in issue and so he could not be convicted for the basic form of organising prostitution. The appeal of the State Attorney's Office against the decision was dismissed and the applicant's constitutional complaint was declared inadmissible.

The notion of 'forced or compulsory labour' under Article 4 aimed to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they were related to the specific human trafficking context.

Any such conduct might have elements qualifying it as 'slavery' or 'servitude' under Article 4, or might raise an issue under another provision of the Convention. In that context, 'force' might encompass the subtle forms of coercive conduct

56 European Court of Human Rights 2021.
57 European Court of Human Rights 2020.

identified in the Court's case-law on Article 4, as well as by the ILO and in other international materials.

The prosecuting authorities had relied heavily on the applicant's statement and so, in essence, created a situation in the subsequent court proceedings where her allegations simply had to be weighed against the denial of T.M., without much further evidence being presented. In that connection, as noted by international expert bodies, there might be different reasons why victims of human trafficking and different forms of sexual abuse might be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma had to be taken into account. There was, therefore, a risk of overreliance on the victim's testimony alone, which led to the necessity to clarify and, if appropriate, support the victim's statement with other evidence.

The multiple shortcomings in the conduct of the case by the prosecuting authorities had fundamentally undermined the ability of the domestic authorities, including the relevant courts, to determine the true nature of the applicant's and T.M.'s relationship and whether the applicant had been exploited by him as she had alleged. In sum, there had been significant flaws in the domestic authorities' procedural response to the arguable claim and prima facie evidence that the applicant had been subjected to treatment contrary to Article 4.

J. and Others v. Austria[58]

The applicants, Filipino nationals recruited from the Philippines, worked as maids and nannies for different families in Dubai. In July 2010 they accompanied their employers to Austria. During their stay there, the applicants left the families and reported to the Austrian police alleging that they had been subject to human trafficking and forced labour.

The public prosecutor later discontinued investigations on the grounds that the offences had been committed abroad by non-nationals. No offence had been committed in Austria. The prosecutor's decision was upheld by the regional criminal court. It is understandable that there is no requirement for the States to provide for universal jurisdiction over trafficking offences committed abroad – including forced labour issues. However, the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons* was silent on the matter of jurisdiction, and the *Council of Europe Anti-Trafficking Convention* only required State parties to provide for jurisdiction over any trafficking offence committed on their own territory, or by or against one of their nationals. In this case, there was no obligation incumbent on Austria to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the United Arab Emirates.

58 European Court of Human Rights 2017b.

Stummer v. Austria [GC][59]

The applicant argued that European standards had changed to such an extent that prison work without affiliation to the old-age pension system could no longer be regarded as work required to be done in the ordinary course of detention.

Austrian law reflected the development of European law in that all prisoners were provided with health and accident care and working prisoners were affiliated to the unemployment-insurance scheme but not to the old-age pension system. It appeared, however, that there was no sufficient consensus on the issue of the affiliation of working prisoners to the old-age pension system. While the 2006 European Prison Rules reflected an evolving trend, this could not be translated into an obligation under the Convention.

The Court did not find a basis for the interpretation of Article 4 advocated by the applicant and concluded that the obligatory work he had performed as a prisoner without being affiliated to the old-age pension system had to be regarded as "work required to be done in the ordinary course of detention" within the meaning of Article 4 § 3 (a) of the Convention and did not therefore constitute "forced or compulsory labour".

Floroiu v. Romania[60]

While serving his sentence, the applicant asked for permission to work, and after his request was granted he carried out this work for a total of 114 days. As the work was deemed by the National Prison Service to assist the day-to-day running of the prison, he *did not receive any payment but, by way of compensation, was granted a reduction of thirty-seven days* in the term remaining to be served.

During his previous periods of imprisonment, he had worked for a cumulative total of five years and eleven months. In return, he had either been granted a reduction in the number of days remaining to be served if the work involved assisting the day-to-day running of the prison, or he had received payment in accordance with the Execution of Sentences Act (Law no. 23/1969), in force at the relevant time. He was not affiliated to the old-age pension scheme under the general social-security system.

1) As to the fact that the applicant was not paid for the work he did, the Court reiterated that this in itself does not prevent work of this kind from being regarded as "work required to be done in the ordinary course of detention" (see *Zhelyazkov v. Bulgaria*, no. 11332/04, § 36, 9 October 2012, and *Stummer*, § 122).
2) The 2006 European Prison Rules refer to the normalisation of prison work as one of the basic principles in this sphere. More specifically, Rule 26.10 of

59 European Court of Human Rights 2011.
60 European Court of Human Rights 2013c.

the 2006 Rules provides that "in all instances there shall be equitable remuneration of the work of prisoners".

3) In the present case, under domestic law, prisoners are able to carry out either paid work or, in the case of tasks assisting the day-to-day running of the prison, work that does not give rise to remuneration but entitles them to a reduction in their sentence. Prisoners are able to choose between the two types of work after being informed of the conditions applicable in each case.
4) In the applicant's case, the Court considered that because of a significant reduction in the time remaining to be served, the work carried out by the applicant was not entirely unpaid, therefore the work performed by the applicant can be regarded as "work required to be done in the ordinary course of detention" within the meaning of Article 4 § 3 (a) of the Convention.

4. Conclusions

The ILO stated that the two elements of modern slavery – forced labour and forced marriage – both reflect a denial of people's freedom and their economic and social agency. Both refer to situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, and deception. Both involve underlying imbalances and abuses of power. Both are embedded in patterns of discrimination, deprivation, and poverty. Gaps in governance, in law and practice, create the space for both these abuses to occur.[61]

Through the adoption of the 2030 Sustainable Development Goals (SDGs),[62] the international community has committed to ending modern slavery among children by 2025, and universally by 2030 (Target 8.7),[63] and, relatedly, by 2030 to eliminating of all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation (Target 5.2),[64] and ending abuse, exploitation, trafficking and all forms of violence and torture against children (Target 16.2).[65]

The findings of this paper can be summarised in nine short points:

1) Forced labour mostly occurs together with human trafficking and discrimination cases.

61 ILO 2022, p. 77.
62 United Nations Department of Economic and Social Affairs / Sustainable Development.
63 United Nations Department of Economic and Social Affairs / Sustainable Development.
64 United Nations Department of Economic and Social Affairs / Sustainable Development.
65 United Nations Department of Economic and Social Affairs / Sustainable Development.

2) The actions of the governments must be judged in the light of case law, the practice of the ILO, and many different international legal norms above the Convention.
3) Prior consent is not sufficient to exclude the characterisation of work as forced labour.
4) The state authorities must take into consideration more types of evidence – even psychological issues regarding traumas caused by the forced labour.
5) The threat of a 'punishment' does not necessarily constitute 'forced or compulsory labour'.
6) 'Forced labour' is physical or mental coercion; 'compulsory labour' cannot refer to just any form of *legal* compulsion or obligation.
7) There is no positive obligation for investigating compulsory or forced labour that happens on the territory of another State or does not involve any nationals.
8) Regarding the working conditions of the prisoners, it can be rightful if the remuneration is given in nature and not in financial form,
9) Also, regarding the cases of prisoners, it can be rightful if they are affiliated to the unemployment-insurance scheme but not to the old-age pension system.

The ILO identifies fourteen areas where, with the right legislative decisions, forced labour can be effectively reduced. These are: the freedoms of workers to associate and to bargain collectively; the extension of social protection; fair and ethical recruitment; strengthening the public labour inspectorates; ensuring protection and access to remedy for those freed from situations of forced labour; ensuring adequate enforcement; addressing migrants' vulnerability to forced labour and trafficking for forced labour; addressing children trapped in forced labour; mitigating the heightened risk of forced labour in crisis; combating forced labour and trafficking

for forced labour in business operations and supply chains; ending state-imposed forced labour; international cooperation and partnership; and research and data collection.

Forced labour occurs in the world of work and is interwoven with denial of the right to bargain collectively and the right to freedom of association. Broader economic and labour market forces can play an important determining role. Ensuring respect for workers' fundamental rights of freedom of association and collective bargaining is a critical precondition for social dialogue, which is in turn vital to building lasting, consensus-based solutions to the challenge of forced labour. Without the respect of freedom of association and collective bargaining in all parts of the economy, there can be no negotiation for a fair share of wealth they have helped to generate, and without that there can be no decent work.[66]

Redressing the lack of effective access to representation in the informal economy, where forced labour abuses are overwhelmingly concentrated, is especially important

66 ILO 2022, pp. 78–79.

to progress against forced labour. It is also a central element in broader efforts towards the formalisation of informal workplaces.

Reaching informal economy workers so they can organise in collective representative structures is difficult but far from impossible. Groups of informal workers, including domestic workers, home-workers, brick-kiln workers, tenant farmers, and artisanal fishers, are developing innovative forms of organisation to represent and defend their interests, often with the support of established trade unions, demonstrating what can be done.

Migrant workers are among the groups particularly affected by restrictions on their rights to freedom of association and collective bargaining, in some contexts because law forbids them to join unions and in others because they are concentrated in sectors in which the freedoms to associate and bargain collectively are not protected under law. This is particularly true for migrants with irregular status. However, most international commitments, as well as the 2030

Agenda's promise of leaving no one behind, means that it is critical that such barriers are removed, including in relevant policy and legislative frameworks.[67]

67 Ibid, p. 80.

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Chapter 6

Unchained, Yet Prosecuted – Victims of Human Trafficking as Subjects of Criminal Liability and Art. 4 of the ECHR[1]

Jan Provazník – David Čep

Abstract

This paper examines the complex legal issue of criminal liability for victims of human trafficking under Article 4 of the European Convention on Human Rights (ECHR). The study addresses the tension between protecting trafficking victims from prosecution for crimes they were compelled to commit during their victimization and maintaining the integrity of criminal law systems. It analyzes the regulatory framework surrounding human trafficking, including the Warsaw Convention, the Palermo Protocol, and EU Directive 2011/36/EU, all of which provide for the possibility of non-prosecution or non-penalization of trafficking victims under specific circumstances. Through examination of recent European Court of Human Rights case law, particularly "V.C.L. and A.N. v. the United Kingdom" and "G.S. v. the United Kingdom", the paper demonstrates that neither international instruments nor ECHR jurisprudence establish absolute immunity for trafficking victims.

The author proposes a comprehensive two-step assessment framework for determining when non-prosecution obligations apply. First, victim status must be established

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through proper investigation by specialized authorities. Second, five critical factors must be evaluated: (I) the nexus between the crime and victim status, (II) the intensity of coercion, (III) reasonably expected consequences of non-compliance, (IV) the victim's personal situation and trafficking context, and (V) the nature and severity of the committed crime. The paper argues that the non-prosecution requirement should be understood as a standalone negative obligation under Article 4 ECHR rather than merely a component of positive protective obligations. This approach would provide clearer legal boundaries while preventing potential expansion to other victim categories. The research concludes that criminal prosecution of trafficking victims does not automatically violate Article 4 ECHR, but requires careful case-by-case analysis balancing victim protection with other legitimate interests, including the rights of crime victims and public safety concerns.

Keywords: human trafficking; criminal liability; victim immunity; ECHR Article 4; positive obligations; non-prosecution

1. Introduction

This year, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'ECHR' or 'Convention') is celebrating its 70th anniversary. During the previous seven decades, the Convention has proven itself to be a strong, efficient and respected treaty on protection of human rights. Nevertheless, by nature of its scope, various new challenges that were hard to imagine in the times when it was adopted, occurred during this long period. The fact that the Convention does not exist in a legal vacuum, but that the level of human rights protection that it provides is supplemented by other treaties, as well as the interpretation doctrine adopted by the European Court of Human Rights (hereinafter "ECtHR" or "Court") according to which the Convention is a living instrument that must be interpreted according to present-day conditions (see *inter alia multa Tyrer v. the United Kingdom*[2]), present a solid basic legal tool in this never-ending struggle for better protection of human rights. However, since the primary protection lies on the Contracting States – their legislation and judicial system, it is necessary to ensure that the protection on a state level will be provided under same conditions and within the same scope as under the Convention as it is interpreted by the Court.

This paper highlights the question of protection of victims of human trafficking in one of its specific aspects, which is the protection from the consequences of Criminal Law of the illegal – criminal – activities they engaged in during their victim status.

2 Judgment of 25. April 1978 in case of *Tyrer v. the United Kingdom*, application no. 5856/72.

The idea that victims of human trafficking represent a highly vulnerable group of individuals due to their social and economic conditions and dependency on traffickers or those who benefit from human trafficking,[3] and can also be easily forced to commit crimes,[4] is not very surprising. Thus, the necessity of not holding victims liable for such illegal activities in order to protect their fundamental rights[5] seems to be legitimate. On the other hand, this requirement may be in contradiction with the obligation to protect the victims of such crimes, which may even carry the same quality of the positive obligation to protect under the Convention. The question of how to respond to such situations and how to reconcile these two requirements is the key issue of this article. Art. 4 of the Convention, prohibiting slavery and servitude, that has been recognised in the Court's case law as the most relevant in human trafficking cases (due to the absence of the explicit recognition of human trafficking and its prohibition in the Convention) does not provide an answer, nor does any other article of the Convention. The Court must thus rely on other international documents such as the Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter the 'Warsaw Convention') or the instruments of European Union law, specifically Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims (hereinafter the 'Directive'), that have frequently been recognised as sources of positive obligations of Contracting States by the Court in interpreting the Convention. Accordingly, the Contracting States, that either adopted the Warsaw Convention or are Member States of European Union, are obliged (under specified conditions) to provide the possibility of imposing no penalties or not prosecuting victims of human trafficking. The question is whether the absence of such provisions or their non-application would – in case of a criminal prosecution or punishment of the victim of human trafficking for criminal offence committed in connection with the fact that he or she was subjected to human trafficking – lead to a decision of the Court stating that Art. 4 of Convention was breached.

In order to provide an exhaustive answer to this question, firstly, we present relevant international instruments related to human trafficking and the positive obligations of states. Subsequently, we subject the relevant case law of the Court and its main conclusions to protect victims from imposing criminal sanctions or from criminal prosecution to a further analysis, so that we can understand how the Court interprets the concept of human trafficking and the scope of positive obligations of the Contracting States towards victims.

The case law study also allows us to point out some specific situations in which criminal activities of victims of human trafficking transpired. Based on the outcomes of previous parts of the text, we first provide analysis of the nature and content of

3 Realising these facts as well as the importance of victims' testimonies that plays a decisive role in the successful prosecution of traffickers led to an emphasis on the protection and assistance of victims of human trafficking (Rijken, 2009, pp. 217, 218.).

4 Piotrowicz, Sorrentino, 2016, p. 673.

5 Muraszkiewicz, 2019, p. 1.

the non-prosecution/non-penalisation obligation, followed by a proposition of assessment in which the non-prosecution/non-penalisation requirement is conducted.

Such assessment provides valuable outcomes, particularly in the context of Central European countries, as according to Group of Experts on Action against Trafficking in Human Beings (hereinafter 'GRETA') some of these countries are not fulfilling their international obligations and their obligations under the law of the European Union to adopt provisions that make it possible not to prosecute or impose criminal sanctions against victims of human trafficking.

2. Regulatory framework on human trafficking

2.1. Historical and general overview

Human trafficking belongs to a group of the oldest criminal fields (along with *e.g.* political terrorism or currency counterfeiting) that have been recognised as a threat of such magnitude that had to be regulated at the international level in modern legal history. To name just a few, the predecessors of the current Central European Countries were the contracting parties or ascended to:

- International Agreement for the Suppression of the White Slave Traffic (Paris, 18 May 1904) and Protocol thereto (New York, 4 May 1949),
- International Convention for the Suppression of the White Slave Traffic (Paris, 4 May 1910) and Protocol thereto (New York, 4 May 1949),
- International Convention for the Suppression of the Traffic in Women and Children (Geneva, 30 September 1921) with a protocol thereto (New York, 4 May 1949),
- International Convention for the Suppression of the Traffic in Women of Full Age (Geneva, 11 October 1933) with a protocol thereto (New York, 12 November 1947),
- Convention Concerning Forced or Compulsory Labour, 1930 (International Labour Organization No. 29, Geneva, 28 June 1930) with its Protocol of 2014 (hereinafter 'Protocol 2014'),
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (New York, 21 March 1950) and the Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others thereto (New York, 21 March 1950),[6]
- Abolition of Forced Labour Convention (International Labour Organization No. 105, Geneva 25 June 1957),

6 Except for Hungary.

- Convention to Suppress the Slave Trade and Slavery (Geneva, 25 September 1926),
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956),
- Worst Forms of Child Labour Convention (International Labour Organization No. 182, Geneva, 17 June 1999),
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (New York, 25 May 2000),
- United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), with its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children – hereinafter the 'Palermo Protocol' and Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime,
- International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006).[7]

On the regional level, the following conventions of the Council of Europe are particularly relevant:

- Warsaw Convention (Warsaw, 16 May 2005),
- Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 25 October 2007),
- Council of Europe Convention against Trafficking in Human Organs (Santiago de Compostela, 25 March 2015).[8]

With respect to all the aforementioned documents testifying that human trafficking is relatively thoroughly regulated by international law and that combatting it does not depend solely on the ECHR, the most important legal provision for our purposes is evidently Art. 4 of the ECHR.

On the level of the EU, the fundamental provision guaranteeing every person within the scope of the EU the right not to be subjected to human trafficking is Art. 5 of the Charter of Human Rights of the European Union. Apart from that, several other legal instruments to tackle this problem area have been adopted:

- Directive,
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or

7 This convention has been signed by Czechia, Poland and Slovakia, however, only Slovakia has ratified it so far.

8 So far Czechia is the only Central-European country which has ratified this convention. Poland has signed it, Hungary and Slovakia have not done so yet.

who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities,
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast),
- Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation.[9]

As is apparent, basically since the dawn of modern international law regarding criminal issues, all aspects encompassing the current notion of human trafficking (forced labour, sexual exploitation, illegal adoption of children etc.), as well as some newer forms (*e. g.* illegal organs trafficking[10]) have been frequently recurring objects of attention of the international community as well as of the European Union, and the Central-European states have cooperated in this global endeavour from the very beginning.

2.2. Article 4 of the ECHR, Palermo Protocol, Warsaw Convention

Among all these legal instruments, Art. 4 of the ECHR plays a crucial role, as, apart from other international conventions, it has a strong centralised judicial authority – the ECtHR, which unifies its interpretation for all the Contracting States.

Art. 4, along with Art. 2 and Art. 3 of the ECHR, enshrines one of the most fundamental values of the democratic society (*e. g. Siliadin v. France*, *Stummer v. Austria*[11]). While no provision of the ECHR explicitly mentions 'human trafficking', according to the Court, the ECHR is not the sole framework of reference for the interpretation of rights and freedoms enshrined therein (*e. g. Rantsev v. Cyprus and Russia*[12]). In interpreting the concepts under Art. 4[13] of ECHR, the Court relies on various international treaties. In case of human trafficking, these are, for instance, the Warsaw Convention and the Palermo protocol. According to the Court, a conduct or situation may give rise to an issue of human trafficking under Art. 4, only if all

9 For further details about the history of the EU's strive to tackle the challenge of human trafficking, see *e. g.* Berman, Friesendorf, 2008, pp. 195–207.

10 For a European perspective see *e. g.* Meyer, 2006, pp. 215–219.

11 Judgment of 26 July 2005 in case of *Siliadin v. France,* application no. 73316/01, judgment of 7 July 2011 in case of *Stummer v. Austria*, application no. 37452/02.

12 Judgment of 7 January 2010 in case of *Rantsev v. Cyprus and Russia*, application no. 25965/04.

13 This provision is the most often applied in the human trafficking cases, but naturally, it is not the only one that may be activated in relation to this type of criminal activity – typically, the issue may arise also under Art. 3 of the ECHR (*e. g. M. and others v. Italy and Bulgaria*), but some other provisions are not *per se* excluded as well (Art. 2, Art. 10 etc.).

three constituent elements of international definition of human trafficking, under the Warsaw Convention and the Palermo Protocol, are present [*e. g. S. M. v. Croatia (GC)*[14]]. These conditions are prescribed in Art. 3 letter a) of the Palermo Protocol and Art. 4 of the Warsaw Convention as a combination of three elements – action, means and purpose. It can thus be summarised as:

1) the recruitment, transportation, transfer, harbouring or receipt of persons (action),
2) by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person (means),[15] while the eventual consent being irrelevant, if after a thorough examination of the context it did not exclude the forced character of the activity (*e. g. Chowdury and others v. Greece* or *Zoletic and others v. Azerbaijan*[16]),
3) for the purpose of exploitation, which shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (purpose).[17]

Although the Court has derived its considerations on human trafficking from these two legal instruments and sticks to the definition of human trafficking provided by them, it does not follow that the ECHR must not be applied in cases in which the definition is fulfilled, but some of the conditions of the scope of application of one of these instruments are missing. The Court has for example explicitly verbalised that Art. 4 of the ECHR might be relevant even if an international aspect or aspect of organised criminality is missing [*e. g. S. M. v. Croatia (GC).*[18]]

Regarding the victims, the Palermo Protocol enshrines only very general obligations of the Contracting States regarding the physical well-being of the victims, suitable assistance etc. It does not impose an obligation on the Contracting States to grant the victims a full criminal immunity for the acts which they conducted in their capacity of the victims of human trafficking, neither recommends it. On the contrary, the Warsaw Convention explicitly covers this issue in its Art. 26, which reads as follows: "*Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.*" At least four very interesting outcomes follow from such a short provision.

14 Judgment of Grand Chamber of 25. June 2020 in case of *S. M. v. Croatia*, application no. 60561/14.
15 This criterion need not be fulfilled in cases of child victims at all.
16 Judgment of 30 March 2017 in case of *Chowdury and others v. Greece*, application no. 21884/15, judgment of 7 October 2021 in case of *Zoletic and others v. Azerbaijan*, application no. 20116/12.
17 See *e. g.* Smartt, 2003, p. 165ff.
18 Judgment of Grand Chamber of 25 June 2020 in case of *S. M. v. Croatia*, application no. 60561/14.

First, it is clear from the wording that it is not formulated in an absolute or categorical way, because it does not grant the victims a subjective right not to be criminally liable or prosecuted, it merely requires the states (as direct addressees) to provide for a *possibility* (as contrasted to an obligation) not to impose sanctions.

Second, it only mandates the opportunity for exemption from sanctions, but not from prosecution or even from general liability. In theory, it thus does not prevent the states to subject the victims of human trafficking to a full-blown criminal proceedings, which would result in a declaration of guilt while refraining from imposing a penalty. Regarding this point, it is also noteworthy that this provision encompasses all illegal activities, not only crimes (*e. g.* beyond Art. 14 of this Convention regarding the residence permit, it also allows the victims to be exempted from an administrative penalty for illegal stay on the territory).

Third, it only very vaguely defines the scope of the *possibility* as relating to the illegal activities to which they *have been compelled*. This formulation, as it will be explained further in more details, leaves a latitude for interpretation of both the necessary level of compelling as well as the scope of application in relation to the severity and other circumstances of the illegal activity in question.

Fourth, states enjoy a very wide range of ways in which they implement this requirement into their legal orders, as each such solution shall be in accordance with *the basic principles of their legal systems*. The explanatory report for this provision, alas, does little more than just rephrasing its text, apart from mentioning that the solution may be conducted through a provision of criminal substantive or procedural law.[19]

However, the position of GRETA on the non-prosecution/non-penalisation requirement towards the Central European countries is quite strict. Regarding the Czech Republic, GRETA advocates for a concrete provision on the non-penalisation of victims of human trafficking for their involvement in unlawful activities to the extent that they were compelled to do so, eventually accompanied also by a guidance for law enforcement authorities.[20] The same applies to Hungary,[21] Poland[22] and Austria,[23] despite the fact that all of those countries have either a general solution in the terms of substantive criminal law (*e. g.* Hungary with the condition excluding or limiting liability in cases of coercion) or in the terms of criminal procedural law (*e. g.* the possibility not to prosecute in the Czech Republic, Poland etc.) and some even have specific internal instructions or regulations for the law enforcement authorities regarding the victims of human trafficking (*e. g.* Poland, Austria). Slovakia was praised by GRETA for introducing a specific provision immunising the victims of human trafficking from criminal liability, albeit stressing out that the scope of

19 Explanatory report, 2005, p. 42.
20 GRETA report for Czech Republic, p. 55.
21 GRETA report for Hungary, p. 40.
22 GRETA report for Poland, p. 32.
23 GRETA report for Austria, p. 34.

the provision at hand is too narrow, as it provides immunity only for minor offences under criminal law, and recommended its extension to all crimes and administrative offences alike.[24]

Sine ira et studio, we cannot accept that the one and only way to satisfy the requirement of non-prosecution/non-penalisation according to Art. 26 of the Warsaw Convention is a special provision applicable only to the victims of human trafficking. The wording and legal construction which we have summarised above do not support such a claim. On the contrary, this article explicitly anchors the above-mentioned requirement in the fundamental principles of the Contracting State. In our opinion, introducing specific provisions for each requirement following from an international legally binding document is not a proper way and may be even harmful in the end, because it has a huge possibility of increasing chaos and particularism in the legal order.

To put it bluntly, the only concern that GRETA (rightfully and legitimately) has is the combat against human trafficking, while states have so many different obligations, often contradictory or mutually exclusive that they necessarily need to resort to general frameworks and solutions when balancing them. Regarding the human trafficking, we think that practical application of the relevant provision is of greater significance than its formulation. As far as the provisions in any way satisfy the non-punishment/non-penalisation requirement, all our effort should be put to the training and specialisation for the sake of professional conduct by the law enforcement authorities, other public authorities and helping professions in order to efficiently execute them in real cases. It can be argued that introducing a specific provision by no means contradicts this approach and that it may only help it thrive. That is however true only in an isolated view. The more special provisions for very specific situation are introduced in the legal order, the greater is the risk that they will not be properly applied as a result of overburdening and entropy and/or unforeseen conflicts among them, inconsistency and legal dead ends. The risk of a slippery slope is quite obvious here, as there are many other specific and highly sensitive situations that may legitimately call for a special treatment requiring a special provision as well (*e.g.* sexual crimes, hate crimes, crimes committed by the drug addicts as a result of their addiction, traffic crimes etc.).

2.3. Directive 2011/36/EU

Along with the Art. 4 of the ECHR, the second very important legal tool in Central Europe is the Directive, as it is backed by the EU and subjected to a unifying interpretation of the Court of Justice of the European Union (hereinafter 'CJEU').

24 GRETA report for Slovakia, p. 27.

The Directive takes a very similar approach as the previously mentioned documents and is clearly inspired by them, often appealing to them in the recitals.[25]

With regard to the immunisation clause, the Directive is a little bit more precise, as its Art. 8 stipulates: "*Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.*"

It should be mentioned that practically the same provision was introduced in the Protocol 2014, which states in its Art. 4 par. 2. "*Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.*"

Once again, it is evident that this provision does not bestow a right to be immunised from criminal liability on the victims rather than enables the Member States not to prosecute or punish them *in accordance with the basic principles of their legal systems*. It also clarifies that this provision should apply only if the illegal activity was a *direct* consequence of being treated as an object of human trafficking.

It is worth mentioning that when it comes to the nature of the non-prosecution/non-penalisation requirement, the European Parliament has taken a similar stance as GRETA, *i.e.* anything less than a special provision dedicated only to the victims of human trafficking cannot satisfy it.[26] We have demonstrated above why we do not share the same view.

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3. Human trafficking and obligations of the state in the Court's case law

3.1. Obligations of the state relating to human trafficking in general

According to Art. 1 of ECHR, the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. Two branches of securing the rights and freedoms by states are

25 It should be mentioned, that the Directive also goes beyond texts of above-mentioned documents. For instance, when defining minimal scope of term 'exploitation' in Art. 2 par. 3 it clearly states, that exploitation of criminal activities of victims also falls within subject of the Directive.

26 Resolution of the European Parliament 2021/C 465/04, par. 59

recognised in the Court's case law – the so-called negative obligations and the positive ones. The negative obligations consist of a duty to refrain from a wrongful conduct, *i.e.* to refrain from actions incompatible with Convention (*e.g. Ilaşcu and Others v. Moldova and Russia*[27]).

When applied to human trafficking, states have an obligation not to bring their people into a situation of human trafficking themselves.[28] The positive obligations consist of a duty to guarantee respect for the rights and freedoms secured under the Convention in an active manner (*e.g. Ilaşcu and Others v. Moldova and Russia*[29]).[30] The distinguishment between positive obligations and negative obligations is that *"the former require positive intervention by the state, whereas the latter require it to refrain from interference. Violation of the Convention will result in the first case from inaction, i. e. passivity, on the part of the national authorities, and in the second case from their preventing or limiting the exercise of the right through positive action".*[31] In the context of human trafficking, the positive obligations of the Contracting States lie especially in a duty to establish an effective legal and administrative framework prohibiting and punishing human trafficking as well as in a duty to conduct an effective investigation if a relevant suspicion of human trafficking occurs (*e.g. C.N. and V. v. France*[32]).

When discussing human trafficking, which undoubtedly falls under the scope of Article 4 – as the Court stated in *Rantsev v. Cyprus and Russia*[33] – the limit of negative obligations, *i. e.* the situations when interference with rights guaranteed in Art. 4 of ECHR by states is not considered as a breach of Art. 4, is set forth in Art. 4 par. 3 of ECHR. Most of the other obligations identified in the Court's case law regarding human trafficking fall into the category of the positive ones.

The duty of the state not just to interfere with concerned right or freedom but to take specific steps to secure its enjoyment and thus comply with its obligations derived from Art. 1 of ECHR was illustrated in case *Siliadin v. France*[34] with regard to human trafficking. In this case the Court noted that states are – in order to comply with Art. 4 of ECHR – obliged not only to take direct actions but also to fulfil their positive obligations such as to adopt a criminal-law provision which penalises the practices referred to in Art. 4 and to apply them in practice (*e. g. M. C. v. Bulgaria*[35]). The duty to penalise and prosecute human trafficking (*e. g. Rantsev v. Cyprus and*

27 Judgment of 8 July 2004 in case of *Ilaşcu and Others v. Moldova and Russia*, application no. 48787/99.
28 Rijken, 2009, p. 216.
29 Judgment of 8 July 2004 in case of *Ilaşcu and Others v. Moldova and Russia*, application no. 48787/99.
30 For further analysis of this phenomenon, we recommend the reader article of Stoyanova, V., 2023.
31 Akandji-Kombe, 2007, p. 25.
32 Judgment of 11 October 2012 in case of *C.N. and V. v. France*, application no. 67724/09.
33 In contrary to his reasoning in *Siliadin v. France* (see Stoyanova, V., 2011, p. 804.).
34 Judgment of 26 July 2005 in case of *Siliadin v. France*, application no. 73316/01.
35 Judgment of 4 December 2003 in case of *M. C. v. Bulgaria*, application no. 39272/98.

Russia[36]) is the key positive obligation. Nevertheless, it is not the only obligation[37] as the Court pointed in the same judgment, where necessity to adopt whole spectrum of safeguards was mentioned. Such safeguards should ensure both practical and effective protection of the rights of victims or potential victims of human trafficking.

This idea of the Court for comprehensive approach to human trafficking cases was inspired by both the Palermo Protocol and the Warsaw Convention that include not just measures to punish traffickers, but also to prevent trafficking and to protect its victims in order to effectively fight against human trafficking. We agree with the argument[38] that such obligations of the state form part of the universal obligation to fight slavery and are not binding just for those that ratified the above-mentioned treaties to suppress human trafficking.

In *Rantsev v. Cyprus and Russia*[39] the Court provided a general framework of the positive obligations under Art. 4 that includes:

I) the duty to put in place a legislative and administrative framework to prohibit and punish trafficking;
II) the duty, in certain circumstances, to take operational measures to protect victims, or potential victims, of trafficking; and
III) a procedural obligation to investigate situations of potential trafficking.

The first type of positive obligation needs no further explanation since its content generally derives from relevant international instruments and their implementation in the legal order of each particular state (especially introducing crimes of trafficking in persons, illegal removal of human organs etc.).

The second type of positive obligation (as stated in *V. C. L. and A. N. v. the United Kingdom*[40]) arises where certain circumstances of a particular case demonstrate that the state authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being trafficked or exploited within the meaning of Art. 3 letter a) of the Palermo Protocol and Art. 4 letter a) of the Warsaw Convention.[41] Once such a suspicion is established, the authorities must act with due diligence *propriu motu*, regardless whether the victim has filed an official complaint (*e. g. C. N. v. the United Kingdom*[42]). In these situations, the Court shall find a violation of Art.

36 Judgment of 7 January 2010 in case of *Rantsev v. Cyprus and Russia*, application no. 25965/04.
37 Opposite approach limiting positive obligations of the state to adoption of relevant provisions of criminal law aiming on human traffickers, that could be deduced from *Siliadin v. France,* has been subject of criticism in its time (see Stoyanova, V. 2011, p. 806.).
38 Kirchner, S., Frese, V. M., 2015, p. 142.
39 Judgment of 7 January 2010 in case of *Rantsev v. Cyprus and Russia*, application no. 25965/04.
40 Judgment of 16 February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.
41 See for example case *V. F. v. France*, where the applicant did not manage to prove that the state authorities were aware, or ought to have been aware, that the applicant was a victim of human trafficking.
42 Judgment of 13 November 2012 in case of *C. N. v. the United Kingdom*, application no. 4239/08.

4 of ECHR in case the state authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.[43] However, the obligation of the state is, as it is common for all procedural positive obligations, one of means, not of outcomes (*e. g. L. E. v. Greece*[44]).

Despite the answer to the question whether the state took appropriate measures is connected with the facts of the case (and giving regard to a condition that it does not impose an impossible or disproportionate burden on the authorities as noted in *Rantsev v. Cyprus and Russia*[45]), there are some general operational measures that the Court identified in its case law. In *V. C. L. and A. N. v. the United Kingdom*[46] the Court categorised these measures as either preventive or protective. The preventive measures include those that strengthen national coordination between the various anti-trafficking bodies and discourage the demand for all forms of human exploitation, whereas the protective measures include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery.

The third type of positive obligation requires from states to conduct an effective investigation as soon as the official authorities become aware of a probable case of possible human trafficking, which is in principle identical to the same obligation which form the procedural limb of Art. 2 and Art. 3 of the ECHR, *i.e.* the investigation must be prompt, impartial, independent, reasonably led in terms of securing all relevant evidence and victim-sensitive (*e. g. J. and others v. Austria*[47]).

3.2. Obligation of the state of non-prosecution and non-penalisation

The status of the obligation to provide possibility of non-prosecution or non-penalisation of victims of human trafficking (hereinafter as 'non-prosecution and non-penalisation'), which is the main theme of this paper, is somewhat debatable. It may be understood as a part of the positive obligation of the state to effectively investigate human trafficking suspicions, or it may be perceived as a standalone negative obligation of the state, triggered by the state's failure to prevent the individual from becoming a victim of human trafficking (see below in detail). The first understanding of this obligation is based on the fact that the issue of the non-prosecution

43 In connection with case *L. E. v. Greece* the question of how proactive the state authorities should be in order to identify the victims of human trafficking – whether they should actively search for them, or just react on situation when victims address themselves (with respect to the fact that the victims of human trafficking usually do not report that they have been subjected to such behaviour for scale of reasons) was raised, with strongly negative evaluation of the secondly mentioned – passive – approach that the Court used in this case when assessing possible violation of art. 4 of ECHR by state before the applicant reported herself to Greek authorities (see Milano, V., 2017, p. 717-719.).

44 Judgment of 21 January 2016 in case of *L. E. v. Greece*, application no. 71545/12.

45 Judgment of 7 January 2010 in case of *Rantsev v. Cyprus and Russia*, application no. 25965/04.

46 Judgment of 16 February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.

47 Judgment of 17 January 2017 in case of *J. and Others v. Austria*, applications no. 58216/12.

and non-penalisation is connected with the above-mentioned operational measures, because the purpose of these provisions is the protection of the victims and ensuring their cooperation with law enforcement authorities free of fear of their own criminal prosecution as well as recognition of the specifics of their situation when considering level of compulsion. This approach seems to be the one that the Court favours. However, we believe that there are some very convincing objections to it (see below).

The Court did not shed much light on the state's specific obligation of non-prosecution and non-penalisation until recent judgment of *V. C. L. and A. N. v. the United Kingdom*[48], delivered in spring of 2021. In this judgment, the Court – when considering whether the state fulfilled its positive obligation to take operational measures to protect the victims of human trafficking under Art. 4 of ECHR – stated, that there is no general prohibition of the criminal prosecution of the victims of human trafficking (not even of minors), when considering the Warsaw Convention or other international documents. However – the Court stated – in some cases, the criminal prosecution of the victims may be incompatible with the state's duty to take operational measures to protect the victims, or possible victims, of human trafficking. A similar approach was taken in the decision *G. S. v. the United Kingdom*[49] of autumn of the same year. These two cases are basically the first ones to deal explicitly with the issue of non-prosecution and non-penalisation, so they deserve a closer attention.

In the case of *V. C. L. and A. N. v. the United Kingdom*[50] the applicants – both Vietnamese, 15 and 17-year-old minors – were arrested during police actions where sophisticated cannabis factories were discovered.

The first applicant claimed that he was smuggled into the United Kingdom and upon arrival he was taken by another Vietnamese national to the address where cannabis was being grown and where he was later arrested. Despite the Refugee and Migrant Justice' (which is a legal advice and representation charity) information that he may have been the victim of human trafficking, the first applicant pleaded guilty to the production of cannabis after a consultation with his legal counsellor. The Crown Prosecution Service then reviewed its decision to prosecute and concluded that there was no credible evidence that the first applicant had been trafficked. A day later, the Crown Prosecution Service received a letter from United Kingdom Border Agency indicating that the circumstances of the first applicant's case had been considered as there were reasonable grounds to believe, that he had been trafficked. The case was adjourned at this moment. Later, a report from the United Kingdom Border Agency pointed at trafficking indicators in first applicant's case, such as that he had been found at a cannabis factory highlighting criminality involving adults; he was not

48 Judgment of 16 February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.

49 Judgment of 23 November 2021 in case of *G. S. v. the United Kingdom*, application no. 7604/19.

50 Judgment of 16 February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.

enrolled in a school; and he was not allowed to leave the property. The case was then reviewed by the Crown Prosecution Service, but the Chief Crown Prosecutor subsequently confirmed that it should be prosecuted. At a court hearing the first applicant maintained his plea, while it appeared that this decision followed a meeting with his solicitor in which he had been informed that the finding that he had been trafficked had not been definitively confirmed (based on the fact mentioned above and pointed out by the Council of the Crown during the hearing). As a result, the first applicant was sentenced to twenty months detention in a young offenders' institution.

The second applicant was arrested together with a number of other Vietnamese nationals when hiding close to the premises where sophisticated cannabis factory was found by the police. During the police interview, he explained, that after arrival to the United Kingdom, he met some Vietnamese people and was given accommodation, clothes and food for a week. While he was staying in a house, he was told that it was best for him if he did not go out. However, when he was asked if he was held there against his free will, he denied it. After a week he was taken to a cannabis factory, where the windows were bricked up, the only door was locked from the outside and he believed that the factory was guarded. His work included watering the plants and cooking. He slept, ate and worked in the factory, and he was not paid for his work. Later, the second applicant became suspicious and wished to leave. He was allowed to leave for a few days, but when he decided not to come back, he was instructed that he might be killed if he stopped working. Thus, he returned to the factory. During file review conducted by the Crown Prosecution Service, the possibility that the second applicant had been smuggled into the United Kingdom was considered.

His legal counsel was instructed accordingly, but since the second applicant during his conference with his counsel described facts of the case as mentioned above, the counsel advised him to plea guilty, which he followed and later was sentenced to an eighteen-month detention and training order. Later, the second applicant's new solicitor referred his case to the National Society for the Prevention of Cruelty to Children National Child Trafficking Advice and Information Line and this organisation found about different background of the second applicant's arrival to the United Kingdom and concluded, that there were reasonable grounds for considering the second applicant to be a victim of child trafficking from Vietnam to the United Kingdom (clear links appeared between the people who arranged his travel out of Vietnam, those who held him in the Czech Republic as a transit country and moved him to the United Kingdom, and those who exploited him for work in the cannabis factory; the previously known facts of the case also provided for this suspicion). Competent authorities had then concluded that the second applicant had been trafficked. Nevertheless, the Crown Prosecuting Service remained firmly of the view that he was not a victim of trafficking and that the public interest would require a prosecution.

Both applicants then sought permission to appeal against conviction and sentencing. The first applicant on the basis (among others) of the fact that he was

credibly a victim of human trafficking and as such should not have been prosecuted. The second applicant argued that his conviction was unfair because as a minor and victim of trafficking and forced labour contrary to Art. 4 of ECHR he had been entitled to protection rather than prosecution. In particular, he argued that the Crown Prosecution Service should have carried out a more thorough investigation into whether he had been trafficked into the United Kingdom and exploited in a cannabis factory. Both appeals were joined, and the Court of Appeal dismissed them. The applicants later addressed the Supreme Court, but their permission to appeal were refused. A subsequent first applicant's application for a review of his conviction based on new evidence and new legal arguments was refused.

In the case of the first applicant the Court found shortcomings in the competent authorities' effort to establish whether he was a victim of human trafficking, and it did not approve of the fact that instead of elucidating this issue, they charged him with cannabis production. The Court mentioned that the relevant information was provided even by other state authorities and that the Crown did not consider whether a relevant nexus had been established between the trafficking and the criminal offence (rather, it repeatedly found that there was no clear evidence that the first applicant had been trafficked) and it did not put forward any clear reasons for reaching a different conclusion from that of the competent authority. According to the Court, at the time of the first applicant's arrest, the Vietnamese minors had already been identified by the Crown Prosecution Service as a specific vulnerable group and trafficked children as more reluctant to disclose the circumstances of their exploitation.

The second applicant's case was also connected to illegal cannabis production, since he was arrested close to it. Even after the Crown Prosecution Service became aware of the existence of circumstances giving rise to a credible suspicion that he had been trafficked, the prosecution continued, and the competent authority was not addressed until a year later. Two years later, the Crown Prosecution Service reviewed the case in the light of information provided by National Society for the Prevention of Cruelty to Children National Child Trafficking Advice and Information Line and competent authority and decided that the second applicant was not a victim of human trafficking. At this point the Court noted that based on the same facts, the Crown Prosecution Service did not explain its opposing view to that of the competent authority. It was also found difficult by the Court to reconcile with the finding of both state organisations mentioned above that the second applicant had in fact been trafficked into the United Kingdom. The Court thus concluded that the facts of the case were sufficient to establish a positive obligation to take operational measures to protect the second applicant, but he was prosecuted and pleaded guilty instead, and even though he was subsequently recognised as a victim of human trafficking, the prosecution continued without providing clear reasons for its opposing opinion.

Based on these considerations the Court decided that the United Kingdom had not fulfilled its duty under Art. 4 of ECHR to take operational measures to protect both applicants either initially as potential victims of human trafficking, and subsequently

as persons recognised by the official authorities to be the victims of human trafficking. Thus, the Court ruled that there had been a violation of Art. 4 of ECHR.

In the case of *G. S. v. the United Kingdom*[51] the applicant – and adult woman – was charged with being knowingly concerned with importation of cocaine on the basis of the fact that she had been stopped by customs officers after arriving into Heathrow Airport on a flight from Trinidad and twenty-three packets of cocaine were recovered from her. The defence objected that her client had acted under duress through all the relevant time as there had been threats of serious injury or death to her and (or) her young son if she had refused to comply with the demand to smuggle drugs. The applicant was convicted and sentenced to seven years in prison and recommended for deportation. After applicant's release from prison, she applied for asylum in the United Kingdom and during the process, the deciding tribunal found out that the applicant had been trafficked when she entered the United Kingdom carrying the drugs. The same decision was then again provided by a competent authority. Later, the applicant sought an extension of time to appeal against her conviction on the basis that the new evidence undermined the safety of the conviction. Among this new evidence there were the two above-mentioned decisions recognising her as a victim of human trafficking, but also evidence concerning her physical and mental state indicating that she was likely to be very vulnerable to exploitation and less able to resist pressure at the time the offence had been committed, and last but not least, a change in the law regarding victims of trafficking accused of criminal offences.

The Court of Appeal then refused the applicant's leave to appeal, because it concluded that neither the Warsaw Convention nor the Directive conferred a blanket immunity from prosecution on victims of trafficking. Instead, the obligations of the state required a careful and fact sensitive exercise of discretion by prosecutors as to whether it was in the public interest to prosecute a victim of human trafficking or not, mentioning the nexus between the crime committed by the applicant and the trafficking as an obvious factor when exercising such a discretion.

In this case, the Court recalled the facts of the *V. C. L. and A. N. v. the United Kingdom*[52] case and noted that in case of the current applicant there was no evidence whether or not, at the time of her apprehension, she fell within the category of persons at particular risk of being trafficked and that her arrest, charge, trial and conviction was conducted before adoption of the Warsaw Convention and the Directive (and only after that the National Referral Mechanism, through which the competent authorities conduct their assessments in order to identify potential victims of modern slavery and ensure that they receive the appropriate support was adopted). The Court again mentioned that the applicant was charged, tried, convicted, and sentenced without a trafficking assessment having first been made by a qualified person. Nevertheless, the Court of Appeal recognised that in fact she had

51 Judgment of 23 November 2021 in case of *G. S. v. the United Kingdom*, application no. 7604/19.

52 Judgment of 16. February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.

been a victim of trafficking, and her leave to appeal was not refused because the Court of Appeal disagreed with finding that she was a victim of human trafficking, but rather because it found that at the time of the offence she had not been under such a level of compulsion that her criminality or culpability was reduced to or below a point where it was not in the public interest for her to be prosecuted.

As to the positive obligations of state under Art. 4 of ECHR, the Court highlighted that these are – in case of contracting states of the Warsaw Convention – constructed in the light of this treaty (or in case of Member States of the European Union by the Directive), which does not forbid prosecution of the victims of human trafficking itself, but only provides for the possibility of not imposing penalties on the victims of trafficking for their involvement in unlawful activities to the extent that they have been compelled to do so.

To sum up, these two cases brought forth two new requirements in Court's assessment of operational measures under Art. 4 of the ECHR.

The violation of Art. 4 of the ECHR would be found in situations where criminal prosecution is conducted against an individual whose status of victim of human trafficking is not considered at all or when competent state authorities come to a conclusion that the applicant was or might have been a victim of human trafficking, but its criminal prosecution continues without convincing explanation of the opposite view on applicant's status of victim. On the other hand, the violation of Art. 4 of the ECHR would not be found in cases where the status of an individual as a victim of human trafficking was assessed with the conclusion that he/she is a victim of human trafficking, but the level of his/her compulsion to commit a crime (as a consequence of such a status of victim) did not reach the exculpatory level.

4. Criminal liability of the victims of human trafficking

If we consider all the aforementioned information, we can draw a few starting standpoints for a further analysis.

First, there has not been a requirement for an absolute, total, categorical immunity of the victims of human trafficking from criminal prosecution and/or criminal liability neither in the relevant international or EU documents nor in the case law of the Court (and as far as we know, of the CJEU as well) so far. On the other hand, the states have not enjoyed an unlimited margin of appreciation on this issue, so *some* form of immunity has to be available.

Second, the legal construction of the requirement for *some* form of immunity which can be found in the Warsaw Convention, in the Protocol 2014 and in the Directive is configured in such a way that the states should develop a system in which their authorities are entitled not to prosecute/punish a victim of human trafficking.

It is thus clear that the relevant provisions of the international conventions are not self-executing[53] and the relevant provision of the Directive has not direct effect.[54]

Third, the Court places this requirement among the bundle of protective positive obligations that the Contracting States have towards the victims of human trafficking, but it does not divert from the firstly mentioned standpoint, *i.e.* from the relative nature of this requirement.

Fourth, the concrete form of the implementation of non-prosecution/non-penalisation requirement should take into consideration the nexus of the coercion with the status of the perpetrator as a victim of human trafficking, the basic principles of the legal order of the state, and the impact of the criminal proceedings on the fulfilment of the protective part of the positive obligation of the state towards such a victim.

Fifth, a breach of the Art. 4 of the ECHR may arise also in a situation in which a prosecution was launched against a person whose status as a (non-)victim of human trafficking had not been sufficiently clarified first.

First of all, we would like to address the issue of categorisation (classification) of the non-prosecution/non-penalisation obligation. Unlike the Court, we are leaning towards a conclusion that the obligation of the state to protect the victims of human trafficking constitutes not merely a component of its broader protective obligations, but rather that it is a separate negative obligation of the state. This conclusion is supported by the fact that a breach of this obligation may occur only if the state takes active steps towards the victim (prosecution, penalisation); if no action is taken, no breach occurs. The Court itself admits in *V. C. L. and A. N. v. the United Kingdom*[55] that the reason why it considers this issue to be a part of the protective positive obligations is the detrimental effect of the ongoing criminal proceedings and possibly also of the imposed sanction (the Court specifically names incarceration) on the victim's recovery from the traumatising experience of being trafficked and its aftermath. This approach uncovers that the only contribution of the non-prosecution/non-penalisation requirement to this bundle of positive obligations consists of the prosecution/penalisation *not happening*, so it is in fact a negative obligation of the state to refrain from a certain activity. We understand the Court's incentives to ascribe this requirement among the protective positive obligations, but to be frank, we do not think that the Court's argumentation for this conclusion is very convincing.

Tying the non-prosecution/non-penalisation requirement to the well-being of the victim creates a huge niche for the slippery slope argument – if the prosecution of a victim of a crime breaches his/her human rights just because it can be detrimental to the his/her coping (healing, rehabilitation) process and if it is an obligation of the state to accept that because it was the state who failed to fulfil its preventive obligation not to let the victim be subjected to victimisation in the first place, then why

53 See more in detail *e. g.* Enabulele, Okojic, 2016, pp. 1–37.

54 See *e. g.* Davies, Van Munster, Düsterhöft, 2023, p. 84.

55 Judgment of 16 February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.

the same courtesy should not be paid basically to every other victim of any other crime who commits a crime with any relation to the victimisation process? The same premise (detrimental effect on the rehabilitation process unjustified by the fact that the state failed to prevent victimisation) is valid also in cases in which the victim of a crime takes revenge against the perpetrator, commits another crime as a stress response to the fact of his/her own victimisation etc.

If we accept this argumentation line, the way to use it as a backing of a claim for criminal immunity of *e.g.* a victim of a rape or grievous bodily harm, who later kills the perpetrator out of frustration, is open. It is undebatable that in such a situation the state failed to fulfil its own positive obligation to prevent the victim from being victimised guaranteed by the Court's case law (see *e. g. Osman v. the United Kingdom*[56]). However, we do not share the view that this thought is reserved only for cases in which the victim of the other crime also enjoys a protection guaranteed by a protective positive obligation of the state to conduct an effective investigation once the prevention failed, but in these cases the downside of the Court's approach is most ostensible.

Apart from that, the basic presupposition of the Court's approach does not limit the immunity of the victim just to crimes with a close link to the conditions of the trafficking and the victim's role in it. After all, the rehabilitation process of the victim can be disrupted by a criminalisation for a totally unrelated crime (*e.g.* if the victim does not commit a crime like production of narcotics for which she/he was trafficked, but takes his/her frustration from the bad living conditions in the narcotics production facility out on a co-victim or an animal by torturing them).

We would thus favour the conclusion that the non-prosecution/non-penalisation requirement is a standalone obligation under Art. 4 of the ECHR, which is conditioned upon the other applicable international legal documents, here namely by the Warsaw Convention. The utility of this requirement would be more restrained this way, because it would limit its use, but it would prevent unexpected consequence and hardly controllable spreading to other categories of criminal activity with the analogic rationale.

Apart from this argumentation thread, the obligation in question may be also perceived as an integral part of the broader duty to conduct an effective investigation. However, we believe that that is not the case, as the obligation not to criminally prosecute or punish the victim can be pretty easily divorced from the obligation to effectively investigate the traffickers – it is quite plain to see that effectively investigating and prosecuting the organisers of human trafficking is not in any way dependent on the victims not being prosecuted at the same time.

Treating the aforementioned obligation as a standalone negative one can prove practical by distinguishing the particular obligations of the state more precisely, thus enabling a more accurate scrutiny in individual cases. It is not hard to imagine

56 Judgment of 28 October 1998 in case of *Osman v. the United Kingdom*, application no. 87/1997/871/1083.

that the state might honour the victim's right under Art. 4 of the ECHR in its positive procedural limb by efficiently prosecuting the traffickers while breaching its passive procedural limb by prosecuting and punishing the undeserving victim as well, or *vice versa*.

However, there might be a hidden reason why the Court considers the non-prosecution/non-penalisation requirement as a part of the positive obligation tied to Art. 4 of the ECHR – as we have already mentioned above, the Court correctly recognises that human trafficking is not explicitly covered by the ECHR or its Protocols, so the supplementary use of the Warsaw Convention and the Palermo Protocol is necessary. In this context, the Warsaw Convention is the only document that includes the non-prosecution/non-penalisation clause. If the basic human trafficking requirement is to be derived from this Convention when applying the ECHR in the praxis of the Court, the concrete form of the immunity of the victim – as we have also already explained above – is basically in the hands of the state.

That is not a position that the Court would be comfortable in, as it needs to secure that the reasons not to prosecute in principle related to human rights may trump any other public interest considerations that otherwise the states might be applying. Even this argument does not appear to be much convincing to us. Although it is undoubtedly founded on a genuine wish to promote as high level of human rights protection as possible, it throws the baby out with the bathwater, as we have demonstrated above.

To proceed to more practical issues, we believe that the aforementioned standpoints are to be interpreted in such a way that the impunity of the victim according to the valid international law is not supposed to be absolute and that not only the protection of the interests breached by the victim's crime may be given priority including the victim's criminal liability (as a principle, none shall be awarded a right to victimise another human being just because they were victimised in the first place), but also that the criminal law provision as a general rule applies to the victims of human trafficking as well, while their impunity is an exception for which certain conditions resting in necessity, connection to the victim status and proportionality must be met.

Impunity must thus be evaluated always against the fact of each individual case. After the analysis of all the abovementioned legal documents and the Court's case law, we believe that the assessment in which the non-prosecution/non-penalisation requirement shall be conducted consists of two steps. In the first one, the victim status has to be established after a due collection and inspection of all relevant facts in cooperation with official public authorities specialised in human trafficking. By skipping or neglecting this step, every subsequent partial step is compromised. If a victim status is established, the following aspects should be taken into consideration:

I) the nexus between the crime and the victim status,
II) the intensity of the coercion,
III) the reasonably expected consequences of not committing a crime,

IV) the personal situation of the victim and of the trafficking settings,
V) the nature and severity of the crime.

Ad (I) the nexus between the crime and the victim status, eventually the trafficking situation as such comes in a much broader spectrum than it may appear at a first glance. If the crime committed by the victim is the genuine core of the trafficking situation, it is a strong argument for impunity. *E.g.* the victim produces narcotic drugs, engages in illegal prostitution etc., which is exactly what he/she has been trafficked for. The same applies for situations where the crime arises as a necessary and inevitable by-product of the core of the trafficking (for example usage of counterfeited documents, illegal trespassing or occupying property of another person, because the traffickers use illegally an abandoned real estate as a place of residence for the victims) or where the victim is forced by the traffickers into a position of responsibility (*e.g.* to supervise the other victims or to organise some parts of the criminal activity),[57] in which he/she commits a negligent crime (*e.g.* he/she causes an accident) or even an intentional one directly caused by the conditions created by the traffickers (*e.g.* a victim forced to prostitution harms his/her violent client outside the conditions of necessary defence). In our opinion, this is similarly valid when the core of the trafficking is not a crime on its face (*e.g.* field labour). All these situations have in common that they are a direct and voluntary consequence of the trafficker's acting.

These would be the most typical situations, but they do not exhaust all of the thinkable spectrum, as the victims of human trafficking may divert from the core of the trafficking in their criminal behaviour. For example, a victim may commit a crime against its traffickers in order to escape from them, which need not be always covered by classical justifications as necessary defence or extreme necessity (*e.g.* the victim slicks the throats of its guardians in their sleep), or she/he may commit a crime out of frustration generated by the desolate living condition she/he has been cast into and target another co-victim or even just a random person totally unrelated to the trafficking. In these situations, the nexus between victim status and the crime is still present, but the impunity is not so strongly supported by it, because the interests of the others must be taken into consideration.

Third group of generic situations is formed by scenarios in which the victim deliberately commits a crime to unnecessarily improve his/her living conditions or his/her position in the traffickers' ring even though nobody forces him/her to it, sacrifices the interests of the co-victims for his/her own unnecessary profit, just abuses the circumstances out of a subjective lust for aggression etc. In these situations, the link between the victim status and the crime should play no role, as it was breached by the victim's own decision.

Ad (II) The intensity of the coercion also plays a crucial role. If the act of the victim is committed under conditions of general justifications or defences (typically

57 So called 'chain of abuse' situation – see Piotrowicz, Sorrentino, 2016, p. 686.

vis absoluta or extreme necessity), there is no need for special considerations about the non-prosecution requirement, because the act would not be a crime even when committed by anybody else outside a trafficking situation (*e.g.* if the victim damages a door of a house in which she/he has been locked to free himself/herself, injures traffickers when defending herself/himself or another victim etc.).

However, it is clear that the general justifications/defences concepts may turn out to be insufficient in specific trafficking context, especially due to the frequent requirement of imminence or proportionality or a high standard for coercion if it is supposed to exclude criminal liability (typically *vis compulsiva*).[58] The impunity of the victim (or grounds for a corresponding procedural solution) may thus be given also in situations in which the compulsion did not reach the threshold necessary for a general justification.

In cases in which the compulsion does not amount to a direct threat of death, grievous bodily harm or other serious consequence for the victim, all relevant factors have to be taken into consideration, especially the severity of the threat, immediate consequences of not obeying, the long-term consequences of not obeying (see below), the seriousness of the crime to which the victim is compelled, whether the compulsion is targeted at the victim or somebody else etc. The fact whether the compulsion was direct or indirect, physical, verbal or even just psychological (based on position of power or fear due to victim's vulnerable position), should also not play any role in this consideration, the only relevant fact is how the concrete victim evaluates the concrete situation.

Ad (III) This criterion should apply not only in situations in which there is a direct or indirect coercion by the traffickers (even though that can be expected to be the most typical situation), but also when the victim commits a crime due to being forced to it by the general conditions or a specific conjunction of conditions (*e.g.* the above-mentioned victim forced to prostitution who has harmed a violent client). Under this criterion, not only the direct outcomes of the not committing should be weighted (if the victim fails to act, she/he will suffer a harm, die etc.), but also the long-term ones (should the victim not take action, he/she will be transferred to a much hazardous, exhausting or health-exploiting work, his/her food rations will be restricted in a following period which will gradually but strongly affect his/her ability to fulfil the assigned activity over a course of time etc.).

What should also be duly assessed is the scope of the impact of not committing, *i.e.* whether it will affect only the single victim or also some of the others or all of them (*e.g.* whether the traffickers apply such brutal methods as collective punishments or decimations). On the other hand, if non-compliance with the coercion can only result in losing privileges that the victim has apart from the other victims, the loss of chances to such privileges or to rise in the structure of the victims (or even

58 As in infamous Dutch *Mehak case* (see Esser, 2017, pp. 77–80., or Piotrowicz, Sorrentino, 2016, pp. 688–689.).

the trafficking ring) and these privileges are not necessary for survival, the impunity requirement might not apply.

Ad (IV) The personal situation of the victim as well as the overall trafficking settings needs to be thoroughly examined. The situation of the victim comprises of her/his general condition, health, psychic resistance etc., as well as the stringency and intrusiveness of the victim status (*e.g.* if the victim is subjected 'only' to forced labour or straight to slavery). If the victim is especially vulnerable (due to age, disability, gender etc.) or is more vulnerable in comparison to the other victims, a special sensitivity should be deployed and greater tolerance for his/her acts should be provided.

Regarding the objective trafficking context, aspects like the professionalism, organisation and size of the trafficking ring and the trafficking operation, its focus (especially the gravity of the core trafficking activity indicating how far the ring is probably willing to go to achieve its goals and not to compromise its existence), brutality of the traffickers, their strategy applied towards the victims (*e.g.* if they are allowed to cooperate and support one another or if they are set against each other or completely separated),[59] the sophistication of covering its illegal activities, the extent of its internationality and relations to the public authorities (*e. g.* if there is a structural bribery or favouritism at place, or on the other hand if the ring has already been investigated by the official authorities etc.) in the place where the core trafficking activity is taking place etc. should be observed. These considerations are necessary to evaluate how much the victim was at risk of a serious harm or abuse, how probable an escape or a rescue from the outside was etc. The outcomes of this partial analysis shall contribute to the overall evaluation whether the victim's act was necessary and proportionate against its complex background.

Ad (V) The nature and severity of the crime reflect the proportionality principle which is present in most applicable justifications or defences. As stated above, we do not need or should contemplate on the general justification or defences in this context (*e. g.* to solve the eternal question whether sacrificing a live of one person is justifiable if it saves the lives of five others under the conditions of extreme necessity), because if general justification or defences apply, the impunity requirement is fulfilled without any doubt, even if these legal constructs are not designed purely for the human trafficking situations.

In the situations not covered by the general justifications or defences, the nature and severity of the crime committed should play a specific role of corrective measure or mean of moderation. Especially if the crime impinges upon the rights of other individuals, the high severity of the crime may override the impunity requirement even if most of or even all the other criteria speak for it. *E.g.* if a victim kills an innocent passer-by due to a frustration completely caused by the conditions, he/she has been put to by the traffickers, we do not believe that there is any room for a complete impunity consideration.

59 For more examples see Zimmerman, Pocock, 2013, p. 267ff.

Naturally, the middle part of the spectrum of crimes is quite broad according to their severity and the thoughts whether the severity of a certain crime already excludes the full impunity of its perpetrator – victim of human trafficking are bound to occur. Especially in these cases, their nature shall be thoroughly examined, namely whether they left a victim behind or not (if only an abstract interest of the society was breached, *e.g.* by using counterfeited documents or currency, the full immunity of the victim should in principle be given), if there was a victim, whether it was the trafficker or not, whether the crime was provoked etc. Attacks against the traffickers should be met with a greater leniency than attacks against third unrelated subjects or even co-victims (although, as already mentioned, the victims should never have a *carte blanche* even against the traffickers, who are subjects to human rights as well).

On the other hand, attacks against the third parties or even against the co-victims shall significantly raise the bar of the other criteria for impunity. Even when duly acknowledging all the specifics of the unfortunate situations of the victims, they in principle cannot outbox the protection of the interest of other people (the more if they are the co-victims), especially (but not limited to) if those interests enjoy human rights guarantees (*e.g.* Art. 2, Art. 3, Art. 8 of the ECHR). In extreme (and rather hypothetical) cases, the severity might be so high that it blocks the full impunity even if the crime committed presents the core of the trafficking activity (*e.g.* committing mass atrocities on a civil population during an armed conflict by a victim of human trafficking).[60]

In principle, each of these criteria may exclude the victim's impunity if it is not fulfilled in a sufficiently convincing manner (the nexus is absent or is too loose, the coercion is absent or is of insufficient intensity, there were no or only negligible immediate or enduring adverse consequences for the victim as a result of non-compliance, the personal situation of the victim and the overall trafficking context did not dictate the commission of a crime or the severity of the crime was too high), but if neither of them counters the impunity *per se*, they all need to be complexly assessed separately and in their mutual connections and context. In such a situation, none shall have an *a priori* dominance over the other.

In each case, all these criteria should be interpreted from the victim's point of view *ex ante* with a special consideration for the specific psychical state of the victim, the availability of the relevant information to him/her, her/his subjective prospect etc. If the result of this extremely intricate analysis results against the impunity of the victim (because a single criterion was not sufficient or as a joint outcome of all of them taken together), all the criteria should be once more taken into consideration when sentencing. Even in the cases in which the victim is found guilty, they may call at least for the application of general (or even specific) legal tools for mitigating the punishment, imposing alternative sanctions or withdrawing from the imposition of a sanction at all.

60 For a list and evaluation of typical criminal activities that are victims of human trafficking being exploited, see Rodríguez-López, 2020, pp. 2–6.

5. Conclusions

The question whether the victims of human trafficking should be prosecuted or even punished is not a dichotomy, meaning that it cannot be simply answered by 'yes' or 'no'. As any other situation where there is a conflict between two individual interests (of a victim of human trafficking and victim of its criminal offence or public interest) it calls for a careful consideration and evaluation of all relevant facts of the case. The case law of the Court as well as the Warsaw Convention and the Directive which the Court reflects, do not require an absolute, total, categorical immunity of the victims of human trafficking from criminal prosecution and/or criminal liability.

Thus, criminal prosecution or even penalisation of such victims does not automatically lead to a breach of Art. 4 of ECHR. The question of whether the absence of clear domestic legal provisions regarding such non-prosecution/non-penalisation of the victims of human trafficking would – in case of prosecution or even punishment of such victims – automatically lead to the determination of a violation of Art. 4 of ECHR must be also answered negatively, because it requires a thorough, careful analysis.

According to our conclusions, the Court's case law provides a basic two-steps scheme for evaluating the non-prosecution/non-penalisation requirement, which we have enriched for other important aspects that cannot be omitted.

First, it is establishing the victim's status after a due collection and inspection of all relevant facts in cooperation with official public authorities specialised in human trafficking. If the victim status is established, the second step consisting of careful consideration of five aspects – the nexus between the crime and the victim status (I), the intensity of the coercion (II), the reasonably expected consequences of not committing a crime (III), the personal situation of the victim and of the trafficking settings (IV) and the nature and severity of the crime (V) – follows. The paper provides a detailed analysis of each relevant aspect with necessary explanation and examples in order to convincingly decide whether the impunity of the victim in each individual case was established and its criminal prosecution or even punishment would constitute a violation of Art. 4 of the ECHR.

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Part III

PROTECTION OF PERSONAL FREEDOM AND FAIR PROCEEDINGS

Chapter 7

The Right to Liberty and Security with Special Regard to Central Europe

Aleksandar Maršavelski

Abstract

This paper examines the application of the right to liberty and security, as guaranteed by Article 5 of the European Convention on Human Rights (ECHR), within the specific context of Central Europe. Through an analysis of key European Court of Human Rights (ECtHR) case law involving Romania, Poland, Slovakia, Hungary, and Croatia, the study explores the Court's interpretation and enforcement of this fundamental right. The paper delves into critical issues such as the distinction between deprivation of liberty and restriction of movement, the lawfulness and duration of pre-trial detention, procedural safeguards for detainees, and the specific protections afforded to vulnerable groups, including individuals with mental disabilities and asylum seekers. Landmark cases are dissected to illustrate the ECtHR's robust approach to preventing arbitrary detention and ensuring judicial oversight. The analysis reveals the significant impact of the Court's jurisprudence on the domestic legal systems of these post-authoritarian states, highlighting both the progress made in protecting individual liberties and the persistent challenges in balancing state security interests with fundamental human rights. The paper concludes that the ECtHR's role remains indispensable in upholding the principles of the Convention and fostering a common standard of human rights protection across the region.

Keywords: Article 5 ECHR, Right to liberty and security, European Court of Human Rights (ECtHR), Central Europe, detention, imprisonment

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1. Introduction

The right to liberty and security, enshrined in Article 5 of the European Convention on Human Rights (ECHR), stands as a fundamental safeguard against arbitrary detention and a cornerstone of democratic societies. This fundamental right guarantees every individual's protection from unlawful confinement, ensuring that individuals are not deprived of their liberty except in accordance with the law and for legitimate purposes. In the context of Central Europe, the application of Article 5 has taken on particular significance, given the region's historical and political trajectory.

Central European countries, emerging from the shadows of authoritarian regimes in the late 20th century, embraced the ECHR as a beacon of democratic values and a tool for protecting individual liberties. However, the implementation of Article 5 has not been without challenges. Concerns have particularly arisen regarding the use of pre-trial detention, the treatment of persons with mental disabilities, and the treatment of migrants and asylum seekers. These concerns underscore the need for thoroughly examining the application of Article 5 in the Central European context.

Central European States have faced a delicate balance between safeguarding national security and protecting individual rights. Pre-trial detention, a particularly contentious issue, has been used to combat organised crime and terrorism. While acknowledging the legitimate concerns underlying its use, the European Court of Human Rights (ECtHR) has consistently emphasised the need for pre-trial detention to be applied in a strictly controlled manner, with strict safeguards against arbitrary confinement.

The application of Article 5 in Central Europe has evolved over time, reflecting the region's political transformation and its commitment to European human rights standards. The ECtHR, as the ultimate arbitrator of the ECHR, has played a crucial role in shaping the interpretation and application of Article 5, ensuring that the right to liberty and security is upheld in line with fundamental human rights principles.

Although progress has been made, there remain areas for improvement in Central Europe. Continued attention to pre-trial detention practices, the proper application of counter-terrorism measures and the humane treatment of migrants and asylum seekers are essential to ensure that the right to liberty and security is fully respected in the region. As Central European States continue to integrate into the European Union, adherence to the ECHR's standards will be crucial for upholding the fundamental rights of all individuals. The ECtHR's role as a guardian of human rights will remain indispensable in safeguarding the right to liberty and security in Central Europe.

This paper shall focus on the analysis of major ECtHR's case-law involving the following 5 countries: Romania, Poland, Slovakia, Hungary and Croatia. In cases involving some of these countries, Article 5 has been observed in contexts beyond formal arrest and detention, such as transportation of individuals to hospitals by

paramedics and police officers (*Aftanache v. Romania*),[1] confinements in transit zones at airports (*Shamsa v. Poland*;[2] *Mogoş and Others v. Romania*)[3] and land borders (*Ilias and Ahmed v. Hungary*;[4] *R.R. and Others v. Hungary*[5]); interrogations at police stations (*Cazan v. Romania*;[6] *Creangă v. Romania*[7]); house searches (*Stănculeanu v. Romania*[8]) and national lockdown imposed due to the COVID-19 pandemic (*Terheş v. Romania*[9]).

2. Literature Overview

There are countless academic debates about the various aspects of Article 5 ECHR.[10] It addresses the fundamental principles such as the presumption of innocence discussed in the context of pre-trial detention, which the ECtHR allows to be used more than necessary and even punitively.[11]

Recent literature on the right to liberty and security mainly focuses on the relationship between anti-terrorism measures and liberty and security.[12] In Central European countries, there were hardly any terrorist attacks, but they adopted anti-terrorism legislation in the context of harmonisation with the trends in European and international law. The major topic discussed in some countries (e.g. UK)[13] was how anti-COVID pandemic measures and legislation deprived individual liberties, but this subject was entirely neglected in most European countries despite the fact that some of them had excessive anti-pandemic measures (e.g. Serbia's lockdown of the elderly).

The greatest challenge, however, concerns balancing the right to liberty and security with the need for security measures to address threats to public safety and national security, which was discussed by Bachmann and Sanden.[14] They argue that the current framework under Article 5 of the Convention is insufficient to address these

1 *Aftanache v. Romania*, 2020.
2 *Shamsa v. Poland*, 2003.
3 *Mogoş and Others v. Romania* (Dec.), 2004.
4 *Ilias and Ahmed v. Hungary* (GC), 2019
5 *R.R. and Others v. Hungary*, 2021.
6 *Cazan v. Romania*, 2016.
7 *Creangă v. Romania* (GC), 2012.
8 *Stănculeanu v. Romania*, 2018.
9 *Terheş v. Romania* (Dec.), 2021.
10 See e.g. Patel, 2005; Macken, 2006; Dickson, 2009; Stevens, 2009; Nordin and Akther, 2015; Lach, 2021; Nisanci, 2021; Snacken, 2022; Johansen, 2022.
11 Stevens, 2009.
12 See e.g. Waldron, 2003, pp. 191–210; Taylor, 2003, pp. 25–31; Lewis, 2005, pp.18–30; Aradau, 2008, pp. 293–314; Payne, 2011, pp. 773–800; Bigo, 2016, pp. 263–288.
13 Pugh, 2020, pp. 1–14.
14 Bachmann and Sanden, 2017, pp. 320-336.

challenges. They propose amendments to the Convention to provide a more flexible framework for balancing these rights. Bachmann and Sanden also suggest that the States should implement general time limits for detention in immigration detention centres, distinguish remand detainees from criminal offenders, and provide access to legal counsel for detainees.[15] According to Crocker, to achieve this balance, the key issue is who makes the decisions regarding liberty and security.[16] On the other hand, Neocleous argues that the idea of a balance between security and liberty is a myth.[17] In any case, as Gearty correctly points out, "the human rights approach to liberty and security raises the right issues, focuses on the key questions, and invites a conversation about freedom and security of a sort that represents real moral progress".[18]

The ECtHR's rulings have not always been consistent in relation to Article 5. For instance, in cases involving the detention of asylum seekers, the ECtHR has been accused of giving too much room for manoeuvre to States, potentially compromising the right to liberty.[19] This inconsistency raises questions about the balance between State security and individual freedoms, a central issue in contemporary legal scholarship.

There is no literature analysing the ECtHR case law on the right to liberty and security in a particular European region. There are, however, articles on upholding Article 5 in a particular Central European country (e.g. Romania).[20] This paper aims to fill the gap to analyse the most important ECtHR case-law on Article 5 of the Convention developed in cases involving the selected European countries.

3. Cases concerning the scope of application of Article 5

3.1. Creanga v. Romania

The main purpose of Article 5 is to prohibit arbitrariness in deprivation of the physical liberty of each individual. The relationship between Article 5 and Article 2 of Protocol No. 4, the relevance of legal conclusions of domestic authorities and the range of criteria for determining whether a person was deprived of his or her liberty or not, was addressed in the landmark case of *Creanga v. Romania*.[21]

15 *Ibidem*.
16 Crocker, 2011, pp. 1511–1544.
17 Neocleous, 2007, pp. 131–149.
18 Gearty, 2010, p. 22.
19 See e.g. Costello and Mouzourakis, 2016.
20 Pîrnuţă, Arseni and Drăghici, 2010, pp. 111–116.
21 *Creangă v. Romania* (GC), 2012.

The case is about a Romanian police officer, Mr Creanga, who was summoned to appear before the National Anti-Corruption Prosecution Service (NAP) to be interrogated. Following his interrogation, Mr Creanga was detained in the NAP premises for an unexplained period of one day. The Romanian Government argued that Mr Creanga was not detained but was free to leave the NAP premises at any time. The ECtHR ruled that Mr Creanga was indeed deprived of his liberty during this period, as he was under the control of the authorities and was not free to leave. The ECtHR found that the Romanian Government had failed to demonstrate that Mr Creanga was in fact free to leave the premises, and therefore concluded that his detention was unlawful. The ECtHR's judgment in *Creanga v. Romania* provides valuable insights into the interpretation and application of Article 5 of the ECHR.

First, in this case the Court confronted the deprivation of liberty with mere restrictions on liberty of movement. The ECtHR made a distinction between the deprivation of liberty, which falls under Article 5, and mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4 to the ECHR. Deprivation of liberty involves a significant interference with an individual's freedom of movement and autonomy, while mere restrictions on liberty of movement may be imposed for legitimate reasons.

Second, the Court provided an autonomous assessment of the deprivation of liberty. The ECtHR asserted its independent role in assessing whether any deprivation of liberty has occurred. The Court clarified that it does not automatically defer to the legal conclusions of domestic authorities on this matter. Instead, it undertakes an autonomous assessment based on the specific circumstances of each case.

Third, the Court observed multi-factorial approach to the deprivation of liberty. The ECtHR emphasised the need for a comprehensive assessment of all relevant factors to determine whether any deprivation of liberty has taken place. These factors include the type of measure applied, its duration, the effects it has on the individual and the manner of its implementation.[22]

Fourth, the Court highlighted the significance of the general principle of legal certainty (*lex certa*) in the context of deprivation of liberty. It stressed that domestic law must clearly define the conditions for the deprivation of liberty and ensure that the law is predictable in its application. This is to ensure that individuals can adequately understand the legal consequences of their actions and avoid arbitrary deprivation of liberty.[23]

Finally, the Court observed that the concept of "arbitrariness" in Article 5 extends beyond mere legal nonconformity. A deprivation of liberty may be lawful under domestic law but may still be arbitrary and thus violate the Convention.[24] This aspect acknowledges the Court's role in ensuring that the deprivation of liberty is not exercised in an unreasonable or capricious manner.

22 *Ibidem*, para. 91.
23 *Ibidem*, para. 120.
24 *Ibidem*, para. 84.

3.2. Ilias and Ahmed v. Hungary[25]

The European Court of Human Rights (ECtHR) has grappled with the intricate distinction between a mere restriction on liberty of movement and a deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants. In the Grand Chamber judgment in *Ilias and Ahmed v. Hungary*, the Court established a framework for assessing this distinction, emphasising the interplay of various factors specific to each case.

In this case, the Court observed whether the confinement of Bangladeshi nationals in the transit zone for 23 days constituted a deprivation of liberty within the meaning of Article 5. The Grand Chamber judgment[26] held that it was a deprivation of liberty in violation of Article 5 § 1 because it was performed solely by virtue of an elastically interpreted general provision of the law without any formal decision of the authorities. The Grand Chamber, however, found that violation claims concerning Article 5 §§1 and 4 were inadmissible in this case. Stoyanova argued that this judgment constituted a further erosion of the protection of asylum seekers under the Convention "to the point that restrictions imposed upon asylum-seekers might not even be qualified as deprivation of liberty worthy of the protection of Article 5".[27]

The Grand Chamber identified four key considerations in determining whether a person's confinement constitutes a deprivation of liberty. The first one concerns an individual's situation and choices, where the Court assesses the applicant's personal circumstances, including their reasons for seeking asylum and their ability to exercise consequential choices regarding their movements. The second one concerns the applicable legal regime, in which the Court examines the legal framework governing the confinement, including the purpose of the regime and the extent to which it allows for exceptions and safeguards. The third one concerns duration and procedural protection where the Court considers the length of confinement and the existence of procedural safeguards, such as access to legal representation and the opportunity to challenge the confinement. The fourth one concerns the nature and degree of restrictions. The Court assesses the actual restrictions imposed on the applicant's freedom of movement and the extent to which they affect their ability to make personal choices.[28]

The Grand Chamber took a 'practical and realistic' approach to conclude that the applicants could make a choice to go back to Serbia, in spite of the fact that they could not do so lawfully. At the same time the Grand Chamber found that Hungary violated Article 3, as it failed to make a thorough examination of the risks the applicants could face in Serbia. This contradiction can only be understood in the context

25 *Ilias and Ahmed v. Hungary* (GC), 2019.
26 *Ilias and Ahmed v. Hungary*, 2017.
27 Stoyanova, 2019.
28 *Ilias and Ahmed v. Hungary*, 2017, para. 217.

of the theory of legal realism, which "exposed the role played by politics in judicial decision-making and, in doing so, called into question conventional efforts to anchor judicial power on a fixed, impartial foundation."[29] In this case, unfortunately, the Grand Chamber was obviously overwhelmed by the political consequences of its ruling rather than focusing on whether the individuals' right to liberty was violated.

3.3. The case of N. v. Romania[30]

In *N. v. Romania*, the Court grappled with the delicate balance between protecting the liberty of individuals and ensuring the necessary care for those with mental health issues. The Court's judgment highlighted the importance of ensuring that the confinement of persons with mental disorders, particularly in the absence of medical treatment, remains justified and subject to stringent procedural safeguards.

The case focused on the continued detention of the applicant, N., who was detained in a psychiatric hospital following his arrest on suspicion of child sexual abuse. Despite the discontinuation of criminal proceedings against N., he remained institutionalised for over a decade. N.'s continued detention was upheld by judicial decisions, even after finding that in principle the applicant should have been released from hospital, because there was no available suitable facility for his treatment. Although N. had agreed to remain in detention until there was an appropriate solution to his situation, the Court found that N.'s continued detention after the release order was arbitrary, emphasising that even voluntary surrender does not deprive individuals of their right to liberty.

The Court also addressed the scope of Article 5(1)(e) of the European Convention on Human Rights (ECHR), which allows for the confinement of mentally disordered persons for the sake of their own protection or the protection of others. The Court held that this measure must be strictly justified by the severity of the person's mental health condition and the necessity to protect them or others.[31]

Furthermore, the Court emphasised the right of individuals confined in psychiatric institutions to access a court and be heard, either in person or through representation. This right is particularly crucial in proceedings related to the continuation, suspension or termination of their confinement. The Court noted that, unless there are exceptional circumstances, individuals in this situation should receive legal assistance to effectively exercise their rights.[32]

Unlike in the previous case, in this landmark ruling the ECtHR reminded us that the right to liberty is too important for individuals with mental disabilities to be deprived of protection by the Convention by merely consenting to their detention.

29 Bybee, 2005, p. 76.
30 *N. v. Romania*, 2017.
31 *Ibidem*, para. 151.
32 *Ibidem*, para. 196.

4. Specific provisions of Article 5: *Pantea v. Romania*[33]

Pantea v. Romania is the type of case which is ideal for students to study the various provisions of Article 5 of the Convention. In this case, the Court condemned Romania for five violations of Article 5. The case concerns Romanian lawyer Alexandru Pantea who was involved in an altercation with an individual who sustained serious injuries. He was subsequently arrested and remanded in custody, initially under the order of a public prosecutor, and later under the order of a judge, which subsequently expired. He requested to be released, and after 3 months and 28 days he was released. During his detention, Mr. Pantea alleged that he was savagely beaten by his fellow-prisoners at the instigation of the prison staff. He was also made to lie under his bed, immobilised with handcuffs, for nearly 48 hours. Additionally, he was transferred to another prison in a railway wagon, where he was denied medical treatment, food, and water for several days. This worsened his condition as he had multiple fractures. A lawsuit in which Mr Pantea requested compensation for his unlawful detention was dismissed by the Court of First Instance due to expired statute of limitations. Besides the obvious violations of Article 3, the Court found the following violations of Article 5 by Romanian authorities with regard to Mr. Pantea:

Article 5 § 1 (c): Romania's failure to comply with the "procedure prescribed by law" at the time of Pantea's arrest violated his right to liberty;

Article 5 § 1 (c): Mr. Pantea's continued detention after the validity of the warrant committing him to prison had expired violated his right to liberty;

Article 5 § 3: The public prosecutor who ordered Mr. Pantea's detention was not a judge within the meaning of Article 5 § 3, and Mr. Pantea was not brought before a judge or other officer satisfying the requirements of the third paragraph of Article 5 within a prompt period;

Article 5 § 4: It took three months and 28 days before any court ruled on Mr. Pantea's request for release, which was not sufficiently expeditious'; and

Article 5 § 5: Romania did not secure Mr. Pantea's effective enjoyment of the right to compensation for unlawful detention with a sufficient degree of certainty.

In this case, the Court emphasised judicial control as a cornerstone of Article 5 § 3. Mere access to a judicial body is not sufficient to satisfy the requirements of Article 5 § 3. Instead, the judicial authority must exercise independent and impartial scrutiny of the detention decision, objectively reviewing the circumstances and determining whether the detention is necessary and proportionate.[34] The Court also highlighted the importance of independent assessment. The potential for conflict of interest when a judicial officer responsible for detention decisions also assumes other functions, particularly as a representative of prosecution services. Such dual roles could raise legitimate doubts about the officer's impartiality, undermining

33 *Pantea v. Romania*, 2003.
34 *Ibidem*, para. 236.

the fairness of the detention proceedings.[35] The ECtHR stressed that objective appearances at the time of the detention decision are crucial. If the judicial officer's involvement in subsequent prosecution proceedings is foreseeable, their independence and impartiality may be compromised.[36]

Finally, the Court emphasised procedural and substantive requirements within the meaning of Article 5 § 3. Procedurally, the detainee must be afforded a personal hearing before the judicial authority, allowing them to present their case and challenge the grounds for detention. Substantively, the judicial officer must meticulously assess the relevant circumstances, including the gravity of the alleged offence, the strength of the evidence, and the risk of absconding or obstructing justice. Based on this thorough evaluation, the officer must determine whether detention is justified and proportionate to the purpose sought.[37]

5. Two Polish cases concerning the lawfulness of deprivations of liberty

5.1. Ladent v. Poland[38]

Preventing unlawful deprivations of liberty is the main purpose of Article 5. In another landmark case, the *Ladent v. Poland* case, the ECtHR reaffirmed the fundamental importance of safeguarding the right to liberty and security enshrined in Article 5 of the Convention. The Court's judgment highlighted the need for rigorous judicial oversight to prevent arbitrary or unjustified deprivations of liberty, particularly in the context of pre-trial detention. The case focused on the detention of Mr Ladent, a French national who was apprehended on suspicion of failing to appear at a court hearing dealing with his prosecution for slander by a private individual. The Polish authorities justified Mr Ladent's detention on the basis of Article 5(1)(c) of the ECHR, which permits the temporary detention of individuals to secure their presence at trial.

In this case, the ECtHR found multiple violations of Article 5 of the Convention: with regard to § 1, the detention lacked procedural safeguards prescribed by law, it was arbitrary and disproportionate; with regard to § 2, the applicant was not informed promptly and in a language which he understood of the reasons of his arrest and charges against him; and with regard to § 3, it lacked automatic judicial review of his detention.

35 *Ibidem*.
36 *Ibidem*.
37 *Ibidem*, para. 231.
38 *Ladent v. Poland*, 2008.

The Court emphasised that detention under Article 5(1)(c) must be strictly proportionate and necessary to achieve its declared objective. It is incumbent on the authorities to demonstrate compelling reasons for depriving an individual of their liberty, ensuring that alternative measures, such as bail or electronic monitoring, are not feasible.[39]

The Court also underscored the crucial role of effective judicial control in safeguarding the right to liberty. It held that automatic judicial review within a short time frame is essential to prevent arbitrary detention and protect individuals from potential ill-treatment.[40] This automatic review indeed serves as a safeguard against potential abuse of power and ensures that detention measures are implemented in accordance with legal safeguards and procedures, including cases of individuals unfamiliar of the language used by officials.[41]

5.2. Baranowski v. Poland[42]

The case of *Baranowski v. Poland* addressed the issue of pre-trial detention under Polish law and its compatibility with Article 5 of the Convention. At the heart of the case was Mr Baranowski's claim that his continued detention for over four years, while awaiting trial on charges of organised crime, was excessive and violated his right to liberty.

The Court highlighted the importance of national authorities, particularly courts, in interpreting and applying domestic law. However, when failure to comply with such law entails a breach of the Convention, the ECtHR has a responsibility to review whether national law has been observed.[43] In examining the lawfulness of Mr Baranowski's detention, the ECtHR carefully considered the grounds provided by the Polish authorities to justify his prolonged confinement. The Court found that the gravity of the offences alleged against Mr. Baranowski, the risk of him influencing co-accused and witnesses, and the need to secure evidence were indeed "relevant" and "sufficient" reasons for keeping him in custody. However, the Court also recognised the exceptional complexity of the case, involving over 50 other defendants and a vast volume of evidence. In this context, the Court acknowledged that the length of the investigation and trial was justifiable, particularly given the authorities' efforts to expedite the proceedings.

However, in the Baranowski case the key issue was compliance with the speediness requirement under Article 5 § 4 of the ECHR, which guarantees detained individuals the right to challenge the lawfulness of their detention and to have the detention terminated if found unlawful. The Court held that this requirement

39 *Ibidem*, paras. 55–56.
40 *Ibidem*, para. 72.
41 *Ibidem*, para. 74.
42 *Baranowski v. Poland*, 2000.
43 *Ibidem*, para. 50.

necessitates a prompt judicial decision on the lawfulness of detention, ensuring that any unlawful detention is remedied promptly.[44] The Court found that the authorities had generally adhered to this requirement, by promptly reviewing Mr Baranowski's detention appeals. However, in one instance, the Court identified a delay of 45 days in reviewing the decision to extend Mr. Baranowski's detention on February 6, 2004. The Court concluded that this delay was not justified and constituted a violation of Article 5 § 4.

This case also illustrates the delicate balance that courts must strike between protecting individual liberty and ensuring public safety. While pre-trial detention may be justified in certain circumstances, such as to prevent fleeing or interfering with the investigation, its duration must be proportionate to the legitimate objectives and subject to rigorous review.

6. Procedural safeguards of authorised deprivations of liberty: the case of *M.S. v. Croatia* (No. 2)[45]

Judicialization of proceedings for confinement of persons with mental disabilities into psychiatric institutions has been a groundbreaking achievement in Europe to protect the human rights of this vulnerable population, particularly with regard to Article 5. In 1979, the ECtHR's ruling in *Winterwerp v. Netherlands*[46] set an important precedent for the protection of the rights of individuals who are subject to involuntary psychiatric detention. The Court's emphasis on procedural safeguards has helped to ensure that such detention is only used as a last resort and that the rights of patients are respected. At the beginning of my academic career, as a student researcher, I was involved in a CARDS Programme entitled "Bridging the Gap: Civil Society Promoting Access to Justice for People with Mental Disabilities in Croatia" (2007-2008). In this project, I visited psychiatric institutions in Croatia and attended court sessions where judges decided on the placement and the extension of involuntary placement of persons with mental disabilities into psychiatric institutions. This was highly controversial as all the cases were practically represented by the same group of lawyers, and hardly visited their clients. The patients were excluded from court proceedings, and the judgments resembled the practice of filling out forms, where the judge simply inserted the personal data of the person and the diagnosis of the psychiatrists. It was just a matter of time for the ECtHR to reprimand Croatia for such practice and one of such cases was *M.S. v. Croatia* (No. 2).

44 *Ibidem*, para. 68.
45 *M.S. v. Croatia* (no. 2), 2015.
46 *Vinterwerp v. Netherlands*, 1979.

In this Croatian case, the applicant M.S. was admitted to a psychiatric clinic against her will after visiting a hospital emergency room complaining of severe lower-back pain. The County Court upheld her continued confinement despite her request for release and complaints of ill-treatment right until her release from the clinic a month later. The ECtHR addressed the procedural safeguards against involuntary hospitalisation under Croatian law and its compatibility with Article 5 § 1 (e) of the Convention, which safeguards the right to liberty and security.

In its judgment, the ECtHR emphasised the importance of ensuring that individuals subjected to involuntary hospitalisation have access to fair and proper procedures to protect them from arbitrary deprivation of liberty.[47] These proceedings must provide effective safeguards against arbitrariness, given the vulnerability of individuals with mental disorders and the need for compelling reasons to justify any restriction of their rights.[48]

The Court also stressed that the mere appointment of a lawyer without their actual involvement in the proceedings is insufficient to meet the requirement of "necessary legal assistance" for individuals placed under involuntary hospitalisation. Effective legal representation for persons with disabilities necessitates an enhanced duty of supervision by competent domestic courts to ensure that their legal representatives provide adequate assistance and advocate effectively on their behalf.[49] Consequently, along with the fact that the applicant was excluded from the hearing, the ECtHR found that the Croatian authorities had failed to ensure that the applicant's national proceedings were free from arbitrariness. Therefore, the Court established the violation of Article 5 § 1 (e) of the Convention. This case shows that the judicialization of the hospitalisation of patients with mental disabilities can fail to improve their human rights if lawyers do not comprehend the importance of their role in such proceedings.

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7. Information on the reasons for arrest under Art. 5 §2: the case of *Z.H. v. Hungary*[50]

The more disabilities an individual suffers from, the greater attention to be paid to protecting the person's human rights. Article 5 § 2 requires an individual to be informed of the reasons for his or her detention promptly, in a language understood by him or her, and in a manner that allows the person to exercise his or her rights under Article 5 § 4, which guarantees the right to challenge the lawfulness of detention.

47 *M.S. v. Croatia* (no. 2), 2015, para. 114.
48 *Ibidem*, para. 147.
49 *Ibidem*, para. 154.
50 *Z.H. v. Hungary*, 2012.

However, what if a person is deafblind like Hellen Keller? Could her teacher and life-long companion Anne Sullivan receive such information on behalf of her? A Hungarian applicant Z.H. was deaf, mute, illiterate, unable to use the official sign language, and suffered from intellectual disability.

The case of *Z.H. v. Hungary* addressed the issue of the right to information for individuals with intellectual disabilities who are detained under Article 5 of the Convention. Only Z.H.'s mother could understand his unique sign-language. In April 2011, he was arrested on the suspicion of mugging and interrogated at the police station with the assistance of a sign-language interpreter. He was unable to understand this interpreter and his interrogation was not conducted using an adaptive interviewing approach fitted to his intellectual disability. Consequently, Z.H. was detained on remand until July 2011, when a district court ordered his release and placement under house arrest, citing the need to minimise his detention due to his communication difficulties. The ECtHR found that Hungary had violated Z.H.'s right to information under Article 5 § 2, which requires an individual to be informed of the reasons for his or her detention promptly, in a language understood by him or her, and in a manner that allows the person to exercise his or her rights under Article 5 § 4, which guarantees the right to challenge the lawfulness of detention.

The Court emphasised that the communication must be adapted to the individual's specific needs, taking into account his or her intellectual disability. If the individual is incapable of understanding the relevant information, the Court stressed that persons representing his or her interests must be informed.[51] Thus, the role of representatives, such as guardians or lawyers, is crucial in such situations. In Z.H.'s case this person should have been his mother. For someone like Hellen Keller, it would have been probably someone like Anne Sullivan.

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8. Right to a trial within a reasonable time or to be released pending trial under Article 5 § 3:

8.1. Štvrtecký v. Slovakia[52]

The right to trial within a reasonable time has been a particular challenge in European countries that transitioned from communism to democracies. The transition involved substantial reforms in the entire legal system and the efficiency of the reformed judiciary in the transitional and post-transitional legal order became one of the major issues. In the landmark case of *Štvrtecký v. Slovakia* (2018), the ECtHR delved into the intricacies of Article 5 § 3 of the Convention by addressing the critical

51 *Ibidem*, paras. 41–43.
52 *Štvrtecký v. Slovakia*, 2018.

issue of determining the permissible length of pre-trial detention and emphasising the importance of balancing the interests of the individual with the need to ensure the effective administration of justice.

Mr Štvrtecký was arrested in October 2006 on charges of extortion and held in pre-trial detention for more than three and a half years. The authorities justified his detention on the grounds that he might put pressure on witnesses, tamper with evidence, or contact other perpetrators. He remained in detention throughout the investigation and trial, which lasted four years. In June 2010, he was convicted of establishing, masterminding and supporting a criminal group, and sentenced to 25 years' imprisonment. Mr Štvrtecký complained to the ECtHR that his pre-trial detention was excessive.

In this case, the ECtHR established that the period to be considered when assessing the length of pre-trial detention under Article 5 § 3 begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance. This approach aligns with the Convention's emphasis on promptness and the need to ensure that detention is not prolonged unnecessarily.[53]

The ECtHR reiterated the principle that detention pending trial cannot be justified by abstract arguments but must be supported by concrete evidence of a risk that the accused may abscond, obstruct justice, or commit further offenses. In cases involving organised crime or criminal groups, the risk of witness tampering or other interference with the proceedings may increase due to the nature of the criminal activities and the potential influence of the accused.[54]

Nevertheless, such risks must be assessed carefully and must be supported by specific facts, rather than providing mere assumptions or generalisations. In Štvrtecký's case, the ECtHR found that the detention period of over three and a half years was excessive and violated the applicant's right to liberty under Article 5 § 3.

The ECtHR's ruling in the *Štvrtecký v. Slovakia* case serves as a reminder to national authorities of the importance of scrutinising the grounds for pre-trial detention carefully and ensuring that detention is not used as a routine measure or a substitute for effective investigation and prosecution. The Court's emphasis on the need for factual evidence and a case-specific risk assessment underscores the need to balance the interests of justice with the fundamental rights of individuals. By adhering to these principles, States can protect the right to liberty while ensuring the proper administration of justice.

53 *Ibidem*, para. 55.
54 *Ibidem*, para. 61.

8.2. Tase v. Romania[55]

In another landmark case, the *Tase v. Romania* case (2008), the ECtHR addressed the critical issues of pre-trial detention and the right to compensation for unlawful detention. Mr Tase was arrested in June 2002 on charges of theft and was ultimately convicted. He claimed that his arrest was unlawful and lacked concrete reasons. He also argued that he should have been entitled to compensation for his pre-trial detention, even though he was eventually convicted.

The ECtHR established that detention pending trial must be based on concrete reasons that are carefully considered and clearly articulated in the relevant judicial decisions. The Court rejected the practice of automatic or routine prolongation of detention, noting that such an approach undermines the individual's right to liberty and fails to meet the requirements of Article 5 § 3.[56] The Court also highlighted the duty of domestic authorities of establishing underlying circumstances warranting a person's detention, as only a reasoned decision facilitates public scrutiny.[57] No matter how short the period of detention may be, its justification must be convincing.[58]

In the *Tase v. Romania* case, the Court found a violation of Article 5 §§ 1, 3 and 5 of the Convention. The Court's emphasis on concrete reasons and rigorous scrutiny highlighted the importance of balancing the interests of justice with the right to liberty and security. This case completes this intellectual journey through the ECtHR's case law regarding Article 5 in some selected Central European countries.

9. Conclusions

This paper has examined the right to liberty and security in the ECtHR case law involving Romania, Poland; Slovakia, Hungary and Croatia. The analysis focused on a number of key issues, including the scope of application of Article 5, the specific provisions of Article 5, the lawfulness of deprivations of liberty, procedural safeguards, the right to information on the reasons for arrest and the right to trial within a reasonable time or to be released pending trial.

The cases observed have demonstrated that the ECtHR has taken a robust approach to protecting the right to liberty and security. The Court has consistently held that any deprivation of liberty must be lawful, necessary in a democratic society and proportionate to the legitimate aim pursued. The Court has also been willing to intervene where there have been procedural irregularities in the detention process.

55 *Tase v. Romania*, 2008.
56 *Ibidem*, para. 40.
57 *Ibidem*, para. 41.
58 *Ibidem*, para. 40.

The cases have also highlighted the importance of the right to trial within a reasonable time. The Court has held that this right is of fundamental importance to the protection of individual liberty. Where a person is detained pending trial, the Court will carefully scrutinise the reasons for the delay and may order the release of the detainee if the delay is found to be unreasonable.

The ECtHR's case law on the right to liberty and security has had a significant impact on the domestic law of the countries concerned. The cases have helped to raise awareness of the right and to ensure that it is better protected in practice. The Court has also been inclined to issue judgments that have significant financial consequences for the governments concerned.

Overall, the ECtHR's case law on the right to liberty and security has made a valuable contribution to the protection of human rights in Romania, Poland, Slovakia, Hu ngary and Croatia. The cases have helped to ensure that this right is interpreted in a way that is consistent with the European Convention on Human Rights and that it is effectively protected in practice.

Among the analysed countries, it was only Croatia that had a recent war experience in which personal liberties were limited for national security reasons in the 1990s,[59] an issue that remained unaddressed by the ECtHR as Croatia was not a Council of Europe Member State at the time. Interventions in liberty and security in wartime are gaining relevance again as we are on the edge of the escalation of the prospect of World War III.[60] Hopefully, we will not be needing them.

59 E.g. evictions of persons from their homes, detention and search of persons without a warrant for security reasons. Matulović and Bošković, 1996, pp. 322–325.

60 For a comparative overview on wartime security and liberty in post-World War II context see Jackson, R.H. (1951) Wartime Security and Liberty Under Law. *Buff L. Rev.*, *1*, pp. 103–117.

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Chapter 8

Due Process and Criminal Law Cases with Special Regard to Central Europe

Eugen-Gheorghe Crişan

Abstract

The right to a fair trial is probably the most comprehensive and complex of the rights provided for in the European Convention on Human Rights (ECHR, or 'convention'). This, in order to be respected as a whole, requires respect for the other rights which compose it – and which in turn are composed of other requirements, conditions and elements – each of which in turn must themselves be respected. The European Court of Human Rights (ECtHR or 'court'), which is constantly confronted with new situations arising in the national practice of EU member states, constantly consolidates or reinforces its case law on each element of the right to a fair trial, thus ensuring that the authorities of the member states – whether political, judicial or otherwise – act accordingly. In order to ensure that the legal provisions contained in Article 6 of the convention and the case law of the court are complied with as faithfully as possible, it is useful to be familiar with all the case law, irrespective of which European state it refers to and whether it is older or more recent, since only a cross-referencing of all of them offers the ideal way forward. It could be said that the judicial systems of the countries located in Central and Eastern Europe offer the most negative cases, but this is not really the case: there are plenty of such cases in other more 'modern', evolved systems – towards which those of the countries located in this part of Europe tend – and their progress in this respect is notable, which is gradually leading to a visible decrease in the number of such cases. The fact is that the direction in which things are going is largely due to the court, which, in each case decided, sets benchmarks between which national legislation and judicial practice must fall.

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Keywords: criminal charge, independent and impartial court, fairness, publicity of trial, reasonable time, presumption of innocence, right of defence

1. Introduction

The right to a fair trial is regulated in Art. 6 of the ECHR,[1] and its features and components can easily be deduced from the legal regulation. However, these have been given full shape by the intervention of the ECtHR.

In order to make things as uncontroversial as possible, the Council of Europe and the court have even drawn up guides on each individual article, and such a guide also exists for the application and observance of Art. 6 of the convention.

Naturally, as the court has been called upon to deal with more and more cases concerning violation of Art. 6, its judicial practice has provided us with more and more elements – with the help of which anyone interested can grasp its full meaning.

In the following, for the sake of reminder I will present the structure of the right to a fair trial as it appears today through the court's case law – summarised in the guide I have mentioned without taking it verbatim – leaving the reader the pleasure of studying it in detail, in any language. Where in the last 10 years the court has come up with new elements of case law, I will present them – and analyse those cases in which the violation of the right took place in Central and Eastern European countries. In the last section, I will follow the 'case study' method, and inform those interested as to how Art. 6 of the convention has been transposed into Romanian criminal law – with both the positive and negative aspects of this approach.

1 Art. 6 – Right to a fair trial: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

2. The right to a fair trial: structure and content

2.1. Criminal charge

Given that there are several systems of law at European level, it is already well known that certain concepts in European law are explained and interpreted independently (autonomously of each other) in order for the legal provisions to have full applicability and validity in any of the member states. No exception is made to the notion of 'charge in criminal matters', defined by the court as "official notification by the competent authority of suspicion of the commission of a criminal offence". On the other hand, because in some legal systems not all anti-social offences are covered by the concept of 'criminal offence', the court has established that this category includes all offences which are so classified under national law, the nature of the violation to which the offence relates, and the seriousness of the penalty to which the perpetrator is liable.[2]

In such circumstances, Art. 6 of the convention has a much wider application, covering not only criminal proceedings – as we all know and understand them according to the legal systems we are used to – but also various other proceedings, including disciplinary, administrative, tax, customs, competition, political, expulsion and extradition proceedings.[3] The court's practice over the last 10 years has not brought any new elements to the above issues.

2.2. General guarantees: access to a court

Although we are talking about an important right, as regulated by Art. 6, the court has nevertheless established that the right of access to a court is not absolute: it can be limited provided that those limitations do not make it impossible to exercise it. The examples of limitations analysed by the court in its practice refer to parliamentary immunity, conditions imposed by procedural rules with the particularity of the requirement to execute a previously pronounced decision, etc.[4]

Nor does the concept of 'court' have the meaning that the court usually uses to indicate, for example, a judicature, a tribunal or a court, but a much broader one defined by two criteria. The first relates to judicial functions, according to which the court is that entity which has the established competence to rule on certain matters on the basis of rules of law and according to a certain procedure. The second refers to the requirements that this court should fulfil, which relate to its establishment by law; its independence from other authorities, institutions, entities etc.; and its impartiality. Independence is also determined by the way in which the members of the

2 Council and Court 2014, p. 7.
3 Council and Court 2014, pp. 8–11.
4 Ibid., pp. 11–13.

court are appointed, their term of office, the safeguards that exist against external pressure and, last but not least, the appearance of independence. As regards the impartiality of the court, the court states that such a conclusion can be drawn only if a double test is carried out – one of a subjective nature, consisting of an attempt to establish the personal conviction or interest of a particular judge in a given case; and the other of an objective nature, which involves establishing whether the judge has provided sufficient guarantees to exclude any legitimate doubt.[5]

The novel element that has recently emerged in the court's practice with regard to impartiality concerns the situation where a judge participates in two similar proceedings against the accused. The court naturally also recalls here the two tests mentioned above. As regards the subjective test, the court holds that a judge's personal impartiality must be presumed until the contrary is proved. With regard to the objective test, the court states that it is necessary to determine whether, apart from the judge's conduct, there are verifiable facts which raise justifiable doubts as to their impartiality – in which the defendant's opinion is important, but not decisive, the decisive character comprising objectively justified fear with regard to impartiality, of importance here being even the appearances which underline the adage that "justice must not only be done, but must be seen to be done."

Although the court notes that the same judge participated in both proceedings – with the exception that in the first proceedings he did not examine the merits of the case – it points out that the mere fact that a trial judge has taken previous decisions on the same offence cannot, however, justify concerns as to his impartiality. The court continues its reasoning in an interesting way – by showing that there would be no reason for legitimate suspicion of a lack of impartiality, even where the same judge takes part in the adoption of a decision at first instance – then takes part in new proceedings, when the first decision is annulled and the case is referred back to the same judge for trial – nor that there is a general rule requiring a higher court to refer the case back to a court composed differently if it annuls a judgment. In concrete terms, even if the first decision in the case has not been annulled and the case has not been sent back for retrial following a regular appeal, if the applicant has been indicted again on some of the same charges, if the same judge participated in both proceedings he is not in himself to be regarded as incompatible with the requirement of impartiality – especially as he did not in the first proceedings adopt a decision establishing that the applicant was guilty or not guilty, nor did he assess any relevant evidence, but merely examined whether the conditions relating to the application of the general amnesty law were met. There were therefore no verifiable facts which could give rise to any justifiable doubt as to the impartiality of the judge, nor that the applicant had any legitimate reason to fear so, so that Art. 6 para. 1 of the convention has not been violated.[6]

5 Council and Court 2014, pp. 13–21.

6 Case *Marguš v. Croatia [GC],* application no. 4455/10, judgment of 24 May 2014, paras. 69, 84–91.

All of the above is insufficient; it is also necessary to take into account the procedure that such a court carries out, which must be fair, public, and of reasonable duration.

Fairness[7] is also made up of several elements. The need for each party to be able to present its case on such terms that it is not placed at a clear disadvantage compared with its opponent, i.e. the establishment of a balance between the parties, putting them on an equal footing or, in other words, equality of arms, is the first of these. The adversarial procedure is the next step and involves the possibility for the parties to know and comment on the evidence in the case, to make observations designed to guide the court's decision – with the proviso that the ECtHR has established that the right to disclose relevant evidence is not absolute and may have certain limitations which, if they occur, attract appropriate compensation.

In order to demonstrate to the parties that they have been heard, to make the court's decision more acceptable to them, to oblige the court to base its decision on objective arguments and at the same time to preserve the rights of the defence, it is necessary that judgments be reasoned in such a way as to indicate sufficiently the grounds on which they are based, without the courts being obliged to give detailed answers to each argument put forward, provided that it is clear from the judgment that the issues raised in the case have been addressed.

Although Art. 6 of the convention does not expressly refer to the accused's right to silence and not to incriminate oneself, since it is international in character, generally valid, applicable and recognised, it is intrinsic to the right to a fair trial, intended to protect the accused from possible abuse by the authorities, and lead to the avoidance of miscarriages of justice, guaranteeing the fulfilment of the purpose for which Art. 6 was conceived. It is so important that it is applicable from the very beginning of the criminal process – from the first hearings by the police – and cover all categories of offences, whether simple or complex. The right to remain silent is not absolute either, so it may be subject to limitations – but these cannot lead to its annulment, which is why the nature and extent of the limitation, the existence of appropriate safeguards in the proceedings, and how the evidence obtained as a result of the limitation is used must be taken into account.

Although the court is not required to rule on the admissibility of evidence which has been obtained unlawfully or in violation of convention rights, it nevertheless points out that it is necessary in such cases to examine whether the proceedings were fair as a whole – which automatically implies an examination of the illegality of the proceedings, and if there has been a violation of a convention right, and what the nature of the violation is. These issues are also reiterated in more recent practice, where the court has also stated that Art. 6 guarantees the right to a fair trial, but does not lay down any rule on the admissibility of evidence, which is primarily a matter for national law. As to whether the procedure as a whole was fair, the court established that it must be ascertained whether the rights of the defence were respected,

7 Council and Court 2014, pp. 21–30.

i.e. whether the applicant was given the opportunity to challenge the authenticity of the evidence and to object to its use; the quality of the evidence; the circumstances in which the evidence was obtained and whether they cast doubt on the reliability or accuracy of the evidence; whether it was supported by other evidence; whether it was decisive for the outcome of the proceedings or not. The court emphasised that special considerations apply to the use of evidence obtained in violation of Art. 3 in criminal proceedings, noting that the use of such evidence obtained in violation of one of the fundamental and absolute rights guaranteed by the convention always raises serious questions as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction.

In cases concerning ill-treatment by public officials, the court has held that the admission as evidence of statements obtained as a result of torture or other ill-treatment prejudicial to Art. 3, in establishing the relevant facts in criminal proceedings, renders the proceedings as a whole unfair, regardless of the probative value of the statements and whether their use was decisive for the conviction of the accused. The court stated that this applies both to the use of actual evidence obtained directly through acts of torture, and where evidence is obtained through an act characterised as inhuman and in violation of Art. 3, but is not an act of torture - provided that it is shown to have had an influence on the outcome of the proceedings against the defendant and impact on the conviction or sentence. The court also pointed out that these principles apply not only where the victim of treatment in violation of Art. 3 is the accused, but also where third parties are concerned.

Specifically, the court held that the information extracted from the witness was transcribed and used by the prosecution in the applicant's trial – and the court administered the challenged writing as evidence and referred to it in the context of the findings of fact and the determination of guilt of the applicant – who did not succeed in this respect on appeal either, although he challenged the reliability of its production. The court reiterated that the use of evidence obtained as a result of the treatment of a person in violation of Art. 3 – however that treatment is qualified (torture or inhuman or degrading treatment) – rendered the procedure as a whole automatically unenforceable and in violation of Art. 6. These consequences occurred regardless of the probative value of the evidence, and whether or not its use was decisive in securing the defendant's conviction. The court also pointed out that this principle applies equally to the admission of evidence obtained from a third party through ill-treatment by private persons, regardless of the classification of such treatment – which is a novelty in the court's case-law and a complement to it.[8]

Closely related to the taking of evidence is the question of challenge, which the court recognises as a necessity in particular in cases of organised crime and corruption, pointing out that such methods do not *ab initio* constitute a violation of Art. 6, only that the use of such methods must take place within very clear limits, be

8 Case *Ćwik v. Poland,* application no. 31454/2010, judgment of 5 November 2020, paras. 70–77, 78–93.

accompanied by adequate and sufficient safeguards against abuse, and be carried out within clear and predictable procedures.

If we finally refer to fairness in terms of waiving the guarantees of a fair trial when a case is concluded by a negotiated settlement, it should be noted that not long ago, in one case[9] the court pointed out that such a procedure offers important benefits such as the speedy resolution of criminal cases, a reduction in the workload of courts, prosecutors and lawyers, and if properly applied, is a successful tool in the fight against corruption and organised crime – helping to reduce the number of sentences imposed and, as a result, the number of prisoners. The court further held that, by entering into a negotiated agreement with the prosecuting authority regarding the sentence and the non-challenge of the accused, the applicant had waived his right to have his criminal case examined on the merits. The court reiterates that in this situation the acceptance of the agreement should have been accompanied by two conditions: the first being that the agreement should have been accepted in full knowledge of the facts of the case and the legal consequences, in a genuinely voluntary manner; and the second being that the content of the agreement and the correctness of the manner in which it was concluded should have been subject to sufficient legal scrutiny.

In transposing them to the specific case, the court found them to be satisfied since the applicant himself requested the prosecution to initiate the settlement. The settlement was not imposed by the prosecution; the applicant expressed his wish to repair the damage, and had access to the case file. He was assisted by two qualified lawyers of his own choosing from the outset of the proceedings, who ensured that he was assisted during the negotiations with the prosecution, one of whom assisted him during the judicial examination of the settlement. The applicant also explicitly confirmed on several occasions before both the prosecution and the court that he understood the content of the agreement, that his procedural rights and the legal consequences of the agreement were explained to him, and that his decision to accept it was not the result of violence or false promises. The court also found that a written record of the agreement had been drawn up and signed by the prosecutor, the applicant and his lawyer, and that it had been submitted to the court for examination, which had verified the exact terms of the agreement, of the previous negotiations, and had thus been subject to legal scrutiny in a clear and indisputable manner. A very important point emphasised by the court concerns the fact that the court was not, under domestic law, bound by the agreement concluded, but had the right to reject the agreement on the basis of its own assessment of the fairness of the terms it contained and the manner in which it was concluded, while having the right to assess the sentence recommended by the prosecutor and to reduce it, to examine whether the charges against the applicant were well founded and *prima*

9 Case *Natsvlishvili and Togonidze v. Georgia [GC],* application no. 9045/05, judgment of 29 April 2014, paras. 76, 90–98.

facie supported by evidence. All of this also happened in practice in a public hearing, further contributing to the overall quality of judicial review in the case.

Finally, the court found no violation of Art. 6 para. 1 of the convention, further stating that it was natural that the applicant, in waiving his right to an ordinary trial, had also waived an ordinary remedy as a consequence of the procedure consciously and voluntarily followed.

The need for the procedure to be a public one[10] is intended to subject the act of justice to public scrutiny, thus ensuring the avoidance of a secret justice system and confidence in the courts. Proceedings are public if they include a hearing in which the accused has the right to participate, which certainly does not mean that a criminal trial cannot be conducted *in absentia* in certain circumstances. It should also be noted here that the participation of the accused in his or her own proceedings has slightly different meanings depending on how they proceed through the trial on the merits or on appeal. There are also natural exceptions to the rule of publicity if there are interests that require them. The public nature of the proceedings to which the accused is subject also means that judgments must be delivered in public – a concept interpreted by the court to mean that they must be delivered in such a way as to facilitate public scrutiny of the judgment and of the judiciary as a whole.

It is well known even to people who are not familiar with the legal world that a criminal trial with a very long duration deviates from its purpose. Therefore it is necessary that the procedure takes place within natural time limits, in relation to the particularities of the case arising from its complexity, the conduct of the accused and the stakes of the dispute for the accused, i.e. to have a reasonable time limit.[11] In this regard, the court has held that a duration of 15 years, which it can take into account in view of the limitation of its jurisdiction *ratione temporis* of the entire 19-year duration of the proceedings, is excessive and does not meet the criterion of a reasonable time.[12]

In addition to its general components, the right to a fair trial also has in its structure some specifics which, although niche, are so important that their absence also leads to a violation of the right, as we shall see below.

2.3. Specific guarantees

Following the logic of the matter, we see in a criminal trial that a person is accused in fact and in law of anti-social conduct, but because they are not yet considered guilty of committing these acts, they enjoy a presumption which may be the cornerstone of the criminal process – namely the presumption of innocence. The accuser is then called upon to prove guilt, but at the same time the accused

10 Council and Court 2014, pp. 30–33.

11 Ibid., pp. 33–37.

12 Case *Mocanu and Others v. Romania [GC],* application no. 45886/07, 32431/08 and 10865/09, judgment of 17 September 2014, paras. 356, 359–364.

is also given the opportunity to defend themselves by questioning the evidence of the prosecution and at the same time presenting their own evidence in defence. At the end of the trial, if there is no doubt as to the guilt of the accused, they will be found guilty and held criminally liable. In this case, the criminal trial is fair and the accused is protected against abuse of any kind and by any institution or authority. Under these circumstances, it is understandable why the presumption of innocence and the right of defence, with all that they contain, have been incorporated into Art. 6 of the convention.

2.3.1. Presumption of innocence

Apart from the legal provision, which is unequivocal and from which it follows in simple terms that a person is considered guilty only if a final court decision establishes so, the presumption of innocence[13] means that the judicial authorities and especially the court may not assume that the accused is guilty and must therefore be punished. At the same time, the burden of proof in a criminal trial is on those judicial bodies that fulfil the role of the prosecution, and they must therefore present their accusation based on sufficient evidence and give the accused the opportunity to prepare and present their defence. Since the convention does not preclude presumptions of fact and law, they can be taken into account and given effect – especially as the presumption of innocence, with all that it implies, is not absolute. The presumption of innocence is not only specific to a particular part of the criminal trial or to the proceedings as a whole, but extends to all subsequent proceedings, meaning for example that once a court has definitively determined that an accused person is innocent, they must be regarded as such *erga omnes* and may not be treated as guilty. An interesting aspect of the presumption of innocence is that no authority, no public institution, no public official of greater or lesser rank is allowed to express the opinion that the accused is definitely guilty, even if the criminal trial has not yet been completed and guilt has not yet been established by a court. With regard to the judicial authorities, and in particular the courts, it should also be pointed out that even a reference in a court judgment to the certainty of the accused's guilt is prejudicial to the presumption of innocence if the accused has not been definitively found guilty.

Having considered several years ago the violation of the presumption of innocence by other public authorities, and even by the judge or the court, the ECtHR completed its practice by showing that comments made by the Minister of the Interior on the day after the applicant was arrested – comments published in a newspaper at a time when the case was in the public eye – went beyond a mere communication of information, because they were capable of giving the public the impression that the applicant was one of the 'brains' behind a criminal group which had allegedly embezzled large sums of public money. The court held that these comments violated

13 Council and Court 2014, pp. 37–41.

the applicant's right to be presumed innocent. The court also considered the judge's reasoning when he ordered the applicant's continued detention, and stated in his reasoning that the court "remains of the opinion that a crime has been committed and that the accused participated in it", which would amount to a finding of guilt before a judgment had been given on the merits and violated the applicant's right to be presumed innocent.[14]

In addition to all this, a press campaign that exceeds normal limits – with characteristics of aggression and virulence – has the ability to violate Art. 6 regarding the presumption of innocence.

2.3.2. The right to defence

Although the first references to the accused's defence strategy only appears in section b of par. 3 of Art. 6, the whole paragraph is considered to regulate this right, and as a whole is in fact a list of guarantees specific to the right to a fair trial – i.e. it can be argued that an accused person enjoys respect for the right to a fair trial if they also enjoy the right of defence, which in turn consists of a whole series of characteristic elements.[15]

Given that an accused can only defend themselves if they know what they are accused of, the first step is to be informed of the charges. Even if the statement of the accusation does not have to take some form and mention the evidence that substantiates it, it is necessary to include the facts on which the charge is based: the cause of the charge, but also the legal classification of these facts, the nature of the accusation, and where the indictment takes place, carried out in a language which the accused understands, before the trial goes to court.

In relation to these issues, in its more recent practice the court has ruled that information in a language understood by the accused – and free assistance from an interpreter – is an obligation not limited to situations in which the accused explicitly requests it. The court intervenes whenever there are reasons to believe that the accused does not know the language of the proceedings well enough, but also when it is necessary to use a third language for interpretation. In such circumstances, the defendant's knowledge of the third language was required to be verified before the decision to use it for interpretation was taken. The fact that the accused has a basic knowledge of the language of the proceedings – or of a third language in which interpretation is available – should not prevent a person from being interpreted in a language they understand well enough to fully exercise their right of defence. Therefore, the suspect – when "accused of committing a crime", must be informed in a language they understand of their right to be assisted by an interpreter. The court draws attention to the importance of recording in the file any procedure used, and the decision taken to verify the need to ensure interpretation, to notify the right to

14 Case *Gustanovi v. Bulgaria,* application no. 34529/10, judgement of 15 October 2010.
15 Council and Court 2014, pp. 41–57.

an interpreter and to the assistance provided by the interpreter. The court found that there was no indication that the authorities intended to provide the applicant with an interpreter in Lithuanian during the trial or investigation, and that only after the judgment in the second instance raised the issue of the availability of such an interpreter, without taking the necessary measures. The judgments of the national courts were based on the assumption that the applicant understood Russian - and as such could participate in all proceedings in that language. The court noted that the authorities did not explicitly verify the applicant's knowledge in Russian, nor was it ever asked whether he understood the interpretation and translation carried out in Russian sufficiently well to prepare his defence. The court also ruled that there were no records or other evidence establishing the applicant's actual level of Russian speaking, so that his lack of cooperation in the proceedings carried out by the police and the investigating judge could at least be partly the consequence of the difficulties of speaking in this language. The few statements made by the applicant during the hearing, "probably" in Russian, do not prove otherwise – or that the applicant had succeeded in communicating with his lawyer, which would have led to the conclusion that the applicant was fit to speak and understand only a little Russian. As such, the court found that he did not know the language well enough to guarantee the fairness of the proceedings. Although under national law the applicant was entitled to interpretation in his mother tongue, with correlative obligations on the part of the authorities, there was no indication that the authorities complied with that requirement. The court therefore concluded that the applicant had not received any language assistance to enable him to take an active part in the proceedings against him, which speaks to the unfairness of the entire process.[16]

After the indictment is brought to attention, the accused must benefit from the necessary facilities (time and means) in order to be able to deal with it whenever necessary during the criminal trial. Among these facilities we find the defendant's access to the file, with the statement made by the court that this access is not absolute - which means that there may be situations in which access to the entire file, and implicitly to all the evidence it contains, cannot be allowed - whether this is necessary to protect the fundamental rights of another person or a certain public interest, as well as to consult with a lawyer. As for the latter aspect, it should be noted that Art. 6 para. 3 section c of the convention provides for the possibility for the accused to defend themselves or to appeal to a lawyer. When the accused decides to defend themselves, this does not mean that the judicial authorities are not allowed to appoint an *ex officio* defender; on the contrary, when the interests of justice so require, a lawyer will be provided, somewhat beyond the will of the accused, who may be *ex officio* if the accused does not have the necessary financial resources.

With regard to the consultation of a lawyer, there is a relatively recent case in which the court reiterated – and developed upon – the fact that the right to receive

16 Case *Vizgirda v. Slovenia,* application no. 59868/08, judgment of 28 August 2018, paras. 75–87, 88–103.

assistance from a lawyer concerns the entire criminal process, with all of its procedures, including the duration of the interrogation by the police. At the same time, legal aid means not only the fact that the suspect is allowed access to a lawyer from as soon as the first interrogation, but to an elected lawyer. Unlike situations when the authorities refuse access to a lawyer, when the criterion to be considered by the court is "the substantiated reasons", in situations when the authorities refuse "the choice of a lawyer" the court refers to much more mild criteria. This later case must meet only the requirements of being "relevant and sufficient" – that is, if the suspect intends to have a legal representative, the authorities may disregard that intention if there are reasons "relevant and sufficient" to assess that it is in the interest of justice if the defence is prejudiced. In particular, the court held that the suspect's defence was prejudiced because he opted for the *ex-officio* lawyer without knowing that his parents had hired a defender. This defender showed up to contact his client, but the police told him to leave – a fact that was not brought to the attention of the suspect. In the relevant and sufficient reasons, the court only held that the lawyer chosen by the parents was refused because he did not have power of attorney from the suspect – but, on the other hand, the police failed to inform the suspect that the chosen lawyer had applied to give him the opportunity to make an informed choice. It should be noted here that under national law, parents are allowed to hire a lawyer. Compared to the suspect's complaint about how his testimony was obtained by the police, the court noted that the authorities had not taken steps to establish the relevant circumstances for his interrogation by the police. In such circumstances, the court presumed that the conduct of the police officers was such as to create a situation in which the applicant could not exercise his right to silence – and to give a statement which was subsequently admitted against him and had a significant impact during the criminal proceedings, even though there was other evidence, which undermined the fairness of the criminal trial as a whole.[17]

In contrast, in another case the court held that there was no violation of this right – even though the lawyer was absent during the first three days of police custody – because it had no impact on the overall fairness of the proceedings. At the same time, the court reiterated the general rule that access to a lawyer must be ensured from the first police interview of a suspect, except in situations where there are extremely serious reasons for restricting this right, but then only if the suspect's rights are not prejudiced – such as if they make incriminating statements during the interview without the assistance of a lawyer, which are then used to convict. Here, a few particularities are worth highlighting. The court pointed out that even if the suspect does not expressly request a lawyer, it cannot be interpreted as meaning that he has waived his right, since the police did not inform him that he had such a right. The court also found that the suspect was not provided with a lawyer even though there were no compelling reasons to deprive him of this right – such as an

17 Case *Dvorski v. Croatia [GC],* application no. 25703/11, judgment of 20 October 2015, paras. 76–82, 83–111.

imminent risk to the life, physical integrity or security of another person – and no such derogation was provided for in national law. Examining the overall fairness of the entire trial, the court held that, having been heard twice, the suspect remained silent, and when he gave his statement he was assisted by a lawyer and made aware of his rights, in particular the right not to incriminate himself, and moreover, the absence of his statement during this period did not have negative consequences for him during the criminal proceedings. On the other hand, it held that the suspect actively participated in all stages of the criminal proceedings, retracted his statements, and presented another version of the facts; his defenders had access to all the evidence in the case file, and were able to challenge them; the suspect's conviction was based not only on his statements but on a body of evidence; the courts made assessments of the evidence, checked that the applicant's rights were respected, and gave reasons in fact and in law for their decisions. The court concluded that even if the applicant was without a lawyer, it did not find any causal link between the absence of a lawyer and the statements subsequently made in the presence of a chosen lawyer. Thus, the absence of a lawyer did not contribute to his own incrimination, nor did it irreparably affect the fairness of the entire criminal proceedings.[18]

The assessment of the overall fairness of criminal proceedings is reiterated by the court in another case, where it emphasised that compliance with the requirements of a fair trial must be examined in each individual case in the light of the development of the proceedings as a whole, and not on the basis of an isolated examination of a particular aspect or incident. He also pointed out that it could not, however, be excluded that a particular element might be so decisive as to enable the fairness of the trial to be assessed at an earlier stage of the proceedings. Under Art. 6 para. 3(b) of the convention, the defence on the merits includes everything necessary to prepare for the main trial, i.e. the accused must be given the opportunity to organise his defence in an appropriate manner and without any restrictions on his ability to present all his arguments in such a way as to influence the outcome of the proceedings. In determining whether the accused has had sufficient time to prepare their defence, it is necessary to take into account the nature of the proceedings, the complexity of the case, and the stage of the proceedings. With regard to the appointment and assistance of a lawyer, the court emphasised that a state cannot be held liable for any failure of a lawyer appointed for legal assistance purposes, because the legal profession is an independent profession, the particularity of which is that the conduct of the defence is actually the responsibility of the accused and his lawyer, and the authorities are obliged to intervene only when the failure of legal assistance is obvious or is brought to their attention. As such, the court held that the short duration of the period between the time when the applicant was informed of the appeal court hearing and the time when it actually took place did not restrict his right to the time and facilities necessary to prepare his defence, or to be legally

18 Case *Simeonovi v. Bulgaria [GC],* application no. 21980/04, judgment of 12 May 2017, paras. 94–95, 110–120, 121–144.

represented during the criminal proceedings to such an extent that it could be said that he did not receive a fair trial, since the applicant had already had the services of his chosen lawyer and had time to prepare his defence, as demonstrated by the fact that he, through his lawyer, presented his defence before the investigating judge and then – in the proceedings before the court of first instance – in three cases submitted additional written arguments. On the other hand, the national courts allowed the complainant to hire another lawyer, but he did not do so. Moreover, in his oral and written defence, in his appeals the applicant analysed the case in detail and referred to all the main evidence.[19]

From the data provided by the judicial practice presented, it can also be concluded that legal assistance must be characterised by being concrete and effective; a purely formal or superficial legal assistance leads to the emptying of the right of content and entails a violation of Art. 6 in this respect.

Although the right to question and request the examination of witnesses would be inherent or implied in the context of the rights already mentioned, in Art. 6 par. 3(d) of the convention it has been expressly covered. The concept of witness also has an autonomous meaning here, and includes not only any person who under the legislation of the various states has such a status, but also any person whose testimony may lead to the conviction of the accused. For this right to be exercised, the judicial authorities must make every effort to ensure that witnesses are present so that the accused can question them and be questioned, especially where the testimony of a particular witness is unique or decisive, when failure to hear them may constitute a restriction of the right to a fair trial in this respect. In such a situation the judicial authorities must demonstrate that they have made every effort to ensure the witness's presence. This does not mean, however, that the non-appearance of witnesses entails the termination of the criminal proceedings or the acquittal of the accused, especially because, in its practice, the court has pointed out that it is possible to use depositions which were taken before the trial took place in court, such as the death of the witness, the exercise by the witness of the right to remain silent, etc. A different situation is that of anonymous witnesses – whose existence and presence in a criminal trial is not prohibited by the convention, but requires that the interests of the defence in such situations be balanced or compensated by other facilities or inducements. The same solutions are laid down by the court in the case of witnesses in sexual assault cases where their hearing may be sensitive, and therefore, if it cannot take place in an appropriate format, the defendant's defence must be compensated accordingly. In its practice the court has shown that advantages may be offered to witnesses in exchange for their testimony, provided that such situations are treated with caution – as there may be witnesses who make statements contrary to the truth simply to benefit from those advantages. Under the convention and the court's practice, circumstantial evidence is not approved for use either against or in defence

19 Case *Galović v. Croatia,* application no. 45512/11, judgment of 31 August 2021, paras. 74, 79–83, 84–91.

of the accused. Last but not least, the accused must have the benefit of hearing the witnesses proposed in their defence – but they have an obligation to indicate why it is important and necessary for each of them to be heard, and the courts may censor this right by refusing to hear them.

As a continuation of the right presented in Art. 6 par. 3(a) of the convention, which refers to the accused being informed of the charge in a well-understood language, subparagraph (e) of the same paragraph has regulated the right to an interpreter free of charge if the accused does not understand or speak the language used at the hearing – thus highlighting the absurdity of an accused being informed of the charge in a language which he knows, and then having the other proceedings or the criminal trial as a whole conducted in a language which the accused does not know or knows only very little.

At the end of the analysis of the structure of Art. 6 of the convention, I would also like to point out that it has an extraterritorial effect, according to which – when the question of extradition or expulsion arises – such a request may be refused if, in the requesting state, the proceedings that would follow would lead to a serious violation of the right to a fair trial, thus achieving what the court has indicated would be a "flagrant denial of justice", the burden of proof being on the right holder, and the judicial authorities requested having the obligation to remove any doubts that might arise in this respect.

3. The conformity of Romanian criminal legislation with the requirements of Art. 6 of the convention

Naturally, after the Revolution of 1989, legislation began to change in Romania – but the upward trend began after Romania's accession to the Council of Europe on 7 October 1993. In this context, criminal legislation has also been subject to a whole series of changes, the last major one being the entry into force of the new Criminal Code (hereafter CC) and the new Code of Criminal Procedure (hereafter CCP) on 1 February 2014. As the criminal legislation was only partly in line with the ECHR, at least until 2014 Romania was subject to many convictions by the ECtHR – including on the basis of Art. 6 of the convention – which continued after the beginning of 2014, but in a smaller number of cases, due to the adaptation of the criminal legislation to the convention and all European legislation.[20]

In order to see how things stand, in the following I will present those institutions of criminal law and criminal procedural law provided for in the current legislation, which represent a national transposition of the elements and conditions contained

20 European Institute 2023a, pp. 2–3.

in Art. 6 of the convention, and where they exist, those cases registered at the court since 2014 in which Romania has been convicted.

Before that, I would like to mention that although the right to a fair trial is not separately regulated in the legislation, there are direct references to such a right, as we find, for example, in the Constitution of Romania (hereafter CR), where – in the context of free access to justice – the constitutional legislator also mentioned the right of the parties to a fair trial and to the resolution of cases within a reasonable period of time, so that the right to a defence was immediately regulated separately, as well as in criminal procedural legislation.[21]

3.1. Criminal charge

In the Romanian judicial system, the notion of criminal charge is not open to discussion because, as the law now stands, a person can only be charged under criminal law. By all means, given the other forms of liability that exist in the Romanian judicial system, it could be argued that Art. 6 on its criminal side would also apply in other areas such as tax, misdemeanour, administrative, disciplinary etc. This does not change the meaning of the concept, but means that Art. 6 applies mainly in the criminal field, while at the same time it can also cover other areas adjacent to it. As regards the duration of the proceedings to which it applies, it is found from the early stages of criminal proceedings until the end of the proceedings, and even after the end of the criminal proceedings in the procedure for enforcement of judgments, and in proceedings relating to extraordinary remedies. By way of example, I would like to mention that even at the stage of criminal prosecution (the first stage of the criminal process in Romania, carried out by prosecutors and police officers), as soon as the prosecution of the suspect is ordered – i.e. the judicial authorities not only know the apparent perpetrator of the crime, but there is also a reasonable suspicion that this individual committed the crime – official notification takes place, which consists of ordering the suspect to appear before the prosecuting authorities (prosecutors or police officers) – on which occasion, before being heard for the first time in this capacity, the individual is informed of their status, the offence of which they are accused, its legal framework, the rights that persons acting as suspects have, and a report is compiled.[22]

3.2. General guarantees – access to a court

In our judicial system, the right of access to a court is institutionally guaranteed by entities that are only courts and perform the functions of a court of law, and are established by high ranking normative acts, separate and independent from other state authorities and institutions, placed on four levels of jurisdiction (in ascending

21 Art. 21, 24 CR; Art. 8 CCP.
22 Art. 3, Art. 307 CCP.

order: judges, tribunals, courts of appeal and the High Court of Cassation and Justice) made up of judges – legal professionals, licensed in law, rigorously selected, trained and appointed to such positions, the professional career with all that is related to it being the attribute of the Superior Council of Magistracy, the guarantor of the independence of justice. Naturally, the judiciary includes prosecutors, police officers and various other persons with clearly defined duties; but only judges enjoy independence and irremovability.[23] In addition to all this, there is also the Constitutional Court of Romania, which has more complex powers – of which we need only mention here its ruling on the constitutionality of laws.[24]

On the other hand, there are three categories of judges in each court, namely: the judge of rights and freedoms, who acts while the criminal proceedings are in their first stage - that of criminal prosecution – who has the power to deal with applications which would restrict or infringe on the rights and freedoms of a person, from the ordering of preventive measures to the taking of evidence; secondly, the pre-trial chamber judge, who acts after the end of the criminal proceedings and either reviews decisions not to prosecute ordered by the prosecutor – when he decides to end the criminal proceedings at the prosecution stage – or decisions to prosecute by indictment, when the prosecutor decides to go ahead with the trial and refers the case to the court, all these reviews covering both the procedural documents and the evidence submitted so far in the case; third, the trial judge – or the judge who alone or together with others makes up the court having jurisdiction to rule on the guilt of the accused. These three judges have well-defined duties, which cannot be performed by the same person in the same case. Moreover, it is not allowed for the same person to be a judge more than once in the same case, the criminal procedure law regulating a single exception – when a person can be in the same case both preliminary chamber judge and then join the court. As regards the appearance of impartiality, several situations have been regulated in the criminal procedure law in which a judge becomes incompatible to proceed to the trial of a case as well as the mechanisms for removing them from the trial of that case, but also those in which the courts as judicial entities as a whole are replaced by others. It should be pointed out that criminal procedure law also prevents a prosecutor from becoming a judge in the same criminal case, and also establishes categories of incompatibilities with regard to prosecutors, judicial assistants, court clerks and police officers.[25]

Regarding the fairness of the proceedings to be conducted, we have pointed out above that both in the basic law and in the introductory part of the CCP it is established that the entire criminal trial must be fair – this being further ensured by the fact that all parties involved have strictly regulated rights, and the judicial

23 Art. 124–130, 131–132, 133–134 CR, developed by Law no. 303/2022 on the status of judges and prosecutors, and Law no. 304/2022 on judicial organisation.

24 Art. 142–147 CR, developed by Law no. 47/1992 on the organisation and functioning of the Constitutional Court.

25 Art. 3, 35–40, 53, 54, 64–76 CCP.

authorities involved have the correlative obligation to make them known, respect them, and give them effect.[26] From an examination of the rights which the parties have in the criminal proceedings, and by reference to the procedural position of each of them, it cannot be concluded that any of them is placed at a distinct disadvantage compared with the others, and the differences are inherent in their status. It is certainly true that the accused (suspect or defendant) has more rights, but this seems natural, since they are the only one of all the participants who, if found guilty, will suffer harsh consequences if they are held criminally liable.

The contradictory nature of the procedure is given by the right of each party to know directly, subject to certain limitations, which are exceptional and relate only to the stage of the criminal proceedings, all the procedural documents and evidence in the case file and to propose the administration of evidence which it deems appropriate. This is more evident when proceedings are conducted before the judges, especially before the court, where oral hearings[27] take place, and is less noticeable at the prosecution stage because of its specific nature, the fact that it is predominantly written and the place where it actually takes place, i.e. mainly in police and prosecutors' offices.

The obligation to give reasons for judgments is regulated in criminal procedure legislation in almost every situation in which a judge is called upon to rule on any matter – and where it is not expressly provided for, it results from a combination of legal provisions,[28] therefore it would not be possible to envisage situations in which a judge decides on a given issue; their decision is not contained in a judgment, and the judgment does not contain the arguments on which the decision is based. In addition, the legislation clearly sets out the types of judgments that a judge must deliver, their structure, and what they must contain.[29]

During the criminal proceedings the accused person (suspect or defendant) has the right not to give any statement; this is made known to them every time they are heard - it is recorded in the statement or in a written document attached to it. Moreover, they are made aware that they will not suffer any negative consequences if they refuse to give a statement, and that if they do agree to give a statement it can be used against them.[30] There are no limits set for the exercise of the right not to give a statement and not to incriminate oneself. Due to the fact that at the beginning of the criminal proceedings the judicial authorities do not know exactly who the persons to be charged are, they treat them all - within the limits of their capacity - as witnesses, which is why the legislation provides that the witness also has the right not to incriminate themselves, precisely so that the information they provide in this capacity cannot be used against them once they have become a defendant.[31]

26 Art. 77–78, 81–87, 108, 111 para. 1–2, 112, 120 CCP.
27 Art. 351 CCP.
28 Art. 140 para. 4–5, 203 para. 4–5, 318 para. 14, 341 para. 5, 346 para. 1, 351 para. 3 CCP.
29 Art. 370, 401–404 CCP.
30 Art. 83 para. 1 lit. a, 108 para. 1–2 CCP.
31 Art. 118 CCP.

Evidence is administered on the basis of an evidentiary procedure, which regulates in detail the way in which the evidence reaches the case file – and when the legal provisions are not complied with, the criminal procedure law expressly states that it cannot be used in the criminal trial, which also entails the exclusion of evidence derived from it. At the same time, evidence obtained through torture is excluded and evidence derived from it cannot be used. The law also does not allow the use of violence, threats, means of coercion, promises, exhortations to obtain evidence, nor those methods or techniques that affect a person's ability to consciously and voluntarily remember and relate the facts that constitute evidence, regardless of whether or not they consent. Provocation to commit or continue the commission of a criminal offence for the purpose of obtaining evidence by judicial bodies or other persons acting on their behalf is also prohibited.[32] If the accused is sent for trial by indictment, but not by plea agreement, the criminal proceedings do not move directly from the prosecution stage to the trial stage, but to the pre-trial chamber stage, where the accused can contest, as already mentioned, the legality of the taking of evidence and of all procedural acts, including those by which it was ordered to be taken – and if the judge finds that there is illegal evidence on file, it is physically removed from the file so as not to influence the court's decision in any way.[33]

As noted above, in criminal proceedings there is a possibility for the accused to enter into an agreement with the prosecutor – whereby they succinctly accept the offence of which they are accused and negotiate the manner of punishment. This procedure is very quick compared to the ordinary trial procedure. It bypasses one stage of the criminal trial (pre-trial chamber), and the trial is based solely on the evidence given during the criminal proceedings. In addition to this procedure, the trial stage also includes the admission of guilt procedure, which does not require an agreement, where the accused person pleads guilty before the court and the penalty is determined by the court without negotiation. The advantages for the accused are that the penalty limits laid down by the criminal law for the offence committed are reduced by operation of law. The characteristic feature of both procedures is that they largely dispense with the safeguards that an ordinary criminal trial offers.[34]

The publicity of the hearing is a fundamental feature of the trial stage, whether it takes place on the merits, in ordinary or extraordinary appeals. Even if the work of the other two judges – the judge of rights and freedoms and the judge of the preliminary chamber – takes place in chambers and the hearing is not public, it still takes place in a courtroom where, for example, relatives or other interested persons may be allowed access – which is restricted compared with access to court hearings.[35]

32 Art. 97, 101, 102 CCP.
33 Art. 342–348 CCP.
34 Art. 478-488, 349 para. 2, 374 para. 4, 375, 377, 396 para. 10 CCP.
35 Art. 127 RC, Art. 352 CCP.

By their very nature, criminal proceedings are not open to the public, which is also regulated.[36]

Besides the legal provisions indicated above, which stipulate that criminal proceedings must be of reasonable duration, the Romanian legislator has also provided for a procedure to control the duration of criminal proceedings. In this procedure, the competent judicial body first establishes whether the criminal trial in a given case has a natural course, the reference criteria being those taken from the practice of the court, and in the event of a negative answer, it has the power to set the deadline for the resolution or completion of the respective stage.[37]

3.3. Specific guarantees

In addition to the fact that the presumption of innocence is regulated in the CR itself - and then in the introductory part of the CCP where, as in the convention, it is established that every person is presumed innocent until a final judgment has been handed down establishing guilt – it is also reinforced and supported by other legal provisions. Thus, the CCP establishes that the doubt is for the benefit of the accused, that the judicial bodies are obliged to establish the truth in the case, and that the prosecution bodies are obliged to provide evidence both for and against the accused. Furthermore, in order for the court to establish the guilt of the accused and then hold them criminally liable in one of the legal forms, it must find beyond reasonable doubt that the act exists, that it constitutes a crime, and that it was committed by the accused.[38]

With reference to damaging statements or aggressive press campaigns, I would point out that a prohibition of these is not regulated in the criminal procedure legislation.

Like the presumption of innocence, the right of defence is first regulated in the CR and then in the introductory part of the CCP, after which an entire section is devoted to the lawyer and legal aid, and, in addition to all this, throughout the CCP there are provisions relating to the presence of the lawyer and the manner in which they exercise the right of defence.[39] According to these provisions, throughout the criminal proceedings the accused may defend themselves and, if they so wish, may call upon a lawyer. But there are also situations in which, even if the accused wishes to defend themselves and do not call upon a chosen lawyer, they must be provided with a public defender whose fees are paid from the state budget. Regardless of whether we are talking about a chosen or appointed defence counsel, it should be noted that they can only be legal professionals, i.e. law graduates, who, following a

36 Art. 285 para. 2 CCP
37 Art. 488/1-488/6 CCP.
38 Art. 23 para. 11 CR, Art. 4, 5, 396 CCP.
39 Art. 24 CR, Art. 10, 88–95 CCP.

rigorous selection examination and a training period, become members of the country's bar associations.[40]

With regard to the actual exercise of the defence, the CCP contains legal provisions establishing that the accused and other participants in the criminal proceedings who do not speak Romanian may express themselves through an interpreter whose fee is paid from the state budget, that they are informed several times of the charge against them, and that the legal classification is changed whenever this occurs, that throughout the criminal proceedings the accused has access – with certain exceptional limitations and for short periods of time during the prosecution stage – to the evidence in the case file and may propose evidence, and that during the trial stage they may express their position on the evidence taken during the prosecution, that evidence which they contest will be presented again in court and that they may propose new evidence, on which occasion they have an active role. In order to establish the truth they may, together with the parties, the prosecutor and the court of their own motion, take any evidence they deem necessary.[41] The accused shall be given all the time necessary to prepare their defence and shall be provided with the facilities to enable them to do so. In order to exercise these rights, the accused shall be guaranteed participation in the trial, which as a rule shall take place in their presence, although there are exceptions where the court may also hold a trial in their absence. If a trial takes place in the absence of the convicted person, there is a procedure for reopening the criminal trial, whereby the criminal trial is resumed – this time with the defendant present.[42]

3.4. Recent case law of the ECtHR against Romania

If we compare the provisions contained in Art. 6 of the convention, the court's practice with regard to its elements and our national regulations, we could argue that Romania's legislation is almost entirely in line with European law and practice – so at least since 2014 Romania should no longer be condemned by the court on Art. 6. However, Romania has recorded new convictions after 2014, admittedly far fewer than in the past, and in order to have an idea of what Romania still has to do, I will briefly present them below.

Stoicu v. Romania[43]

The court observed that, although the applicant was acquitted at first instance on the basis of the same evidence, the applicant was later convicted by the appeal court only on the basis of a reinterpretation of that court of the evidence which had

40 Law no. 51/1995 on the organisation and practice of the legal profession.
41 Art. 12, 94, 99 para. 3, 100, 374 para. 5-10, 378–384 CCP.
42 Art. 364, 466–469 CCP.
43 European Institute 2023b, p. 11.

been adduced at first instance, without having heard the person concerned in person and without having directly examined that evidence despite the request made to that effect by the prosecutor's office. Given that the court had to establish if the applicant was in bad faith at the time of the commission of the offence – meaning, an element of fact – the court held that this element of fact could only be established through a direct examination of the evidence and a personal interview with the defendant.

Frana v. Romania[44]

The situation is similar to that in the previous case – that is, an acquittal at first instance, followed by a conviction on appeal – except that, unlike the other case, the appeal court relied solely on the statements of a witness given at the scene of the incident and before the prosecutor, without taking into account the statement given in accordance with the adversarial principle before the court – which led to the decision of the first instance to acquit him. This statement was rejected by the court of appeal without giving reasons why it considered it unreliable. The court held that before excluding the statement of the witness, the appeal court should have first examined whether it was necessary to hear the witness and whether it was appropriate to hear the other witnesses. The court pointed out that assessing the credibility of a witness is a complex task which generally cannot be achieved by simply reading written statements.

Gal v. Romania[45]

This case is also an acquittal, followed by a conviction – only here, the appeal court has administered insufficient evidence. The appeal court limited itself to hearing three of the five witnesses heard by the tribunal, to rejecting the request to examine the audio recordings, even though this evidence supported the applicant's challenge and relied on the other documents in the court file, which was such as to undermine the guarantees of an adversarial procedure and the principle of equality of arms.

Spasov v. Romania[46]

Here it should be pointed out that there is a difference between the European and Romanian legislation on the subject. This led to the initiation of proceedings against Romania, proceedings which were under way at the time of the trial, in which the European Commission expressed its views. Although these proceedings were ongoing and led to a change in the law, the Court of Appeal nevertheless convicted the defendant on the basis of Romanian law, in which case the court held that the

44 Ibid., p. 12
45 European Institute 2023a, p. 16.
46 European Institute 2023a, pp. 28–29.

Romanian domestic court had committed a manifest error of law, and the applicant had been the victim of a denial of justice.

Mena v. Romania[47]

The court held in this case that by a final decision the Court of Appeal admitted the defendant's appeal, found that the statute of limitations had expired on his criminal liability but, pursuant to Art. 25 of the Criminal Procedure Code, left the civil aspect unresolved. The court also held that the victim could not be obliged in such circumstances to initiate a new trial, a civil one, more than six years after he was brought as a civil party and seven years after the date of the facts in order to claim compensation for his damage. Although the legal provision on which the judgment of the Court of Appeal was based was declared unconstitutional and then amended to the effect that now, even if the statute of limitations is found to have expired, the civil side is dealt with, I wanted to present it because it is an eloquent example of how the court's practice influences the law, leading to its amendment.

Alecsandrescu v. Romania[48]

In this case the court considered that the subsequent charge was different from the original one, so that the grounds which the applicant could have invoked against the new charge would also have been different, and, therefore, held that the applicant had not been informed in detail of the nature and cause of the charge against him, nor had he had the necessary time and means to prepare his defence.

Călin v. Romania[49]

The court noted that the criminal investigation alone lasted 10 years and 10 months. Throughout, there were procedural delays, such as the submission of an expert account after a year's delay or successive declines of jurisdiction, and numerous periods of inaction by the authorities. The court noted that it did not appear from the documents on file that the applicant was responsible for those delays. (A similar situation is found in the cases of Mocanu and Others v. Romania – analysed above, Palabiyik v. Romania).[50]

47 European Institute 2023c, p. 9.
48 Ibid., p. 19.
49 European Institute 2022c, p. 1.
50 European Institute 2020b, p. 2.

Ionescu v. Romania[51]

The court found that the witness with a protected identity, who was summoned to appear before the tribunal, never appeared to give the parties the opportunity to cross-examine him. Although he was no longer in Romania, the Romanian authorities continued to summon that witness to appear by means of notifications in Romania, and made no effort to try to locate him. Given that the witness's statements were of some importance and that their admission caused difficulties for the defence, the court held that very few procedural steps were taken to compensate for the defence's inability to address the witness.

Nistor and Nistor v. Romania[52]

In this case, the applicants were convicted both at first instance and on appeal, except that the appeal court changed the legal classification – not from one offence to another, but the form of participation from perpetrators to accomplices. Given that the defence strategy differs according to the form of participation, the court concluded that the Court of Appeal did not inform the complainants of the possibility of changing the legal classification, and did not give them the opportunity to present their arguments in this regard.

Tartouși v. Romania[53]

The court held that the High Court of Cassation and Justice, as an appellate court, rejected the applicant's request for the examination of a witness on the grounds that further questioning of the witness was not necessary evidence, since other evidence had already been examined – and subsequently decided that the questioning in the rogatory committee in the case was relevant. Where the prosecutor's office relies on such a witness statement and the court is able to use that statement as a basis for its guilty verdict, the interest of the defence in being able to obtain the examination of the witness in question in their presence must be presumed and, as such, constitutes sufficient grounds for granting the defence's request to summon that witness, and would have required steps to be taken to give the person concerned the opportunity to obtain the examination of that prosecution witness, either by requesting an appearance at trial or by some other procedure.

51 European Institute 2022b, p. 15.
52 Ibid.
53 European Institute 2022a, pp. 12–13.

Toma v. Romania[54]

The court held that the applicants had contested before the preliminary chamber judge the merits of the prosecutor's office's order, sentencing them to pay a fine for participating in a fight. They questioned the credibility of several witnesses on whose statements the prosecution order was based. In addition, they claimed that the investigation had been superficial and complained about the prosecutor's office's refusal to allow them access to the documents on file. The preliminary chamber judge rejected the applicants' complaint without responding to any of their claims, and without even hearing the parties concerned.

Antohi v. Romania[55]

The court held that the change in the composition of the bench of the trial court – and the subsequent failure of the appeal court to hear the witnesses directly – amounted to depriving the applicant of his right to a fair trial.

It follows from the above cases that several of Romania's convictions are due to an incorrect application or interpretation of Art. 6 of the ECHR and the practice of the ECtHR by the courts, and it is necessary for the courts to be more diligent when they change the situation of the accused from acquittal to conviction, to re-administer directly the evidence from which the guilt of the accused emerges, and if a re-administration no longer possible, the court must prove that it has done anything possible to do so, when the legal framework is changed, when the composition of the trial panel is changed, especially when the judge or the court that carries out all of this gives a final judgment. A similar situation is found with regard to informing the accused of the offence of which they are accused, the details of the legal framework and the time needed to make an effective, rather than formal, defence. It is also necessary that when European law is contrary to national law, to apply European law - or at least not to complete the judgement until this issue is clarified, especially if proceedings are being conducted against Romania by European bodies. As regards the need for a party to bring a new civil case after the criminal trial has ended, I think that a legislative intervention would be welcome, whereby the criminal court – if it has ordered the end of the criminal trial by giving a decision on the criminal side of the case – would continue the trial on the civil side of the case or automatically refer the case to the civil court to continue the trial.

Regarding the length of the criminal trial, I consider that legislative changes can be made to facilitate its shortening. For example, the preliminary chamber should be rethought, as well as the two procedures which allow the criminal trial to be conducted quickly – namely the plea agreement and the simplified trial procedure.

54 Ibid., p. 16.
55 European Institute 2020a, p. 6.

At the same time, there is a need to ensure sufficient staffing of both magistrates and court clerks, as the courts are clearly overburdened.

4. Conclusions

In the end, I believe that the ECHR and the ECtHR represent a real bastion designed to protect citizens' rights and freedoms from any kind of violations – all the above being ample proof that the situation would have been entirely different, and predominantly negative, if the convention and the court had not existed, or if the court's case-law had not been attentive and complex with regard to all the situations referred to it. Surely every member state will still have convictions before the court on Art. 6, it being obvious that the whole state of affairs is evolving positively, and the court's case-law is still vital to maintaining this trend and achieving the European desiderata of respect for citizens' rights and freedoms, the foundation of a democratic state to which all peoples should aspire.

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Chapter 9

Selected problems of diplomatic and consular immunities and functions in the case law of the European Court of Human Rights, from a Central European perspective

Paweł Czubik

Abstract

The intensive development of human rights is increasingly affecting cross-border issues – including diplomatic and consular traffic. Although these areas are classic branches of international law, their development is increasingly influenced by the perception of the dignity of the human person and the proliferation of human rights norms. The following text examines the interplay of human rights and the issue of immunities to ensure the proper functioning of diplomatic missions and consular offices. This is a contentious matter. Attention is also given to consular functions, the task of which may also be to ensure the protection and dignity of the human person. A special place in this catalogue is occupied by the tasks of the foreign service in the field of diplomatic and consular protection. A special legal construction, which can be seen as being in line with due process standards, is the access to the consul of a person deprived of liberty. In this regard, international law has produced a rich jurisprudence. Finally, the text also devotes attention to the issue of consular functions regarding external voting – in this regard, an established standard of legal and human guarantees has not yet formed.

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Keywords: diplomatic and consular immunities, right of access to the consul, consular care, diplomatic protection, external voting.

1. Introduction

Diplomatic and consular relations appear to be quite distant from the issue of human rights protection. International immunity protects both members of a foreign service mission and the premises occupied by a consular post or diplomatic mission. This makes the impact of human rights protections in force in the receiving state very weak compared to those of the sending state. Gross human rights violations by diplomats[1] of the sending state end up declared *persona non grata*.[2] In contrast, there is rarely a judicial encounter between the human rights protection system and international diplomatic and consular traffic. Few cases of this type have emerged in the European human rights protection system[3] – but they are quite limited in nature, and the reference to diplomatic or consular law is essentially secondary. Interestingly, the key case on the immunity of missions in the field of labour law took place based on the experience of Central European countries (Poland and Lithuania). Even in this case, however, it is difficult to speak of the creation of a customary regulation weakening the immunity of a state in the case of human rights violations by its diplomat. Immunities from jurisdiction are especially difficult to justify in light of the growing role and status of international human rights. Immunities are created to secure the harmonious performance of functions, and not to protect diplomats or consuls as human rights violators. Also, diplomatic or consular functions themselves performed by persons protected by immunities (such as consular protection, conducting elections abroad) can lead to human rights violations. Immunity does not protect against the jurisdiction of the sending state for whose citizens the consul or diplomat performs

1 Such as the brutal murder on 2 October 2018 of Arab opposition activist Jamal Ahmad Khashoggi at the Saudi Arabian Consulate in Istanbul. Khashoggi had gone to the Saudi consulate to obtain the necessary documents regarding his marital status. Despite assurances regarding his safety, he was murdered and his body was dissolved in hydrochloric acid.

2 The institution of recognition as *persona non grata* has a dual role in international law. On the one hand, it is a form of punishment for a diplomat who cannot be brought before a court (due to immunity). The offender must expect to be declared *persona non grata* and thus to have to leave the receiving state before the end of their mandate. See: Salmon, 1994, pp. 490–492; see also: Denza, 2016, p. 72. On the other hand, this institution is used by states as a retaliatory mechanism. See: Combacau and Sur, 1997, p. 209. States consider their diplomats *persona non grata* in situations of deterioration of mutual relations. It is more political and not legal in nature. See: Conforti, 1995, p. 362.

3 The system is primarily performed on the basis of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950 (European Convention on Human Rights), ETS No. 005.

functions. This means the potential possibility of evaluating these activities through the prism of human rights protection.

2. Immunities versus human rights

Analysing selected problems of diplomatic or consular intercourse in European Court of Human Rights (ECtHR) judgements, attention should first be paid to the issue of state immunity. Immunities in cross-border relations can be divided into those enjoyed by diplomats or consuls, and those enjoyed by the diplomatic mission – i.e. *de jure* enjoyed by the state. Only some of the immunities of the state can be considered directly regulated by the provisions of the Vienna Convention on Diplomatic Relations.[4]

A quite clear line of jurisprudence on state immunity in labour cases is forming in the ECtHR and in the jurisprudence of national courts. This line has developed with respect to labour law cases. Before it, in 1979 the United Nations International Law Commission (ILC) was given the task of codifying and gradually developing international law in matters of jurisdictional immunities of states and their property. It produced a number of drafts that were submitted to states for comment.[5] On this basis, in 2005 the United Nations Convention on Jurisdictional Immunities of States and Their Property was signed (it has not entered into force). The 1972 European Convention on State Immunity ('the Basel Convention')[6] was adopted – Art. 5 of which reads that a contracting state cannot claim immunity from the jurisdiction of a court of another contracting state, if the proceedings relate to a contract of employment between the state and an individual where the work has to be performed on the territory of the state of the forum. But according to Art. 32, "Nothing in the Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them." As an aside, this convention is not popular in Central Europe: neither Poland nor Hungary are parties to the treaty.

4 UNTS 1964, vol. 500, No. 7310. A number of solutions contained in the Vienna Convention on Diplomatic Relations safeguard the inviolability of the sending state's diplomatic mission (Article 22) and the mission's archives and documents at all times and places (Article 24). It also guarantees numerous privileges of the mission as such (e.g., use of the emblem and flag – Article 20, tax privileges – Articles 23 and 28, freedom of communication – Article, 27, customs privileges – Article 36(1)(a), etc.). Since the diplomatic mission has no legal personality, these are privileges and immunities of the sending state (referring to tax privileges, the Vienna Convention explicitly provides for exemptions of the sending state in this regard).

5 Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries 1991, Yearbook of the International Law Commission, 1991, vol. II, Part Two, p. 51.

6 ETS No. 74, UNTS 1988, vol. 1495, no. 25699. It came into force in 1976.

The jurisprudence of the ECtHR is not very rich, but it is relevant in this regard. Created on the basis of the Fogarty[7] and Cudak[8] cases, the standard of the ECtHR assumes that the immunity of the state is not granted in *de jure gestionis* cases – which have an essentially civil (commercial) dimension. It is, though, granted in *de jure imperii* cases – that is, those that relate to the interest of the state. Transferring this to the field of labour cases, the ECtHR took the position that immunity does not apply to labour cases of persons from the receiving state employed by the sending state in the embassy of that state and performing labour tasks that do not affect international activity. The exception in this regard, however, is for recruitment issues - a point made explicitly in the Fogarty case. It should be noted, however, that the standard for treating labour matters as falling outside the scope of state immunity is essentially *in statu nascendi*, and it is difficult to assume the formation of such a uniform practice of states in reality as assumed by the ECtHR. In particular, it is difficult to relate it unequivocally to Central European practice.

For example, in light of Polish immunity laws (the Polish Code of Civil Procedure[9] has always had (i.e. for 60 years) strongly specified provisions in this regard), it is impossible to file a lawsuit against the embassy of a foreign state.[10] The embassy has no legal subjectivity and the qualification of it as a branch of a company, which is permissible under the jurisprudence of the Court of Justice of the European Union,[11] is impossible under Polish law without the foreign state expressly granting such a possibility.[12] Which naturally, in procedural practice, will not occur – as this state, in principle, is definitely not interested in the settlement. The only few labour cases relating to foreign embassies resolved before Polish courts in favour of the employees[13] were resolved in this way solely due to the court's error in ignoring the provisions relating to legal capacity in labour cases. It should be considered that the *Cudak* case (against Lithuania for labour rights violations – harassment by the Polish Embassy in

7 *Fogarty v. The United Kingdom (*Application no. 37112/97*),* Judgment 21 November 2001.

8 *Cudak v. Lithuania* (Application no. 15869/02) Judgment 23 March 2010.

9 Law of November 17, 1964. – Code of civil procedure - Dz. U. (Polish official journal of legal acts) 1964, vol. 43, no. 296, updated text: Dz. U. 2023, no. 1550.

10 And for comparison, Lithuania had no laws on the question.

11 Judgment of the Court (Grand Chamber) 19 July 2012 in case C-154/11 *Ahmed Mahamdia v. People's Democratic Republic of Algeria* (ECLI:EU: C 2012, p. 491).

12 See Art. 1111 § 1 point 4 and Art. 460 § 1 of the Polish Code of Civil Procedure. However, these provisions must be interpreted taking into account the content of Article 1117 of the Code of Civil Procedure and Art 17 para 3 point 4 of the Law of February 4 2011 on Private International Law (Dz. U. 2011, vol. 80, no. 432, updated text: Dz. U. 2023, no. 503).

13 See: Order of the Supreme Court of the Republic of Poland of December 18 2018 r., II PK 296/17, see also: Order of the Supreme Court of the Republic of Poland of January 11 2000 r., I PKN 562/99. But *cf.* Order of the Supreme Court of the Republic of Poland of March 18 1998 r., I PKN 26/98, *cf.* also: Judgement of the Supreme Court of Republic of Poland, December 15 2022, I NSNc 23/22.

Vilnius) was severely stretched in its factual premises, which must have contributed to its perception, which is very weak in practice.[14]

Issues related to the ownership of buildings by a foreign state are more problematic when the owner is an individual and resists it. In Poland, there are more than a dozen such cases, which have only been partially resolved in recent years (through judicial, administrative and diplomatic negotiations). The most important case involved the buildings of the Serbian Embassy in Warsaw.[15] The situation is complicated by a number of international agreements concluded during the communist era, providing for the transfer of real estate for diplomatic use. In the 1990s, properties formally recovered by pre-war owners meanwhile remain in the possession of a foreign state.

In the future, with the development of the human rights system, a potential source of conflict that may arise may concern violations of the convention right to property through the application not so much of state immunity (for this has already been partially resolved under the convention), but of diplomats' immunity. This is because diplomats' immunity is in principle a full immunity,[16] while the exceptions to it – in terms of civil or administrative law, which may affect the violation of the right to property – are very narrowly framed. In practice, there are situations in which there are significant violations of the law involving the ownership of property used by diplomats.[17] In view of full diplomatic immunity, failure to regulate, for example, the rent of privately owned real estate used for diplomats' purposes may involve a violation of the right to a court. However, the ECtHR's ability to rule in this regard appears to be severely truncated. In view of the evident deficit in the protection of the right to property in the face of restrictions on the right to a court (whose rationale is immunity), a practical solution would be insurance mechanisms used by the receiving state to protect persons entering into civil law relations with diplomats of the sending state. It could be very practical for real estates' owners or commercial merchants trading with diplomats.

14 Ms. Cudak sued Lithuania before the ECtHR, claiming that it was severely restricted for her to assert her labour rights against the Polish State in a Polish court - when at the same time she was already residing in Poland and her interests in Strasbourg were represented by a Polish lawyer running a law firm in Wroclaw.

15 Judgment of the Supreme Court of the Republic of Poland of June 19 2018, I CSK 45/18. The judgement explicitly addressed the issue of the state's immunity from jurisdiction, and was the quintessence of a number of preceding court rulings (including those issued by the Supreme Administrative Court of Poland and the Supreme Court, and relating to various aspects of the acquisition of real estate by a foreign state for a diplomatic mission). In its implementation, the Court of Appeals issued a judgment finally regulating the fate of the property (see the judgment of the Court of Appeals in Warsaw of July 10 2019, VI ACa 572/18). For the history of the litigation over the Serbian embassy building in Warsaw, see: www.dzp.pl/en/deals-corner/231-dzp-win-end-of-real-estate-dispute-with-serbia

16 See: Salmon, 1994, pp. 281–358, Denza, 2016, pp. 232–260.

17 On the jurisdiction of the sending state as a potential remedy see: Denza, 2016, pp. 266–273.

3. Consular care and access to consular activities

A separate issue that naturally coincides with human rights protection is the performance of diplomatic and consular functions, in particular concerning diplomatic protection and consular care.

One can mention cases related to access to consular premises, and the issue of anti-terrorist protection of consulates. Such a situation occurred in El Morsli v. France[18] – in which the applicant, refusing to remove her burqa, was not admitted to the consulate and therefore did not receive a visa. The court did not recognise the religious freedom arguments in this case.

Diplomatic or consular assistance and care alone in Strasbourg jurisprudence has not earned the name of a conventionally protected right. The theme of diplomatic or consular activity has already appeared in older rulings still issued by the Commission on Human Rights – but it was marginal and concerned the problem of extraterritoriality in the application of the convention.

Noteworthy here is the citation of several cases before the commission, in which it was deemed unacceptable to guarantee the right of an individual to diplomatic protection. Thus the first, somewhat curiously factual case of the Bertrand Russell Peace Foundation[19] established, firstly, the absence of any obligation on the part of the state to intervene in acts committed by another state not party to the convention; and secondly, in that case there was an explicit rejection of the presumption of the existence under the European Convention of any guarantees with respect to diplomatic protection. Actually, analogous conclusions are drawn from the cases Kapas,[20] Jasinskij[21] and Abraini Leschi[22] – as in the Bertrand Russell Peace Foundation case, complaints were also declared inadmissible. This does not mean, however, a categorical refusal to recognise diplomatic care as a human right, but only a rejection of the convention guarantees in this regard. It also explicitly stipulates that it is incorrect to make any presumption in this regard.[23] While it must be acknowledged that the manner in which the references to diplomatic protection are phrased quite broadly,[24] it leaves no illusion that the commission did not view this right not only

18 Judgment 15585/06, 4 March 2008

19 *Bertrand Russell Peace Foundation Ltd. v. the United Kingdom*, app. No. 7597/76, dec. of 2.05.1978, Decisions and Reports, vol. 14, pp. 117–132.

20 *Kapas v. United Kingdom*, app. No. 12822/87, dec. 9.12.1987, Decisions and Reports, vol. 54, pp. 203–206.

21 *Jasinskij v. Lithuania*, app. No. 38985/97, dec. 9.09.1998, Decisions and Reports, vol. 94-B, pp. 147–150.

22 *Abraini Leschi et autres c. la France*, app. No. 37505/97, dec. 22.04.1998, pp. 1–8.

23 ("(...) *Aucun droit de ce genre ne peut être déduit de l'article 1 de la Convention*" (quotation from cases: *Bertrand Russell Peace Foundation*..., p. 131; *Kapas*, p. 205)).

24 "(…) *la Commission rappelle la jurisprudence selon laquelle la Convention ne garantit aucun droit à la protection diplomatique ou autre mesure de ce genre que devrait prendre une Haute Partie Contractante en faveur de toute personne relevant de sa jurisdiction*." (Quotation from *Bertrand Russell Peace Foundation*…).

as a convention-guaranteed right, and did not view this right as a right in general. Which, by the way, is not surprising – the influence of British legal thought (understanding the right to diplomatic custody as solely a right of the state) in the Strasbourg bodies was and is clearly evident, and the two oldest of the cases mentioned above – which set the standard for the commission's view of these issues – involved a failure to act on the part of the United Kingdom precisely. The UK opposed any individual rights conceptions concerning diplomatic and consular protection (it was clearly seen in the time of negotiating directive rules of European consular protection in the EU in 2007). The Strasbourg interpretation of the issue is not clear-cut, however. Already in the Bertrand Russell Peace Foundation case the commission, despite its general refusal to recognise an individual's right to diplomatic care, recognised that failure to intervene – which is the essence of diplomatic care in a case – can affect the protection of rights guaranteed to the individual by the convention. The commission took a negative view of the granting of conventional protection for activities for which the state party to the convention is not responsible. Thus, the convention cannot oblige intervention in third countries. Thus, it is possible that the resulting line of jurisprudence evolved in the indicated direction not because of the court's general view of diplomatic and consular protection in the system of human rights protection, but due to the insignificance of the cases presented. However, it is more likely that this position reflects the actual development of international law, in which we are not dealing with a formed human right to diplomatic protection. By all means, given the difficulty of determining the potential scope of such custody, this solution remains quite convenient. From a classical international legal point of view there is the right to citizens' diplomatic protection, and there is any state's duty of such protection. The only one obliged is the state of the territory – obliged to enable the state of nationality to provide such care. So from the point of view of the state granting protection abroad, there is only free right to grant protection, but no duty to grant it. From the point of view of the individual, there is no right to be protected in any situation.

On the other hand, one has to wonder whether the indicated line of jurisprudence in terms of only classical, limited consular care or assistance (and not diplomatic care in the broad sense) would be identical. Consular activity is, to a significant degree, a concretised activity, not subject to such a significant margin of discretion as diplomatic care. Hence, in situations where its exercise involves concrete, often clearly normatively specified factual activities, their violation (potentially also through inactivity) by external organs of the state could be seen as a violation of human rights subject to possible assessment by the Strasbourg Court. If one looks at consular activity solely as the consul's performance of specific functions in the framework of assistance (disregarding the strictly 'care' aspect, constituting a reaction to a violation of the law by the receiving state) one risks a change in perception of the problem outlined above. The lack of territorial limitation in the application of the ECHR,

confirmed by the court's jurisprudence in some cases[25] – for example, the Banković[26] or Ilascu case[27] – makes it possible to view the improper performance or non-performance of consular functions by a consul of a state of nationality party to the convention, even residing in a third country, as a violation of human rights.

Cases involving violations of human rights through the action of a consul, or failure to perform functions, have also been reflected upon by the former European Commission of Human Rights. It is worth citing the complaint against Germany,[28] related to the violation of a citizen's rights through the improper action or inaction of the consul of the country of his nationality in a third country (Morocco) – as a result of which the citizen suffered significant damage with his expulsion from the third country. The commission declared the case inadmissible, however only due to the fact that the party was unable to prove its allegations. It made clear, however, that foreign missions are obliged to carry out their functions abroad, and failure to do so may lead to future liability under the ECHR.[29] Even more interesting in this context is a later case based on a complaint against the United Kingdom.[30] The party's allegation concerned the lack of sufficient assistance from the consular office in a third country in the search for the daughter of 'Citizen X' – who had been kidnapped by her father (a citizen of a third country, namely Jordan). The commission not only raised and developed in light of the Cyprus v. Turkey case [31] the conclusions formulated above, but also assessed the sufficiency of the action taken by the consul. In view of the fact that in this case, in the commission's view, the British consul in Amman took all the expected reasonable actions (contacted the mother with a lawyer, went to the place where the child was being held, saw first-hand the child's condition, spoke with the child's family, and entered the child in the mother's passport), the complaint was considered manifestly ill-founded. The commission, moreover, did not limit itself to assessing the actions of a diplomatic post or consular office of a state obliged to perform actions for an individual because of their citizenship of that state. Such a case was W.M. v. Denmark.[32] Here the complainant (a German citizen) complained to Denmark about its refusal to grant him diplomatic asylum, instead surrendering him to East German authorities in 1988, when he entered the Danish embassy in East Berlin. The case was considered inadmissible (without links, however, to the activity of diplomatic personnel), but the liability of the state was not excluded if the

25 See: Jankowska-Gilberg, 2008, p. 15.

26 *Banković et al. v. Belgium and 16 NATO States*, app. no. 52207/99, Rep. 2001-XII.

27 *Ilascu et al. v. Moldova and Russian Federation*, app. no. 48787/99, Judgment of 4.06.2001.

28 *X. v. Germany*, app. No. 1611/62, dec. 25.09.1965

29 "*Whereas in certain respects, the nationals of a Contracting State are within its 'jurisdiction' even when domiciled or resident abroad; whereas, in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make the country liable in respect of the Convention*." (Quotation from *X. v. Germany*).

30 *X v. UK*, app. No. 7547/76, dec. 15.12.1977.

31 *Cyprus v. Turkey*, app. No. 6780/74, 6950/75, dec. 26.05.1975

32 *W.M. v. Denmark*, app. No. 17392/90, dec. 14.10.1992, pp. 1–11.

diplomatic representative by his actions violated human rights, including those of a non-citizen of the receiving state.[33]

It is possible to consider applying the concept of positive obligations of the state to future cases of this type pending before the ECtHR - and thus resolving consular cases in favour of the applicant, in particular for refusal to take consular custody. Although the right to exercise consular care in the classical doctrine of international law is considered a power of the state, in the light of the human rights protection system, there are slowly outlining tendencies to consider this right not only *de facto*, but also *de jure* as its obligation. An important problem undoubtedly remains the assessment of what is a reasonable state action in this regard, considered as the fulfilment of consular care. Another issue is whether we can establish such a scope irrefutably at all, or whether it will vary each time, and whether we are indeed dealing with consular care or merely consular assistance – i.e. the performance of activities for the benefit of an individual, within the limits set by law, and under conditions in which there has been no violation of the law by the receiving state. It should be noted that in the *X v. UK* case cited above, this was an issue raised in part (the commission's assessment of the fulfilment of legitimate activities was not very restrictive, after all). However, the inclusion of the jurisdiction (as to the assessment of the sufficiency of the measures taken) of the law of the sending state completely skews the uniform standard of protection. Besides, it should be emphasised that consular assistance remains the discretionary decision of the sending state, and it can be far from easy to assess its positive obligations in this regard as well. This is particularly true with regard to the effects of the right of access to the consul – for this right, although it does not link the consul's activity to a violation of the law by the receiving state, is viewed according to the same mechanisms left at the discretion of the sending state as consular care.

In the future, one cannot exclude the possibility that a state may be challenged before the ECtHR in the event of the inactivity of its consular service in connection with the failure to perform its positive duty under Article 8 of the convention, and in extreme situations even a violation by the state of Article 3, by failing to take diplomatic and consular action to stop the inhuman and degrading treatment by the state of residence applied to a person entitled to consular protection of state of nationality.

33 "(...) *a State party to the Convention may be held responsible either directly or indirectly for acts committed by its diplomatic agents*" (quotation from *W.M. v. Denmark*).

4. The right of access to the consul

The framing of the right of access to the consul as part of a foreigner's right to a fair trial[34] has not yet been analysed in the legal and human rights context at the ECtHR. This is an issue already settled, in the context of Article 36 of the Vienna Convention on Consular Relations,[35] in several judgments of the International Court of Justice.[36] The right of access to the consul was also, as an individual right, the subject of analysis in an advisory opinion of the Inter-American Court of Human Rights.[37] These judgments and opinion composed in international law something like grounds for international Miranda rights.[38] Their basis was Article 36 para. 1. point "b" of the Vienna Convention, which provides[39] for so-called facultative notification of the right of access to the consul. The transmission of information about deprivation of liberty to the consul is carried out if the citizen consents to it.[40] In many bilateral consular conventions (for example the Polish-Hungarian Consular Convention signed June 5 1973[41]) we have obligatory notification on detention. The will of the citizen is not important. This article is *lex specialis* to Art. 36 of the Vienna Convention (also according to Art. 73 of the Vienna Convention, bilateral convention rules have priority in usage[42]).

The reason that this issue has not yet become the subject of the ECtHR's juridical decision is due to the lack of significant issues in dispute. The laws of the member states correctly implement consular powers regarding foreigners deprived of liberty. The best example of this is the Polish criminal process – under Polish code regulations

34 *Cf.* Stephens, 2002.

35 UNTS 1967, vol. 596, no, 8638.

36 In 5 proceedings so far, the International Court of Justice has dealt with various aspects of the right of access to the consul. These are: 1. *Breard, Case concerning the Vienna Convention on Consular Relations* (Paraguay v. United States of America), Order of Provisional Measures, 9 April 1998 (application waived); 2. *LaGrand Case* (Germany v. USA) – Judgment, 27 June 2001, General List No. 104; 3. *Case Concerning Avena and Other Mexican Nationals* (Mexico v. USA) – Judgment, 31 March 2004, General List No. 128; 4. *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Judgement of 30 November 2010, General List No. 103; 5. *Jadhav Case* (India v. Pakistan), Judgement, 17 July 2019, General List No. 168.

37 Inter-American Court of Human Rights Advisory Opinion OC-16/99 of October 1 1999, Requested by the United Mexican States: *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (see: – http://corteidh-oea.nu.or.cr.).

38 See: Woodman, 2001; Phillabaum, 2001.

39 Art. 36 para 1 point b: "*if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph*".

40 D.W. Williams, *Consular Access to Detained Persons*, International and Comparative Law Quarterly 1980, vol. 29, s. 240.

41 Dz. U. 1974, vol. 5, no. 28.

42 *Cf*: Kho, 1995, pp. 275–276.

it is simply impossible to violate the right of access to the consul.[43] The consul is notified at all stages – the arrest, detention and conviction of a foreigner – by both the prosecutor's office (and in practice, previously the police) and the criminal court.

Hence, in a classic criminal trial it is difficult to imagine a violation of such procedural rights of a foreigner. Naturally, a complaint to the ECtHR will not be able to directly concern individual extra-conventional rights (arising from the 1963 Vienna Convention or bilateral conventions), but will have to indicate a violation of the right to a fair trial. Procedurally, this may be tricky – because the European Convention does not provide for specific rights for foreigners.

More likely will be a possible finding of a violation in the case of the refugee detention procedure. This will be possible if there is a transfer of information to the consul of the nationality of the person applying for protection. Such an obligation may arise from a bilateral consular convention between the state of nationality and the state granting protection. The Protocol to the European Convention on Consular Functions[44] blocks such a transfer of information, but the convention is only binding on 5 European countries (it entered into force in 2011). Such a transfer can be considered a threat to the right to life under the ECHR. Given that cases of this type do occur (for example, in Polish practice under the Polish-Chinese bilateral consular convention, signed July 14,1984[45] – not in the case of administrative detention of a refugee, but in the case of criminal detention) it is not excluded. Poland at the statutory level excludes notification without consent of a refugee seeking protection in Poland in administrative proceedings.[46] However, in criminal proceedings, as well as in any type of detention in the case of a refugee who seeks protection outside Poland, there may be notification to the consul of the country from which they fled. Thus, such cases in the future are not excluded.[47] There is also a problem of how to treat a refugee who asks for the protection of a consular officer of their own country of nationality. According to the Geneva Convention,[48] in such a situation a refugee may lose their status.[49] In fact there is no practice in this area so far.

43 See: Czubik, 2011, p. 563–602.

44 Convention signed in Paris, December 11 1967 (ETS No. 061, UNTS 2011, vol. 2757, no. 48642).

45 Dz. U. 1985, vol. 8, no. 24.

46 Although in essence the law violates treaty obligations providing for mandatory consular notification. Poland has c.a. 40 such conventions.

47 *Cf.* Lee and Quigley, 2008, p. 191–194.

48 Convention Relating to the Status of Refugees of 28 July 1951, Geneva, (UNTS 1954, vol. 189, no. 2545) with consideration of the contents of the 5. Protocol relating to the Status of Refugees. New York, January 31 1967 (UNTS 1967, vol. 606, no. 8791).

49 Art. 1C (1) of the Geneva Convention provides: "*This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality*".

5. Consular functions on external voting

The last issue worth paying some attention to is the problem of elections abroad (so-called external voting rights). In order to understand the potential scope of the possible impact by most consular functions on the sphere of human rights, it should be noted that consular activities in their essence are not homogeneous activities. They are divided into those guaranteed by international law and those resulting from the acquiescence of the receiving state. The non-performance of the latter does not depend on the sending state and its consul, but on the acquiescence of the state of the territory – hence directing a claim against an entity innocent of their non-performance is groundless. The consul's electoral activities are not guaranteed by international law – unlike, for example, its ability to perform consular protection activities, to which the receiving state cannot object. The performance of election activities abroad depends on the consent of the specific receiving state. Elections abroad, carried out as a result of the activity of the diplomatic and consular service of a state, thus constitute another, seemingly closed, aspect of the impact of the law of the European Convention. The case law of the ECtHR has indicated the absence of a human right to vote abroad[50] even when there is a constitutional obligation of the state to conduct elections abroad. It is all the more difficult to recognise the existence of such a right when the state has no obligation to hold elections abroad.

Naturally, in view of the existence of various practices of states regarding voting abroad, there are claims by individuals expressed before national courts deciding on the validity of elections as to violations of the alleged human right to vote abroad. The creation, moreover, of such an obligation in light of constitutional provisions is irrational. This is because the source of restrictions on the exercise of electoral rights abroad is the state of the territory, which, for various reasons, does not allow consuls of a foreign state to conduct elections in the consular districts concerned.[51] In the case of the 2020 presidential elections in Poland, we had such complaints regarding, for example, the failure to hold elections in Chile (which the country banned from holding elections due to Covid)[52] or Sudan (where it was impossible to conduct election procedures due to the terrorist threat). At present, the line of jurisprudence of the Polish Supreme Court emphasises the impossibility of effectively raising electoral complaints about the fact that elections were not held in a particular

50 See: Judgement of March 15 2012 *Sitaropoulos & Giakoumopoulos v. Greece,* app. 42202/07.

51 See: Fabrowska, 2020.

52 See: Order of the Supreme Court of Republic of Poland of July 30, 2020, I NSW 219/20. *Cf.* P. Bucoń *Brak obwodu do głosowania w okręgu konsularnym jako podstawa protestu wyborczego – uwagi na tle postanowienia Sądu Najwyższego z dnia 30 lipca 2020 r., I NSW 219/20* (*No voting district in a consular district as grounds for an election protest – comments in the context of the Decision of the Supreme Court of 30 July 2020, I NSW 219/20*), Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 2021, vol. 19, pp. 283–292.

consular district.[53] The aforementioned Greek case is cited in this jurisprudence.[54] It is doubtful to create a different standard in the reality of the ECtHR. After all, it should be noted that EU countries provide for various restrictions on elections abroad, while in terms of broad European law there is a noticeable retreat from the liaison of citizenship, in favour of the liaison of domicile. The fact, meanwhile, of external voting in national elections is a consequence of having citizenship of the country of origin.

6. Conclusions

In summary, it should be noted that diplomatic and consular turnover, given the existing immunity guarantees for its application, is not of particular interest to human rights jurisprudence. The evaluation of many events simply cannot take place, also taking into account the usually hidden nature of many state foreign policy functions from the public and other states.

Hence, only in the field of part of the problems of diplomatic and consular law is there interaction with human rights mechanisms. Undoubtedly the scope is gradually increasing. However, given both the limitations of the European system of human rights protection itself, as well as the above-mentioned specific character of the norms of diplomatic and consular law (and the exercise of them in the highly heterogeneous jurisdiction of a foreign state), it is difficult to assume a fundamental and rapid change in this regard.

53 As an aside, the Supreme Court jurisprudence points to a strong constitutional-legal argument against the constitutional right to vote abroad: "*Article 37 of the Constitution stipulates that he who is under the authority of the Republic of Poland enjoys the freedoms and rights provided by the Constitution. The authority of the Republic of Poland can only be equated, in light of this provision, with full territorial authority, and not, for example, the performance of limited legal and factual acts on the territory of a foreign state, with its consent. The only constitutional provisions adopted for their application outside the borders of the Republic of Poland are Article 6, paragraph 2 (this provision, as not applicable to citizens but to ethnic Polonia, is completely irrelevant to electoral issues) and Article 36 – the right to guardianship of a citizen abroad (which is a positive reflection only of the power of the state of nationality guaranteed by international law to exercise such guardianship and thus, a kind of break in the jurisdiction of the state of the territory). Voting rights only under the authority of the Republic are constitutionally guaranteed. Thus, there is no constitutional obligation of the state to ensure voting abroad. The silence of the Constitution of the Republic of Poland on the subject of elections abroad, should be seen as fully justified in connection with the content of its Article 37. Thus, Article 62 provides for the right and political freedom only under the conditions of Article 37, and thus only in the situation of territorial authority exercised by the Republic of Poland with which we never have outside its borders*." (Quotation from the order of Supreme Court of Republic of Poland, November 7 2023, I NSW 73/23).

54 See: Order of the Supreme Court of Republic of Poland of July 27 2020 r., I NSW 1098/20; Order of the Supreme Court of Republic of Poland of July 29 2020 r., I NSW 2786/20.

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Part IV

PROTECTION OF PERSONAL AUTONOMY

Chapter 10

The Right to Private Life under the ECHR with Special Regard to Central Europe

Agnieszka Wedeł-Domaradzka

Abstract

This study addresses the right to private life in the jurisprudence of the European Court of Human Rights. The right to private life will be presented in the context of this right's general scope. The study will also analyse how the content and scope of the right to private life has been shaped in the jurisprudence regarding the content of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The jurisprudence of the Strasbourg Court has also shaped the very content and understanding of the right to private life. Thus, those judgments and those parts that affect the understanding of the right to private life will be presented. The most extensive consideration will be given to judgments rendered in cases concerning the observance of the right to private life in Central European countries. The consideration will cover three spheres of private life: the physical, psychological or moral integrity of individuals, privacy and the protection of personal autonomy and identity. The analysis will provide conclusions. These will include two aspects: an indication of what is specific to violations of the right to privacy in Central European countries and identifying the challenges posed to these countries. The latter aspect is based on already existing cases in Western Europe.

Keywords: right to private life, human rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights, Central Europe, autonomy, privacy, identity

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1. Introduction

The right to private life is one of the fundamental rights of individuals. It is protected not only in the international human rights protection system but also in national systems. However, the extent of this national protection must be consistent with the international framework adopted at both the global and regional levels. The modern understanding of the right to privacy encompasses the autonomy of the individual, his or her ability to control his or her actions and the data concerning him or her, as well as to be free from any undue interference in private spheres.

The genesis of the right to respect for private life is sought in the legal arrangements of the United States of America and the Fourth Amendment to its Constitution. Interpreting this provision and other provisions of national constitutions in drafting the Universal Declaration of Human Rights, J. Humphrey pointed to the existence of a separate category of rights, which he termed "freedom and respect for private life".[1] It has also been adopted in fundamental human rights documents, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Nowadays, this instrument is identified as one of the fundamental instruments for the existence of democratic societies. This is why it is so crucial for the legal systems of Central European States, which had been struggling with a democratic deficit for many years. After the political changes of the late 1980s and early 1990s, these States joined universal and regional systems for the protection of human rights. By doing so, they not only committed themselves to having their legal systems introduce the relevant rights as well as their guarantees, but also undertook to have their practice of dealing with individual rights assessed by international bodies.

This paper is intended to address the issue of the right to private life as it applies to Central European countries. The study will indicate the genesis of the right to privacy in the context of the preparatory work for the ECHR and how this right is understood therein. Another aspect covered in the paper will be an analysis of the rulings on selected Central European countries and the subject matter of the rulings, together with an indication of how similar the scope of the rulings is in each country. The rulings will be analysed in three groups of problems related to the right to private life, i.e., the individuals' physical, psychological or moral integrity, privacy and the protection of personal autonomy and identity. This type of analysis is to answer the question of whether the range of problems occurring in Central European States in connection with the realisation of the right to private life is similar to each other, whether the identified violations of the right to private life are therefore specific of the geographical area, or do not differ from violations occurring in other States of the Council of Europe system, and whether, if there are differences, what they concern and what their consequences are.

1 Schabas, 2015, p. 358.

The scope of the analysis will mainly cover cases considered as so-called 'key cases'. The reflections carried out in this way will allow for the formulation of conclusions concerning the condition of the right to private life in Central European countries and the possible future challenges that have been and will be posed to the realisation of this right. The latter aspect is of particular importance in the context of the development of medical science, technological developments, the need to consider societal interests and the fact that the right to privacy increasingly intersects with other human rights and their violations.

2. Right to Private Life in the Preparatory Work for the ECHR

The right to private life and its regulation in the ECHR is recognised, like the Convention as a whole, as being strongly inspired by the provisions of the Universal Declaration of Human Rights (UDHR).[2] Work on the content of Article 8 of the ECHR was undertaken in August 1949. The original version of the said Article framed the need for protection as a 'non-violation' of private life as well as of the home, correspondence and family, implemented in accordance with Article 12 of the UDHR. However, this version was amended during the Committee vote initiated by the position of the Belgian and French representatives. Another version put forward by the Committee provided for "immunity from arbitrary interference in his private life, his home, his correspondence and his family",[3] while leaving the reference to Article 12 of the UDHR. Significantly, it was decided from the outset to use the term 'private life' rather than 'privacy' as in the UDHR. In the document submitted from the Committee to the Consultative Assembly in September 1949, this version was maintained, but the term 'immunity' was dropped and replaced by 'freedom'. In the report presented to the Assembly, however, the focus was more on the right to family life and its possible content, without any broader consideration regarding the right to privacy.

In November 1949, the Committee of Ministers of the Council of Europe forwarded the Assembly's recommendation to the Committee of Experts on Human Rights. On this basis, the Committee of Experts on Human Rights drafted the proposed provisions of Article 8. It returned to the far-reaching inspiration of the UDHR in particular by proposing a provision that "no one shall be subjected to arbitrary

2 Czubik, 2009, p. 113; Preparatory work on Article 8 of the European Convention of Human Rights, p. 2, available: https://www.echr.coe.int/documents/d/echr/echrtravaux-art8-dh-56-12-en1674980.

3 Preparatory work on Article 8 of the European Convention on Human Rights, p. 3, available: https://www.echr.coe.int/documents/d/echr/echrtravaux-art8-dh-56-12-en1674980.

interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference".[4]

This proposal was the subject of further work involving both States[5] and The Conference of Senior Officials. The Conference of Senior Officials adopted the content of Article 8 as: "Everyone's right to respect for his private and family life, his home and his correspondence shall be recognised",[6] based on the British proposal.[7] The content of Article 8 prepared by The Conference of Senior Officials then became the basis for work within the Committee of Ministers. However, this work mainly focused on clarifying Article 8(2).[8] Finally, in August 1950, the Committee of Ministers adopted a working version which, without much discussion, became the basis of Article 8 of the ECHR. concerning the right to respect for private and family life. According to the wording of this Article, it includes:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The protection provided by Article 8 thus falls under four elements: the right to private life, family life, the home and correspondence. At the same time, it is essential to emphasise the apparent predominance of cases addressed by the European Court of Human Rights (ECtHR) in which the Court considers the violation of the right to private life and the right to family life over the violation concerning the protection of the home and correspondence. It should also be pointed out that the ECtHR often considers violations of the right to private life and the right to family life together without making a clear distinction between violations of both rights based on the facts.[9]

As can be seen from the above-mentioned text, Article 8 ECHR points out two aspects of protecting the right to private life and the situations permitted by law in

4 Preparatory work on Article 8 of the European Convention of Human Rights, p. 2, available: https://www.echr.coe.int/documents/d/echr/echrtravaux-art8-dh-56-12-en1674980, p. 4–5.

5 For example, the proposal from the United Kingdom in: Preparatory work on Article 8 of the European Convention of Human Rights, p. 2, available: https://www.echr.coe.int/documents/d/echr/echrtravaux-art8-dh-56-12-en1674980, p. 6.

6 Preparatory work on Article 8 of the European Convention of Human Rights, s. 2, available: https://www.echr.coe.int/documents/d/echr/echrtravaux-art8-dh-56-12-en1674980, p. 7.

7 Schabas, 2015, p. 365.

8 Preparatory work on Article 8 of the European Convention of Human Rights, p. 2, available: https://www.echr.coe.int/documents/d/echr/echrtravaux-art8-dh-56-12-en1674980, p. 7-8.

9 Schabas, 2015, p. 366.

which this interference with privacy will be possible and will not be considered a violation of this right. The protection of the right to private life encompasses both a negative obligation on the part of the State (to refrain from interfering with the activities that an individual wishes to undertake) and a positive obligation (to ensure that an individual can pursue his or her intentions and to intervene if someone wishes to prevent him or her from doing so).

3. Right to Private Life within the Meaning of the ECtHR's Basic Case Law

The ECtHR has explicitly defined the right to private life itself. It has been emphasised that it is a broad concept,[10] subject to expansive interpretation,[11] and because of this breadth of understanding, it is not possible to formulate an exhaustive definition for it.[12] However, in the case law, there are some elements indicating how the right to private life should be understood and interpreted. Firstly, it has been pointed out that the interpretation of the right to privacy should be moderate. It does not only refer to the 'inner circle', but also includes establishing and developing relationships with others.[13] Secondly, it refers to a person's physical and psychological integrity[14] and embraces aspects of an individual's physical and social identity.[15] Thirdly, the ECtHR has identified several elements that fall within the scope of the right to privacy, such as gender identification, name, sexual orientation, sexual life,[16] a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.[17] However, the right to establish

10 Case Niemietz v. Germany, application no. 13710/88, 16 December 1992, § 29, https://hudoc.echr.coe.int/?i=001-57887;Case Pretty v. the United Kingdom, application no. 2346/02, 29 April 2002, § 61, https://hudoc.echr.coe.int/eng?i=001-60448. Also: Aleca and Duminică, 2012, p. 112.

11 Van Dijk et al., 2006, p. 664.

12 Case of *Costello-Roberts v. the United Kingdom*, application no. 13134/87, 25 March 1993 § 36, https://hudoc.echr.coe.int/?i=001-57804.

13 Case of *Niemietz v. Germany*, application no. 13710/88, 16 December 1992, § 29, https://hudoc.echr.coe.int/?i=001-57887.

14 Case of *X and Y v. the Netherlands*, application no. 8978/80, judgment of 26 March 1985, § 22, https://hudoc.echr.coe.int/eng?i=001-57603.

15 Case of *Mikulić v. Croatia*, application no. 53176/99, 7 February 2002, § 53, https://hudoc.echr.coe.int/eng?i=001-60035.

16 Case of. *B. v. France*, application no. 13343/87, 25 March 1992, § 63, https://hudoc.echr.coe.int/eng?i=001-57770; of Case of *Dudgeon v. the United Kingdom*, application no. 7525/76, § 41, https://hudoc.echr.coe.int/eng?i=001-57473; Case of *Laskey, Jaggard and Brown v. the United Kingdom*, application nos. 21627/93; 21628/93; 21974/93, § 36, https://hudoc.echr.coe.int/eng?i=001-58021; Case of *Botta v. Italy*, application no. 21439/93, § 32, https://hudoc.echr.coe.int/eng?i=001-58140.

17 Case of *Friedl v. Austria*, application no. 15225/89, 19 May 1994, § 44, https://hudoc.echr.coe.int/eng?i=001-45662.

contact with one specific person does not itself fall within the scope of this right. It will not apply particularly if that other person does not share the desire for contact.[18] This right also includes the values held by the individual,[19] such as goodness and dignity.[20] The sphere of the right to privacy also includes protecting aspects of personality development,[21] the right to self-determination[22] or integrity of both the physical and psychological dimensions,[23] and some aspects of social identity.[24] The right to privacy also covers aspects bordering on (albeit not eligible for) the right to respect family life, such as the right to respect the decision of whether or not to have children.[25] The protection envisaged by the right to privacy also relates to the emotional ties that have been created and that are developed between an adult and a child in situations other than classic kinship situations.[26]

Given the increasing access to and ease of obtaining personal data, the right to privacy also protects personal data,[27] including an image[28] and a person's home address.[29] This protection also applies to personal data in respect of which the individual may assume that it will not be published without his or her consent.[30] Data protection may also extend to post-mortem situations.[31] The right to private life also includes verbal abuse of another person, such abuse causing emotional distress and

18 Case of *Evers v. Germany*, application no. 17895/14, 28 May 2020, § 54, https://hudoc.echr.coe.int/eng?i=001-202527.

19 Case of *Denisov v. Ukrainie* [GC], application no. 76639/11, 29 September 2018, § 95, 96, 129, https://hudoc.echr.coe.int/eng?i=001-186216.

20 Case of *Hudorovič and others v. Slovenia*, applications nos. 24816/14 and 25140/14, 10 March 2020, § 112-116, https://hudoc.echr.coe.int/eng?i=001-201646; Case Beizaras and Levickas v. Lithuania, application no. 41288/15 14 January 2020, § 117, https://hudoc.echr.coe.int/eng?i=001-200344.

21 Case of *Von Hannover v. Germany* (no. 2) [GC], applications nos. 40660/08 and 60641/08, 7 February 2012, § 95, https://hudoc.echr.coe.int/eng?i=001-109029.

22 Case of *Pretty v. United Kingdom*, § 61.

23 Case of *J.L. v. Italy*, application no 5671/16, 27 May 2021, § 118, https://hudoc.echr.coe.int/eng?i=001-210299; Case of *Vavřička and Others v. the Czech Republic* [GC], applications nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15, 8 April 2021, § 261, https://hudoc.echr.coe.int/eng?i=001-209039.

24 Case of *Mikulić v. Croatia*, § 53.

25 Case of *A, B and C v. Ireland*, application no. 25579/05, 16 December 2010, § 212, https://hudoc.echr.coe.int/eng?i=001-102332.

26 Case of *Jessica Marchi v. Italy*, application no. 54978/17, 27 May 2021, § 62, https://hudoc.echr.coe.int/eng?i=001-210090.

27 Case of *M.L. and W.W. v. Germany*, applications nos. 60798/10 and 65599/10, 28 June 2018, § 87, https://hudoc.echr.coe.int/eng?i=001-183947; Case Liebscher v. Austria, application no. 5434/17, 6 April 2021, § 31, https://hudoc.echr.coe.int/eng?i=001-209035.

28 Case of *Reklos and Davourlis v. Greece*, application no. 15 January 2009, 1234/05, § 38, https://hudoc.echr.coe.int/eng?i=001-90617.

29 Case of *Alkaya v. Turkey*, application no. 42811/06, 9 October 2012, § 30, https://hudoc.echr.coe.int/eng?i=001-114030.

30 Case of *M.P. v. Portugal*, application no. 27516/14, 7 September 2021, § 33-34, https://hudoc.echr.coe.int/eng?i=001-211781.

31 Case of *Polat v. Austria*, application no. 12886/16, 20 July 2021, § 48, https://hudoc.echr.coe.int/eng?i=001-211365.

harming mental well-being, dignity and moral integrity, as well as humiliating the person in the eyes of others.[32] Violations of the right to private life also include attacks on a person's reputation, dismissal, demotion, inadmissibility or other similarly adverse actions taken against an individual.[33] These violations also include any initiative that adversely affects the physical and psychological integrity of another person,[34] as well as actions with the characteristics of sexual harassment[35] or the violation of individual psychological well-being and dignity.[36] According to the ECtHR's rulings, the right to private life also applies to cases involving legal proceedings. In particular, those proceedings that involve sensitive issues, such as court proceedings related to gender violence and how the rhetoric of the proceedings is conducted in such cases.[37] It should be mentioned that the right to private life cannot be absolute or invoked in every distressed situation. According to the ECtHR, the possibility to exclude the invocation of a violation of the right to private life refers, for example, to situations in which a person's suffering is the consequence of his/her previous actions, such as, for example, committing a crime.[38] Nor does the protection of the right to private life extend to activities of a public nature.[39] The Court considers personal autonomy a vital principle underlying the interpretation of guaranteeing the right to private life.[40]

It is worth noting that the jurisprudence of the ECtHR on the right to private and family life is considered one of the richest, if not the richest. According to statistics on ECtHR case law, cases decided on the basis of alleged violations of Article 8 ECHR account for more than 30,000 complaints. Although more of the complaints relate to Article 6 ECHR, in many cases, they are of a similar nature, mainly concerning the length of proceedings.[41] There are even situations where the ECtHR, despite the pos-

32 Case of *F.O. v. Croatia*, application no. 29555/13, 22 April 2021, § 81, 59-61, https://hudoc.echr.coe.int/eng?i=001-209331.

33 Case of *Denisov v. Ukraine* [GC], § 111-112 and 115-117; Case of *Vučina v. Croatia* (dec.), application no. 58955/13, 24 September 2019, § 44-50, https://hudoc.echr.coe.int/eng?i=001-198384; Case of *M.L. v. Slovakia*, application no. 34159/17, 14 October 2021, § 24, https://hudoc.echr.coe.int/eng?i=001-212150.

34 Case of *Nicolae Virgiliu Tănase v. Romania* [GC], application no. 41720/13, 25 June 2019, § 128 https://hudoc.echr.coe.int/eng?i=001-194307.

35 Case of *C. v. Romania*, application no. 47358/20, 30 August 2022, § 50-54, https://hudoc.echr.coe.int/eng?i=001-218933.

36 Case of *Beizaras and Levickas v. Lithuania*, application no. 41288/15, 14 January 2020, § 109 and 117, https://hudoc.echr.coe.int/eng?i=001-200344.

37 Case of *J.L. v. Italy*, § 119.

38 Case of *Denisov v. Ukraine* [GC], application no. § 98 and § 121; Case of *Evers v. Germany*, § 55; Case of *M.L. v. Slovakia*, § 38, Case of *Ballıktaş Bingöllü v. Turkey*, application no. 76730/12, 22 June 2021, § 54, https://hudoc.echr.coe.int/eng?i=001-210755.

39 Case of *Centre for Democracy and the Rule of Law v. Ukraine*, application no. 10090/16, 26 March 2020, § § 114-116, https://hudoc.echr.coe.int/eng?i=001-201896.

40 Case of *Pretty v. the United Kingdom*, § 61.

41 HUDOC, database, https://hudoc.echr.coe.int, 19 of June 2024.

sibility (resulting from the indication of a potential violation) refers to other rights contained in the ECHR, is more willing to consider only the Article 8 provisions.

The protection of the right to private life provided for in Article 8 is not absolute. It is subject to the limitations provided for in paragraph 2 of that Article. These limitations include:

- the interests of national security,
- public safety
- the economic wellbeing of the country,
- the prevention of disorder or crime,
- the protection of health or morals,
- the protection of the rights and freedoms of others.

However, the restrictions must meet specific requirements to be effectively considered acceptable under the ECtHR's jurisprudence. These restrictions include tests relating to whether they are taken by a public authority 'following the law' or 'prescribed by law' and whether they are 'necessary in a democratic society'.

The question of 'under the law' or 'prescribed by law' in the jurisprudence of the ECtHR[42] is understood as one that must meet specific criteria. These criteria include a clear basis in national law, the proper formulation of the law, the adequate precision of the regulation and the foreseeability of the consequences of the application of the regulation.[43] It also draws attention to the accessibility of the regulation to the recipient and its predictability.[44] The ECtHR also points out that the term 'law' in the context of 'following the law' and 'prescribed by law' should be understood in its 'substantive' sense, not its 'formal" one.[45]

Referring to the aspect of "necessary in a democratic society", the ECtHR points out that interference is considered necessary if it responds to a "pressing social need" and, in particular, if the reasons adduced by the national authorities to justify it are "relevant and sufficient" and if it is proportionate to the legitimate aim pursued.[46] With that said, the national authorities are pr imarily relevant here when it comes to assessing the balance of public interest encroachments on the rights of individuals under Article 8 ECHR. Here, the ECtHR only examines whether the interference was 'necessary', while leaving the Parties to the ECHR with a margin of appreciation. This margin of appreciation may concern assessing the use of resources and social

42 Case of *Vavřička and Others v. the Czech Republic* [GC], § 266.

43 Case of *Dubská and Krejzová v. the Czech Republic* [GC], applications nos. 28859/11 and 28473/12, 15 November 2016, § 167, https://hudoc.echr.coe.int/eng?i=001-168066; Case of *A, B and C v. Ireland*, application no. 25579/05, 16 December 2010, § 220, https://hudoc.echr.coe.int/eng?i=001-102332.

44 Case of *X v. Latvia*, applications no. 27853/09, 26 November 2013, § 58, https://hudoc.echr.coe.int/eng?i=001-138992.

45 Case of *Vavřička and Others v. the Czech Republic* [GC], § 269.

46 Case of *Vavřička and Others v. the Czech Republic* [GC], § 273.

needs.[47] This margin restricted to issues related to intimate aspects or identity.[48] In contrast, the margin is wide concerning the balance between competing private and public interests or Convention rights.[49]

4. Case Law on the Right to Privacy concerning Central European countries

Central European States joined the ECHR system after the political changes in the late 1980s and early 1990s. This has had an impact not only on the model of protection of individual rights they adopted but also on their activity and involvement before international bodies, including the ECtHR. Since their accession, several proceedings initiated by their citizens have been successfully conducted before the ECtHR. Most of these proceedings concerned respect for the right to private life.

The discussion of the jurisprudence against these States will be carried out based on three thematic groups: the notion of private life is the physical, psychological or moral integrity of individuals, privacy and the protection of personal autonomy and identity.[50]

4.1. The Individuals' Physical, Psychological or Moral Integrity

Physical, psychological or moral integrity of individuals refers to situations related to the individual and his/her physical or psychological aspects to be protected or about which the individual has the right to decide. The scope of decision-making on this issue can be very broad.

Firstly, as is evident from the ECtHR's jurisprudence vis-à-vis Bulgaria, it can include aspects related to protection from domestic violence. In *Bevacqua and S.*, the applicants alleged a violation of Article 8 due to the failure of the national authorities to take adequate measures to protect one of the applicants from the violent behaviour of her ex-husband. In the view of the ECtHR, Article 8 protects the individual against arbitrariness by public authorities as its primary objective; however, it also pursues other objectives, including ensuring adequate respect for private and family life, in particular, in the context of the need to protect children and other

47 Case of *Hristozov and Others v. Bulgaria*, applications nos. 47039/11 and 358/12, 13 November 2012, § 119, https://hudoc.echr.coe.int/eng?i=001-114492.

48 Case of *Vavřička and Others v. the Czech Republic* [GC], § 273.

49 Case of *Evans v. the United Kingdom* [GC], applications no. 6339/05, § 77.

50 Based on the division contained in: Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence Updated on 31 August 2022, Council of Europe/European Court of Human Rights, 2022, https://www.echr.coe.int/documents/d/echr/guide_art_8_eng.

vulnerable persons.[51] In this case, it effectively ensured reunification with the child and guaranteed the contact with the child envisaged by the judgments. Concerning the voluntariness of private life in this case, the ECtHR recalled its previous rulings, which consider a person's physical and mental integrity to be a private life.[52] The State's positive duties in this regard, on the other hand, refer to the maintenance and application in practice of an adequate legal framework that protects against acts of violence by private persons.[53] In this regard, Bulgaria failed to fulfil these obligations, as the pending proceedings concerning safeguarding the applicants' situation were unreasonably prolonged, or at least were not provided with a timeframe of consideration appropriate to the seriousness of the situation. The source of these delays was the practice of the domestic courts seeking to postpone the adjudication of child custody issues in divorce proceedings until the expiry of the statutory reconciliation period. While, in general, the purpose can be considered legitimate, the automaticity of its application is not legitimate. Consequently, the right to private and family life was violated. Significantly, the ECtHR did not explicitly separate the consideration of both rights, and it only emphasised the privacy-related aspect of physical and psychological integrity.

According to ECtHR statistics, domestic violence issues are the subject of intensified jurisprudence. Most often, these rights are decided in Central European countries. Bulgaria, Croatia, Poland, Romania and Slovenia lead the way in the statistics of domestic violence cases, with a large proportion of judgments against these countries being issued based on Article 8.[54]

Secondly, protecting private life encompasses actions towards persons who become victims of violations of personal rights. This is particularly relevant in the case of persons who should be particularly protected, namely children. In a case against Croatia,[55] the ECtHR had to deal with the issue of harassment by a teacher in a State school. The allegation concerned the failure of the domestic authorities to respond effectively to his allegations of harassment. The applicant had suffered prejudice due to the teacher's several demeaning statements directly and indirectly directed at him. In considering this case, the ECtHR pointed out that the purpose of the Article 8 provisions is to protect the individual from arbitrary interference by public authorities. These authorities should ensure that students are protected from any form of violence originating from an entity under their supervision.[56]

51 Case of *X and Y v. the Netherlands*, § 23-24 and 27.

52 Case of *Bevacqua and S. v. Bulgaria*, application no. 71127/01, 12 June 2008, §65, https://hudoc.echr.coe.int/eng?i=001-86875.

53 Case of *Osman v. the United Kingdom*, application no. 23452/94 28 October 1998, § 128-130, https://hudoc.echr.coe.int/eng?i=001-58257.

54 KeyTheme Article 2 Domestic violence, 29 February 2024, https://ks.echr.coe.int/documents/d/echr-ks/domestic-violence.

55 Case of *F.O. v. Croatia*, application no. 29555/13, 22 April 2021, https://hudoc.echr.coe.int/eng?i=001-209331.

56 Case of *F. O. v. Croatia*, §82.

The ECtHR also pointed out that the teacher's conduct certainly had an impact on the psychological well-being and moral integrity of the applicant, which constituted an interference with the rights protected by Article 8. In addressing whether this interference was justified, the Court analysed both the aspect of harassment by the teacher and the failure of the competent authorities to respond adequately to the applicant's reporting of it.[57] In the ECtHR's view, the harassment constituted an unacceptable interference with the right to private life, for which the State is responsible. This liability is rooted in the fact that the interests of the minor were not adequately protected. Although the Croatian legal system provided solutions to initiate proceedings in cases of violation of the right to private life through harassment, these solutions did not work properly in this specific case. In particular, it was highlighted that despite the complaint, no official action was taken by the school authorities, and only the involvement of the applicant's father, who started sending letters to official institutions, resulted in a reaction.

Moreover, other entities obliged to supervise the public education system also conducted their proceedings incompetently, thus violating Article 8. The ECtHR also reached similar conclusions regarding the effectiveness of State protection in a case concerning the harassment of a person with a disability.[58] It should be added that the harassment aspect appeared in other cases decided by the ECtHR concerning Central European countries.

In the case of *R.B. v. Hungary*,[59] the issue of an anti-Roma rally and how the public authorities reacted to its course and consequences was decided. In this case, the ECtHR noted the failure of the national authorities to investigate in such a way as to not only notice but also adequately assess and document the attack against a member of an ethnic group and, consequently, lead to proper accountability for it.[60] Anti-Roma statements were also the subject of a complaint by Budinova and Chaprazov,[61] in which it was held that the politician's anti-Roma statements went beyond being a legitimate part of the public debate on ethnic relations and crime in Bulgaria, and that by failing to grant the applicant redress, the State had failed to fulfil its positive obligations. The ECtHR reached similar conclusions when considering a case related to anti-Semitic and anti-Roma statements,[62] while stressing that statements attacking or placing entire ethnic, religious or other groups in a negative light do not merit protection under Article 10 ECHR. Another of the cases

57 Case of *F. O. v. Croatia*, §84.

58 Case of *Đorđević v. Croatia*, application no. 41526/10, 24 July 2012, https://hudoc.echr.coe.int/eng?i=001-112322, §151-153.

59 Case of *R.B. v. Hungary*, application no. 64602/12, 12 April 2016, https://hudoc.echr.coe.int/eng?i=001-161983.

60 Case of *R.B. v. Hungary*, § 89.

61 Case of *Budinova and Chaprazov v. Bulgaria*, application no. 12567/13, 16 February 2021 https://hudoc.echr.coe.int/eng?i=001-207928.

62 Case of *Behar and Gutman v. Bulgaria*, application no. 29335/13, 16 February 2021, https://hudoc.echr.coe.int/eng?i=001-207929, §101, 105.

concerned sexual harassment[63] and, as it related to the applicant's psychological integrity and sexual life, it was also considered necessary to be dealt with based on the desire for the right to private life. In this case, the investigating public prosecutor's office discontinued the case, considering that the acts committed did not meet the requirements of criminal law as a sexual harassment offence. Therefore, it was again a situation of failure to provide adequate procedural guarantees, particularly during the investigation.[64]

Central European countries diagnose certain problems with the treatment of students. The legal basis here is not always Article 8 or only Article 8, if their treatment is sometimes discriminatory, the legal basis is Article 14 ECHR. This is also applicable to the State's positive obligations to protect children against abuse by peers. Such insufficient State protection is diagnosed especially in countries with a Roma minority.[65] In many cases, the Roma population escapes the rules of the education system and the Convention-compliant treatment by public authorities.[66]

Thirdly, in the context of protecting private life, issues of violation of the right to private life may also arise, which are related to the political and State changes in Central Europe. An example well illustrating how political changes affect citizens is a case against Slovenia.[67] The facts of this case concern a situation where it was part of Yugoslavia and one of Yugoslavia's constituent republics (but not Slovenia), and citizens residing in Slovenia. After Slovenia's independence, these persons either did not apply for Slovenian citizenship or their applications were rejected. Their names were deleted from the Register of Permanent Residents. The persons concerned themselves had yet to learn immediately after such a change was made and only found out later when they planned to obtain new identity documents. Consequently, they became foreigners or even stateless, resulting in many unfavourable situations in their daily lives. In examining the case, the ECtHR's Grand Chamber found that the Slovenian authorities' actions impacted the applicants' private and family life. While the idea of creating a society based on informed citizens was considered legitimate to protect national security, the lack of regulation and the protracted procedures for obtaining residence permits for those who did not declare themselves as Slovenian

63 Case of *C. v. Romania*, application no. 47358/20, 30 August 2022, https://hudoc.echr.coe.int/eng?i=001-218933.

64 Case of *C. v. Romania*, §79-82.

65 Case of *Durđević v. Croatia*, application no. 52442/09, 17 July 2011, https://hudoc.echr.coe.int/eng?i=001-105691

66 Case of *D.H. and Others v. the Czech Republic* [GC], application no. 57325/00, 13 November 2007, https://hudoc.echr.coe.int/eng?i=001-83256; Case of *Oršuš and Others v. Croatia* [GC], application no. 15766/03, 16 March 2010, https://hudoc.echr.coe.int/eng?i=001-97689; Case of *Horváth and Kiss v. Hungary*, application no. 11146/11, 29 January 2013, https://hudoc.echr.coe.int/fre?i=001-116124.

67 Case of *Kurić and Others v. Slovenia* [GC] application no. 26828/06, 26 June 2012, https://hudoc.echr.coe.int/eng?i=001-111634.

citizens were considered disproportionate.[68] Consequently, the rights guaranteed by Article 8 were violated.[69]

The aspect of political regime change also had consequences for the employees of the Lithuanian branch of the Soviet Security Service.[70] States took measures to limit the professional activity of the persons concerned. Lithuania adopted those measures by banning former employees from holding positions for ten years. In assessing this case, the ECtHR considered that while the ban could be justified concerning the public sphere, a ban on employment in the private sphere would violate Article 8.[71]

While the ECtHR's jurisprudence is also aware of other cases considering the right to private life in the context of individuals' physical, psychological or moral integrity, these were not applicable to Central European countries. These cases concerned considerations of the right to decide when to end one's own life by assisted suicide[72] or the right to decide on reproductive aspects,[73] including considerations relating to the existence or otherwise of the right to decide whether or not to become a parent[74] or a genetic parent,[75] as well as access to IVF.[76]

4.2. Privacy

Regarding the second aspect to be protected under Article 8, the considerations of the ECtHR are usually understood as"people's interests in not being exposed to unwanted attention from the state or third parties".[77] Also included in the scope of what is understood as protected by privacy are aspects of decisions relating to the physical and moral integrity of reputation and data relating to a person, including personal data or images.

As regards physical and moral integrity, however, the ECtHR's jurisprudence includes numerous cases in which the Court found violations of the right to private life resulting from the failure of the State to recognise the will of the mother as to where and how to give birth[78] and immunisation.[79] The first situation concerned

68 Case of *Kurić and Others v. Slovenia* [GC], §358–259.

69 A similar situation occurred in the case of *Hoti v. Croatia*, application no. 63311/14, 26 April 2018, https://hudoc.echr.coe.int/eng?i=001-182448.

70 Case of *Sidabras and Džiautas v. Lithuania*, applications nos. 55480/00 and 59330/00, 27 July 2004, https://hudoc.echr.coe.int/eng?i=001-61942.

71 Case of *Sidabras and Džiautas v. Lithuania*, §58.

72 Case of Pretty v. the United Kingdom, §61.

73 Case of *A, B and C v. Ireland*, [GC].

74 Case of *Evans v. the United Kingdom*, [GC].

75 Case of Dickson v. the United Kingdom [GC], application no. 44362/04, 18 April 2006, https://hudoc.echr.coe.int/eng?i=001-73360.

76 Case of *S.H. and Others v. Austria*, [GC], application no. 57813/00, 3 November 2011, https://hudoc.echr.coe.int/eng?i=001-107325

77 Westlund, 2018, p. 24.

78 Case of *Dubská and Krejzová v. the Czech Republic* [GC], applications nos. 28859/11 and 28473/12, 15 November 2016, https://hudoc.echr.coe.int/eng?i=001-168066.

79 More: Nilsson, 2021.

women who wished to give birth at home with the assistance of a midwife. However, such an arrangement was unacceptable from the perspective of the applicable law. According to the applicants, this violated their right to private and family life. The Court considered that the issue was physical and moral integrity, medical care, reproductive health and the protection of health-related information. It also held that the interference with this right was lawful and aimed at protecting the health and safety of the mother and child during and after childbirth,[80] serving the legitimate aim of protecting the health and rights of others. The Court approved the State's action as necessary in a democratic society. It considered that the margin of appreciation available to the State in such forfeiture cases was wide because of the protected goods, the specificity of national policy and the lack of consensus among the Council of Europe Member States. State interference was not considered disproportionate, and thus, there was no violation of Article 8.[81] Interestingly, in earlier jurisprudence on the permissibility of home births, the ECtHR considered them permissible and no more dangerous than hospital births.[82]

In another health case, the ECtHR referred to the obligation to vaccinate a child. In this case, the Applicants considered the obligation to vaccinate and the consequences thereof (heating, non-admission to care facilities) to be an infringement of their rights under Article 8. In deciding this case, the Court considered that vaccination (its performance and the consequences of non-performance) interfered with the right to respect for private life. It considered interfering with the applicants' rights to be lawful and a legitimate aim. In contrast, the ECtHR addressed more broadly whether it was necessary in a democratic society. It argued that it was the national authorities who had the best knowledge of the health situation in their own country, emphasised the existing consensus on the need for the highest level of vaccination and pointed to the need to take into account the child's best interests.[83] The ECtHR's position suggests the acceptance of the idea and practice of mandatory vaccination.[84] They were intended to ensure population immunity. Any attempt to deviate from this obligation and the negative consequences applied to deviators by the State does not violate Article 8. The issue of vaccination has primarily been the subject of ECHR rulings against countries in Europe, especially the Czech Republic.[85]

80 Štefko, 2017, pp. 248–249.

81 Case of *Dubská and Krejzová v. the Czech Republic*, §174–191.

82 Chen and Cheeseman, 2017, pp. 116–117; *Ternovszky v. Hungary*, application no. 67545/09, 14 December 2010, https://hudoc.echr.coe.int/eng?i=001-102254.

83 Case of *Vavřička and Others v. the Czech Republic* [GC], § 285–288.

84 I. Gawłowicz, Europejski Trybunał Praw Człowieka na rzecz obowiązkowych szczepień dzieci - Vavřička i inni przeciwko Republice Czeskiej, „Dyskurs Prawniczy i Administracyjny", 2021, http://www.dyskurs.inp.uz.zgora.pl/index.php/DPiA/article/view/184/97, p. 67–68.

85 HUDOC Database, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22vaccinate%22],%22display%22:[2],%22languageisocode%22:[%22ENG%22]}.

A sphere also covered by privacy include issues related to the publication of personal data. The relevant case that touched on this issue was *L.B. v. Hungary*.[86] The facts of this case concerned the publication of the applicant's data (name and residential address) on the list of significant tax defaulters and subsequently on the list of tax debtors. Hearing the case, the Grand Chamber of the Court concluded that there had been an interference with the applicant's private life but that the interference was provided for by law. It also considered that the actions had a legitimate aim. That aim was to improve the fiscal discipline of citizens as well as to ensure transparency and business reliability and, consequently, to protect 'the rights and freedoms of others'.[87] However, the Court considered whether a proper balance was struck between the above-mentioned objectives and the interests of private individuals. In analysing this aspect, the ECtHR concluded that States enjoy a wide margin of appreciation in assessing the relationship of these interests. However, the freedom of States in this regard is not unlimited. In particular, attention was paid here to the scope of published data. It was considered that while the publication of the name has a deterrent effect, the publication of the home address[88] (even though it promotes data accuracy) is optional to achieve the State's objective of stigmatising defaulters. The widespread availability of these addresses and the danger of their use by third parties were considered actions violating Article 8.

In the context of data collection, a case against Romania is also noteworthy.[89] This case concerned an employee Internet use during working hours (both for business and private purposes) was monitored by the employer who subsequently used the data on private activity to justify termination of employment. In this case, the ECtHR pointed out that communication in the workplace falls within the scope of private life and the positive duties of the State to protect it. As workplace communication issues are not very often regulated by the States, they were entitled to a wide margin of appreciation.

In considering whether there had been a breach of Article 8 ECtHR, the ECtHR had to consider whether the employee had been informed of the monitoring and its scope, the reasons justifying the monitoring of communications, the effects of the monitoring on the employee, whether there were alternative less intrusive monitoring possibilities, as well as whether the employee had access to a legal remedy to establish the correctness of the monitoring.[90] The conclusions of these considerations led the ECtHR to conclude that the domestic courts had failed to verify the correctness of the employer's actions in this respect and to examine whether the employer could have achieved its objectives by other means. Thus, it was considered

86 Case of *L.B. v. Hungary* [GC], application no. 36345/16, 9 March 2023, https://hudoc.echr.coe.int/eng?i=001-223675.

87 Case of *L.B. v. Hungary* [GC], §113.

88 Case of *L.B. v. Hungary* [GC], §136.

89 Case of *Bărbulescu v. Romania* [GC], application no. 61496/08, 5 September 2017, https://hudoc.echr.coe.int/eng?i=001-177082.

90 Case of *Bărbulescu v. Romania* [GC], §121.

that, despite the wide margin of appreciation, the national authorities still needed to ensure the realisation of the right to private life. However, it is not so much a question of seeking a balance but the question of the right to privacy and its relevance to the individual that should be the primary consideration here.[91]

4.3. Protection of Personal Autonomy and Identity

The third thematic group of possible violations of the right to private life under Article 8 includes personal autonomy and identity protection. In many cases, the matters covered by these regulations overlap with individuals' physical, psychological or moral integrity. However, they appear to be more 'conscious' and more clearly identified by those whose rights have been violated.

Cases often taken up in human rights considerations include those concerning the establishment or non-establishment of paternity. One such case is *Mikulić v. Croatia*.[92] This case concerned a child born out of wedlock who, together with her mother, brought an action to establish paternity. The national courts ordered DNA tests to be performed, but the defendant repeatedly failed to appear. The parties appealed this verdict; at the time of filing, the appeal proceedings were still ongoing. The ECtHR decided to examine the case based on Article 8. It pointed out that, despite the absence of family life between the applicant and her alleged father, information regarding paternity falls within the protection of the right to private life as encompassing an individual's physical and social identity. The question of establishing one's own identity is a fundamental issue; it encompasses the right to know one's parents (in this case, one's father) and affects an individual's personality. In its ruling, the ECtHR had to examine whether Croatia had breached its positive obligations. It found that the mere possibility of bringing actions establishing a man's paternity must be considered insufficient if it is not combined with the efficiency of obtaining a paternity determination, in particular in the absence of a practical possibility to carry out DNA tests. Considering the fact that the applicant had no other means of establishing paternity than just conducting the test, the ECtHR considered that an inadequate balance had not been struck between her right to know her identity without undue delay and the right of her alleged father not to be tested.[93] In this particular case, the first right, relating to knowledge of identity, must be more effectively protected as a right, the non-observance of which could have more severe consequences for the applicant.

Procedural aspects may also fail in reverse cases, namely where a person wishes to contest his declaration of paternity having DNA data indicating its absence.

91 Jervis, 2018, p. 452.
92 Case of *Mikulić v. Croatia*, application no. 53176/99, 7 February 2002.
93 More: Dobozi, 2013; Kinkelly, 2010.

The ECtHR was confronted with such a factual situation in a case against Slovakia.[94] In its ruling, the Court indicated that, in particular, where it does not conflict with the right to certainty and security of family relationships or prejudice the child's best interests, it should be permissible to carry out such a procedure. The impossibility of carrying out such a procedure, contrary to the wishes of those concerned,[95] constitutes an infringement of the right to respect for private life.

The aspects of protection of personal autonomy and identity were also addressed by the ECtHR when dealing with a case concerning forced sterilisation.[96] The Applicant was a Roma woman who had been sterilised during her hospital stay in connection with childbirth. The medical records made after the birth contained information about the sterilisation, together with a form containing requests for sterilisation. The applicant explained this by her lack of understanding of the term 'sterilisation' and the fact that she had been told that another pregnancy was a risk to her life. The applicant complained that she had been unsuccessful in seeking redress before the national courts for having carried out the procedure and not being adequately informed of its consequences and possible alternative solutions.

This case was part of the broader issue of the sterilisation of Roma women carried out in Slovakia signalled by international bodies.[97] In the ECtHR's view, the existing laws on sterilisation in Slovakia did not contain adequate safeguards and resulted in procedures being carried out without adequate knowledge of their necessity and consequences. Thus, the persons concerned were not adequately involved in the decision-making process,[98] which is necessary to meet the standard of positive obligations of the State under Article 8. Slovakia did not introduce the relevant procedural solutions until several years after the procedure was performed on the applicant. Such practices were the subject of ECtHR consideration also in cases against the

94 Case of *Paulík v. Slovakia*, application no. 10699/05, 10 October 2006, https://hudoc.echr.coe.int/eng?i=001-77327.

95 Case of *Paulík v. Slovakia*, §46.

96 Case of *V.C. v. Slovakia*, application no. 18968/07, 8 November 2011, https://hudoc.echr.coe.int/eng?i=001-107364.

97 European Commission Against Racism and Intolerance Third report on Slovakia Adopted on 27 June 2003, https://rm.coe.int/third-report-on-slovakia/16808b5c11, p. 20-22; Follow-up report on the Slovak Republic: Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights. 2001-2005, CommDH(2006)5 / 29 March 2006, https://rm.coe.int/16806db7e7, p. 8-10; Committee on the Elimination of Discrimination against Women Forty-first session, 30 June-18 July 2008, Draft concluding observations of the Committee on the Elimination of Discrimination against Women: Slovakia, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/427/73/PDF/N0842773.pdf?OpenElement, p. 8.

98 Case of *V.C. v. Slovakia*, §141.

Czech Republic, Hungary and Moldova.[99] This fact shows the need to adopt a specific model of treating the Roma population and ensuring its members respect human rights.

The last of the cases worth noting are cases concerning Poland.[100] The applicants in this case were the spouses of the victims of the crash of a Polish Government plane in Russia. The subject of the complaint was the prosecutor's decision to exhume the bodies of the victims of the disaster. The applicants objected to this decision and filed appeals. However, domestic law did not provide for any judicial review of the prosecutor's decision to exhume the remains. The applicants failed to obtain an injunction against the exhumation in civil proceedings. In deciding this case, the ECtHR pointed out that the exhumation of the spouses constituted an interference with the right to family and private life. The law supported this interference.

Consequently, a conflict between two Convention rights – Article 2 (fairness of the proceedings) and Article 8 (right to family and private life)[101] – had to be considered. The Court recognised the importance of the proceedings, particularly the need for a fair investigation, but stressed that the proceedings lacked reflection on whether similar results could have been obtained by less restrictive means. Above all, however, it noted that the prosecutor's decision was not subject to any appeal before a court or any form of review by an independent body.

5. Conclusions

As the ECtHR's jurisprudence indicates, Central European States have taken up the challenges of adapting their national legal systems to the human rights standards in force since the establishment of the Council of Europe. They have, of course, done so in their way, at their own pace and only since political changes have made this possible.

The accession of Central European States to the ECHR system gave a new impetus to the development of the right to privacy. New threats and calls emerged, such as aspects of situations remnants of previous non-democratic regimes. In particular, those concerned the data of individuals associated with services in the past and how

99 Case of *Anna Maděrová v. the Czech Republic*, application no. 32812/13, case declared inadmissible on 8 June 2021, https://hudoc.echr.coe.int/eng?i=001-211043; Case of *G.H. v. Hungary*, application no. 54041/14, case declared inadmissible on 9 June 2015, https://hudoc.echr.coe.int/eng?i=001-156027; Case of *G.M. and Others v. the Republic of Moldova*, application no 44394/15, 22 November 2022, https://hudoc.echr.coe.int/eng?i=001-220954. The ECtHR decided the latter case under Article 3 of the ECHR, although the complaints were brought under Article 8.

100 Case of *Solska and Rybicka v. Poland*, applications nos. 30491/17 and 31083/17, 20 September 2018, https://hudoc.echr.coe.int/eng?i=001-186135.

101 Wedeł-Domaradzka, 2020, pp. 60–61.

the solutions adopted by States to isolate them from public structures. Some shortcomings also resulted from the lack of proper development of policies protecting groups exposed to human rights violations, e.g. minorities.

It was also necessary to ask whether these actions exceeded the Convention standard. This subject matter was certainly unfamiliar even to the Western European States. However, the experience provided a deeper understanding of the right to privacy.

As the analysis shows, procedural issues were also a significant challenge for Central European countries. It takes time to create a legal system that works optimally and guarantees the realisation of individual rights and freedoms. These countries only started to develop a control system after the changes of the late 1980s and early 1990s. Consequently, there were excessive requirements on complaints submitted to the ECtHR, such as the need to address the Constitutional Court at the national level and only after the Constitutional Court has ruled.[102] Hence, many cases before the ECtHR involving Central European States involved violations of Article 6, sometimes also linked to Article 8.[103]

Indeed, Central European States still face many challenges concerning the right to privacy. There are silent or incidental cases concerning access to the realisation of reproductive rights, which are already familiar to Western European States. Such issues include the registration of children from surrogacy, access to assisted procreation procedures, and the right to the identity of children born as a result of assisted procreation procedures. Due to the differences in the affluence of societies between Western and Central Europe, such problems are yet to emerge.

It should be borne in mind that societies are gradually raising their standard of living, which does not exclude an increase in the availability of foreign reproductive technology, for which, as it may turn out, the domestic system of those who will benefit from it will not yet be prepared.[104]

In the future, an increase in harassment cases against sexual minorities is also to be expected, such as in a case against Hungary,[105] which has been communicated but declared inadmissible.

102 Case of *Pavlović and Others v. Croatia*, application no 13274/11, 2 April 2015, § 32-38, https://hudoc.echr.coe.int/eng?i=001-153316; Bajić v. Croatia, application no 41108/10, 13 November 2012, §68-69, https://hudoc.echr.coe.int/eng?i=001-114490.

103 Violations by Article and by State 1959-2022, https://www.echr.coe.int/documents/d/echr/stats_violation_1959_2022_eng.

104 This is the case, for example, in French cases concerning the regulation of surrogacy practices from which French or Italian citizens benefited abroad. For example: Case of *Mennesson v. France*, application no. 65192/11, 26 June 2014, https://hudoc.echr.coe.int/eng?i=001-145389; Case of *Labassee v. France*, application no. 65941/11, , 26 June 2014, https://hudoc.echr.coe.int/eng?i=001-145180; Case of *Paradiso and Campanelli v. Italy*, application no. 25358/12, 27 January 2015, https://hudoc.echr.coe.int/eng?i=001-151056.

105 Case of *Andrea Giuliano against Hungary*, application no. 45305/16, lodged on 26 July 2016, https://hudoc.echr.coe.int/eng?i=001-198563.

The size of the Central European countries and the number of their residents guarantees an increasing dynamic but also a thematic change in the cases that the ECtHR will decide. There is a decrease in procedural cases or those that still need to address the specificities of non-democratic regimes. It will be possible to observe the emergence of cases similar to those currently pending against Western European countries.[106] This is an important signal to follow the ECtHR jurisprudence and anticipate legal regulations concerning situations that could generate complaints. Legislative action must cover cases that are highly problematic in terms of morality, where States often have a wide margin of appreciation accepted by the ECtHR, provided that it is well secured procedurally.

106 For example: *Hájovský v. Slovakia*, application no. 7796/16, 1 July 2021, https://hudoc.echr.coe.int/eng?i=001-210766

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Chapter 11

The Right to Family Life under the ECHR – with Special Regard to Central Europe

Lilla Garayová

Abstract

This article delves into the interpretation the right to family life, as enshrined in Article 8 of the European Convention on Human Rights (ECHR), with a particular focus on the Central European context. It seeks to unravel how this right is interpreted and applied amidst the backdrop of evolving societal norms, legal developments, and cultural traditions unique to Central Europe.

The analysis highlights the interplay between changing social attitudes, increased global mobility, economic challenges, and their collective impact on family-related matters. It explores the role of the family in child-rearing, societal advancement, and the personal development of its members, emphasising the deep-rooted connection between family life and cultural values.

Furthermore, the paper examines the principle of the margin of appreciation and the doctrine of dynamic interpretation, as key legal mechanisms that navigate the balance between universal human rights protections and the respect for national sovereignty and cultural diversity. It reflects on the challenges and opportunities presented by the shifting perceptions of what constitutes a family in contemporary society, exploring the potential for legal frameworks to adapt to these changes while safeguarding fundamental rights. By providing an understanding of the right to family life from a Central European perspective, this paper contributes to the ongoing discourse on human rights, family law, and societal development.

Keywords: Family life, protection of families, best interest of the child, children's rights, ECHR, right to family life

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1. Introduction

The protection of the family dates back to prehistoric times. The toolbox of family protection originates in the natural laws that long preceded the establishment of the state and, therefore, the law. The protection of the family is one of the oldest natural and moral codes: self-defence and the protection of family, offspring and community are all manifestations of our most basic instinct – that is, biological survival. Based on this, humans – like all other living organisms – must survive and reproduce so that their ancestors' essence can continue in the lives of their descendants, and their offspring's descendants, and so on. That is the reason a person establishes a marital relationship, starts a family, tries to create security for it, and protects it.[1]

All of this is natural, to the extent that we should not even have to question it. And this would be the case if marriage and family worked hand-in-hand with this natural law. However, it appears that modern marriage and the family are no longer working as they once did; indeed, such institutions are changing within Western civilisation. Therefore, we need to have a legal framework to protect families and the right to family life.

The legal framework on which the right to family life and unity is based is contained in numerous provisions in international human rights, humanitarian and refugee laws. As the foundation there is universal consensus that – as the fundamental unit of society – the family is entitled to respect and protection.[2] A right to family unity is inherent in recognising the family as a group unit: if members of the family did not have a right to live together, there would not be a group to respect or protect. Family protection encompasses a broad spectrum of legal, social, and economic measures designed to preserve the family unit's stability, security, and well-being. This concept is rooted in the recognition of the family as the basic unit of society, deserving of special care and assistance. The underlying family values that inform and guide the legal frameworks for family protection often include notions of mutual respect, solidarity, care for the vulnerable, and the promotion of social cohesion.

The intricate relationship between family protection, family values, and the law's role in safeguarding families is a cornerstone of legal systems worldwide, reflecting a complex interplay between societal norms, ethical considerations, and legal principles. The protection of the family unit, regarded as the fundamental group of society and the natural environment for the growth and well-being of all its members, particularly children, is enshrined in various international legal instruments, national legislations, and judicial interpretations.

A central aspect of the law's role in protecting families is the delicate balance between upholding family values and protecting individual rights within the family unit. Legal systems are often tasked with navigating the tension between collective

1 Lenkovics, 2021.
2 Barzó, 2021.

family interests and the personal freedoms of family members. This balance is critical in cases involving the rights of children, gender equality, and the rights of minority or marginalised family members, where the law must ensure that family protection does not come at the expense of individual autonomy and rights.

Evolving family structures and societal values poses a significant challenge to the law's role in family protection. Legal systems are increasingly required to adapt to diverse forms of family life, including single-parent families, blended families, and other non-traditional family units. This adaptability ensures that the law remains relevant and effective in protecting all families, reflecting contemporary understandings of family life and relationships. Moreover, the law's protective function extends to addressing socioeconomic factors that impact family stability and well-being, such as housing, employment, healthcare, and education. By providing a legal framework that supports families in fulfilling their basic needs, the law plays a crucial role in enhancing family resilience against social and economic challenges. As society continues to evolve, the legal system's capacity to adapt and respond to the changing contours of family life remains a testament to its foundational role in upholding the dignity and integrity of the family unit.

This paper will delve into the right to family life as enshrined in Article 8 of the European Convention on Human Rights (ECHR), with a particular focus on the Central European context. It seeks to unravel the complexities of how this right is interpreted and applied amidst the backdrop of changing societal norms, legal developments, and cultural traditions unique to Central Europe. Through a detailed examination of various facets of family life – including adoption, immigration, reproductive technologies, same-sex relationships, and the nuances of traditional and religious marriages – the paper provides a comprehensive overview of the family rights protection.

Furthermore, the paper examines the principle of the margin of appreciation and the doctrine of dynamic interpretation, as key legal mechanisms that navigate the balance between universal human rights protections and the respect for national sovereignty and cultural diversity. It reflects on the challenges and opportunities presented by the shifting perceptions of what constitutes a family in contemporary society, exploring the potential for legal frameworks to adapt to these changes while safeguarding fundamental rights.

2. Family Life in International Human Rights Law

International human rights frameworks acknowledge the family as the essential building block of society, encapsulating a comprehensive range of rights and duties related to family dynamics. These encompass duties to refrain from intruding into family life, to uphold equality rights within the familial structure, and to safeguard

and support the family unit. Such obligations are fundamental and must be adhered to across all legislative, policymaking, and intervention efforts directed at families. This overarching recognition shows the role of the family in nurturing and sustaining societal health and development, mandating a legal and procedural framework that respects, protects, and facilitates the flourishing of family life. Consequently, it is imperative that all actions and measures concerning the family are designed and implemented with a deep commitment to these principles, ensuring that the integrity and well-being of the family unit are consistently promoted and maintained across diverse societal and cultural contexts.

The family unit is universally acknowledged as a cornerstone of societal structure, prompting international human rights documents to delineate specific responsibilities for states to both preserve and support this fundamental institution. This obligation is reflected in a variety of international legal instruments, which articulate the necessity for state action to ensure the protection and assistance of the family. Notably, the Universal Declaration of Human Rights (UDHR), in Article 16(3),[3] affirms the family as the natural and fundamental group unit of society, entitled to protection by society and the state. This recognition is foundational, establishing the family not merely as a social construct, but as an inherent and vital component of societal health and stability, warranting dedicated safeguarding measures.

This provision in the UDHR serves as a universal acknowledgment of the family's critical role in nurturing, socialising, and providing for its members, contributing to the overall well-being and development of societies worldwide. By stipulating the entitlement of the family to protection by society and the state, Article 16(3) articulates a dual responsibility. It calls for a collaborative effort between societal entities and governmental structures to ensure that families are supported in their essential functions, emphasising the need for policies, laws, and practices that fortify the family unit against challenges and adversities.

The inclusion of this provision in the UDHR highlights the value placed on the family across cultures and legal systems, advocating for a framework within which families can thrive. It sets a global standard for the treatment and perception of the family, urging states and societies to prioritise the protection and assistance of families as a fundamental human rights obligation. This approach fosters an environment conducive to the growth, security, and prosperity of families, underpinning the broader goals of peace, justice, and human dignity that the UDHR seeks to achieve.

Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESR), particularly in Article 10,[4] emphasises the importance of family protection as part of broader economic, social, and cultural rights. It requires state parties to accord *"the widest possible protection and assistance* [...] *to the family* [...] *particularly*

3 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

4 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

for its establishment and while it is responsible for the care and education of dependent children."

Article 10's emphasis on family protection is reflective of an acknowledgment that the well-being of families is integral to the realisation of broader economic, social, and cultural objectives. By specifying the need for protection and assistance, particularly during the family's establishment and in the period it undertakes the care and education of dependent children, the covenant highlights critical stages in a family's lifecycle where support is most needed. This encompasses not only financial aid but also access to social services, educational opportunities, and legal protections that collectively enable families to fulfil their roles effectively within society.

The requirement set forth by the ICESCR for state parties to provide such comprehensive support means a commitment to ensuring that families are equipped with the resources and environments conducive to their stability and growth. It recognises that the strength and resilience of families are fundamental to the advancement of economic, social, and cultural rights for all individuals. By advocating for the widest possible protection and assistance to families, Article 10 encourages a holistic approach to family support, integrating economic, social, and cultural policies to promote family well-being. This approach not only enhances the quality of life for family members but also contributes to the broader goals of social equity and cultural richness, reinforcing the interconnectedness of family welfare with societal progress and development.

The International Covenant on Civil and Political Rights (ICCPR), through Article 23(1),[5] declares the right of men and women of marriageable age to marry and found a family, recognising the family's entitlement to society's protection. The Human Rights Committee, established to monitor states' implementation of the ICCPR, has clarified that: *"the right to found a family implies, in principle, the possibility to procreate and live together."*[6] When state parties formulate and implement family planning policies, it is crucial that these policies align with the principles enshrined in the covenant. Specifically, such policies must uphold non-discrimination and voluntariness, ensuring that they do not impose choices on individuals or families. Moreover, the right to family unity necessitates that states adopt effective measures, both domestically and – where relevant, in collaboration with other nations – to facilitate the unity or reunification of families. This is especially pertinent in situations where families are fragmented due to political, economic, or related factors. These measures should aim to mitigate the barriers that prevent family members from living together, recognising the fundamental human right to family unity. States are therefore called upon to review and adjust their legal, administrative, and operational frameworks to cultivate conditions that support family cohesion and reunification. This

5 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

6 CCPR General comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses

includes addressing legal and bureaucratic obstacles that impede the ability of family members to reside together, ensuring that family planning and reunification efforts are governed by principles of equity, humanity, and respect for individual rights and choices. The committee acknowledges the inherent variability in the understanding of what constitutes a family, recognising that perceptions of family can vary significantly across different states and even within various regions of a single state. This diversity in understanding makes it impractical to prescribe a universal definition of the family. Despite these variations, the committee underscores the principle that any group of individuals recognised as a family under the legal and societal frameworks of a state should be afforded the protections outlined in Article 23. As a result, it is imperative for state parties to provide detailed accounts of how the concept and boundaries of the family are interpreted or established within their own societal and legal contexts. This includes reporting on the criteria and considerations employed to define family units, reflecting the unique cultural, social, and legal landscapes that shape family constructs. Such reporting is crucial for assessing the extent to which states are upholding their obligations to protect the family, ensuring that all forms of family structures, as recognised by respective legal systems, receive the requisite support and protection under international human rights standards.

Moreover, the Convention on the Rights of the Child (CRC),[7] starting from its preamble, acknowledges the family's vital role in children's growth and well-being, necessitating comprehensive measures for its protection and support. The CRC enshrines provisions aimed at safeguarding the child's right to family life, alongside delineating the corresponding obligations of state parties to uphold these protections. Article 7 of the CRC provides the child with the right, *"as far as possible, to know and be cared for by his or her parents."* This establishes a foundational principle that emphasises the importance of the parental role in a child's life, and the inherent right of children to maintain a connection with their parents.

Further expanding on this framework, Articles 8 and 9 of the CRC address the child's right to preserve family relations as legally recognised, safeguarding against any unlawful interference. Article 8 obligates state parties to respect the child's identity - including nationality, name, and family relations as recognised by law - and to promptly provide assistance and protection to re-establish basic aspects of their identity if it is unlawfully deprived. Article 9 goes further by asserting the child's right not to be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such circumstances are strictly defined, including considerations of parental abuse or neglect, or when parents are living separately and a decision must be made regarding the child's place of residence.

7 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

The principle of the best interest of the child stands as a fundamental human rights doctrine, pivotal in guiding all matters related to the child, including the right to family life. Embedded within the CRC, Article 3 stipulates that in all actions concerning children, *"the best interests of the child shall be a primary consideration."* This directive highlights the importance of prioritising the child's welfare in every decision and action affecting them. This principle of the child's best interest is universal, applying to all children irrespective of their background. It encompasses the substantive right of the child to have their best interests thoroughly assessed and regarded as a primary consideration in all actions and decisions concerning them. This aspect emphasises that the assessment of the child's best interests should not be superficial, but a detailed evaluation that accounts for the myriad factors affecting their life and development.

Furthermore, the best interest principle serves as an interpretive legal principle, guiding the interpretation and application of all rights enshrined in the CRC. It acts as a tool that ensures the child's rights are interpreted in a manner that serves their welfare and development optimally. In expanding the understanding and application of this principle, it is imperative that state parties to the CRC adopt a comprehensive approach that incorporates this concept into their legal systems, policies and practices. This involves not only enacting laws and policies that explicitly reflect the best interest principle, but also training professionals involved in child-related matters to apply this principle effectively in their work. Moreover, it requires the establishment of mechanisms to review and monitor the implementation of this principle across all sectors affecting children, from family law to education, health care, and beyond. Its comprehensive application ensures that children's rights are not just theoretical constructs but living realities that shape their experiences and futures in profound and positive ways.

These provisions collectively underscore the CRC's commitment to ensuring that children enjoy their right to family life, highlighting the critical role of the family in providing care, affection, and security. The CRC mandates that state parties undertake all appropriate legislative, administrative, and judicial measures to ensure that children are not arbitrarily or unlawfully deprived of their family environment and that, in cases where separation is deemed necessary, all efforts are made to provide alternative care that is in the child's best interests. In essence, the CRC articulates a framework that not only protects the child's right to maintain family connections but also sets out the obligations of state parties to actively support and facilitate these rights. This includes creating conditions that favour the cohesiveness of the family unit and ensure that any interventions or decisions affecting the child's right to family life are carried out with the paramount consideration of the child's best interests.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, especially in Article 44(1),[8] focuses on the rights of migrant workers and their families, highlighting the need for measures that facilitate family reunification and safeguard familial rights across borders. This provision reflects a deep understanding of the challenges and hardships faced by migrant workers and their families, acknowledging that family separation can have profound emotional, psychological, and social impacts. The convention calls on state parties to take concrete steps to facilitate family reunification processes, recognising this as a fundamental human right and an essential aspect of ensuring the well-being and stability of migrant workers and their families. This involves creating legal and administrative frameworks that are conducive to family reunification, including streamlining visa processes, reducing bureaucratic hurdles, and providing social and economic support to reunified families.

Moreover, Article 44(1) highlights the necessity of protecting the rights of migrant workers' families across international borders, emphasising the need for cross-border cooperation and coordination among states. This includes respecting the rights of family members to maintain their cultural identity, access to education, health care, and social services, and ensuring their legal protection within host countries.

By focusing on these aspects, the convention seeks to address the broader implications of migration on family life, aiming to mitigate the negative consequences of separation and enhance the positive contributions of migrant workers to their host and home countries alike. It includes the obligation of states parties to adopt a compassionate approach to migration policy, one that recognises the intrinsic value of family unity and the fundamental rights of all family members affected by migration.

In expanding the scope and application of this provision, it is crucial for states to consider not only the legal dimensions of family reunification but also the practical and emotional needs of migrant families. This means providing adequate support for integration, addressing language barriers, and ensuring that policies reflect an understanding of the diverse cultural backgrounds of migrant workers and their families.

Within the realm of international law, the safeguarding of family life is deeply intertwined with the core principles of equality and non-discrimination. This connection is explicitly recognised in key international documents, such as the Beijing Declaration and Platform for Action.[9] This declaration emphasises the critical importance of interpreting the concept of family through the lens of equality and non-discrimination. This approach is paramount not only for the enhancement of family well-being, but also for the strengthening of democratic societies. By ensuring that

8 UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158

9 United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995

families are respected and protected in all their diversity, we lay a foundation for more inclusive and equitable societies. The application of the principle of equality and non-discrimination to human rights treaties and frameworks necessitates a comprehensive approach to all legislative, policy, and practical measures concerning the family. This means that laws, policies, and practices related to the family must be designed and implemented in a manner that neither discriminates against any particular family structure, nor prejudices the individual members within families. Whether concerning marital status, family composition, or the roles and responsibilities of family members, these measures should uphold the dignity and rights of all individuals, ensuring that no one is marginalised or disadvantaged.

Lastly, the Convention on the Rights of Persons with Disabilities,[10] through its preamble, recognises the importance of the family in supporting persons with disabilities, and advocates for appropriate measures to strengthen family capabilities to assist members with disabilities.

These provisions collectively underscore a global consensus on the critical role of the family in strengthening societal stability and development. They mandate states to adopt a proactive stance in crafting laws, policies, and interventions that not only protect the family from external infringements but also actively support its welfare and development.

3. The Right to Family Life and Family Unity in Regional Law

The principles governing the rights to family life and family unity are consistently reflected across various regional human rights instruments, underscoring the universal recognition of the family as a pivotal societal unit deserving of comprehensive protection and support. This concept is not only a staple of international law, but also finds resonance within regional human rights frameworks, highlighting the global consensus on the critical role of the family.

In the Americas, the American Convention on Human Rights explicitly acknowledges the family's fundamental importance, stating that *"the family is entitled to protection by society and the state."*[11] This provision emphasises the dual responsibility of society and governmental entities in safeguarding the family unit, illustrating a commitment to creating a supportive environment for families. The convention also solidifies the fundamental right to marry and establish a family within its provisions,

10 UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106

11 Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969

specifically through Article 17(2). This article serves as a clear affirmation of the importance placed on the personal freedoms associated with marital union and family life, emphasising the recognised autonomy and dignity of individuals in making such profound life choices.

Article 17(2) not only includes the liberty of individuals to enter into marriage and create family units but also implicates a broader commitment to safeguarding these rights from undue restrictions. This commitment reflects an understanding of the intricate ways in which the rights to marry and found a family intersect with various aspects of human rights, including privacy, equality, and non-discrimination. It ensures that individuals can pursue these fundamental aspects of human existence without facing arbitrary or discriminatory barriers, thereby promoting the principles of freedom and equality enshrined in the convention.

The inclusion of this right within the convention signifies the collective agreement among member states to honour and protect the personal choices of individuals regarding marriage and family life. It represents a commitment to creating legal and social environments that respect and nurture the family unit, recognising its critical contribution to society. Furthermore, by codifying this right the convention provides a legal framework for challenging laws or practices that unjustly impede the ability to marry and establish a family, offering protection and recourse for individuals whose rights are violated.

In expanding upon the right to marry and to found a family, the convention not only affirms the value of these personal decisions but also encourages states to adopt measures that facilitate the realisation of these rights for all individuals, free from discrimination. This approach aligns with the broader objectives of the convention to promote human dignity, equality, and justice, reinforcing the essential nature of marriage and family as cornerstones of both individual fulfilment and societal well-being.

Europe presents a parallel commitment through the European Social Charter, specifically in Article 16, which delineates the rights related to family life, advocating for the protection and assistance of the family.[12] This highlights the European commitment to fostering conditions that support the familial unit, recognising its essential role in social cohesion and individual well-being.

In examining the European context, it becomes evident that the rights articulated in the Convention on the Rights of the Child have been integrated into European legal frameworks, notably through the Charter of Fundamental Rights of the European Union (EU charter).[13] Specifically, Article 24 enshrines the principle of the best interests of the child, mirroring the foundational tenets of the CRC. This article explicitly declares that *"every child shall have the right to maintain on a regular basis*

12 Council of Europe, European Social Charter, 18 October 1961, ETS 35

13 European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

This provision in the EU charter underscores the importance of encouraging and preserving the child's relationship with both parents as a fundamental aspect of the child's welfare, except in circumstances where such contact would not serve the child's best interests. The charter acknowledges the value of these relationships in the child's development and well-being.

Furthermore, the inclusion of the best interest principle within the EU charter signifies a commitment to child welfare at the heart of EU policies and legislation. It ensures that all actions and decisions impacting children within the EU are guided by a consideration of what will best serve the child's needs and rights. This alignment with the CRC not only reinforces the universal principles of child protection and welfare, but also provides a clear legal mandate for EU member states to prioritise the well-being of children in their national laws and practices.

Expanding on this, the EU charter's emphasis on maintaining personal relationships and direct contact with both parents reflects a broader understanding of the complex dynamics of family life and the diverse challenges that can arise in safeguarding these essential relationships. It highlights the need for legal and social mechanisms that support families in fulfilling the child's right to family connections, while also equipping authorities to intervene protectively when the child's best interests require it.[14]

The integration of the CRC's principles into the EU charter represents a significant step in ensuring that children's rights to family life, care, and protection are upheld across Europe. It affirms the collective responsibility of EU member states to create environments where children can thrive, underpinned by laws and policies that recognise the paramount importance of their best interests.

Similarly, in Africa the African Charter on Human and Peoples' Rights declares the family as the natural unit and basis of society, mandating state parties to extend protection and assistance to uphold the family's integrity and welfare.[15] This is further reinforced by the African Charter on the Rights and Welfare of the Child, which not only reiterates the family's foundational societal role but also explicitly states that the family *"shall enjoy the protection and support of the State for its establishment and development."*[16] Such provisions highlight a focus the family's needs, from its formation to its ongoing development, emphasising the state's role in ensuring a supportive and nurturing environment for all families.

14 Pascual and Torres Pérez, 2019.

15 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

16 Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990)

Lastly, we need to address the European Convention on Human Rights (ECHR), the main focus of this article, with its Article 8 specifically articulating the right to respect for private and family life.[17]

This article declares:

1) Everyone has the right to respect for his private and family life, his home and his correspondence.
2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Through this provision, the ECHR enshrines the fundamental importance of protecting individuals' privacy and family relationships from arbitrary or unjustified interference by the state. Article 8 not only demonstrates the intrinsic value of personal and familial autonomy but also establishes a legal framework within which the privacy and integrity of family life are safeguarded. This includes the right to live free from unwarranted intrusions into one's family affairs, and the assurance that any actions by public authorities that impact this right must be legally justified and proportionate to a legitimate aim.

Furthermore, the inclusion of this right within the ECHR reflects a broader commitment to the principles of dignity, autonomy, and security, recognising the central role that family life plays in an individual's existence and well-being. It mandates that member states of the Council of Europe take all necessary measures to protect these rights, ensuring that their legal and policy frameworks respect and uphold the sanctity of private and family life. Expanding on this, Article 8 also implies a positive obligation on the part of states to actively facilitate the conditions under which family life can flourish. This includes not only preventing undue interference, but also adopting measures that support the maintenance and development of family relationships, particularly in cases where family unity might be threatened by legal or administrative barriers.

In essence, Article 8 represents a cornerstone in the protection of private and family life within the human rights jurisprudence of Europe. It affirms the obligation of states to both respect and protect family life, emphasising the balance between individual rights and societal interests. This provision ensures that the fundamental rights to privacy and family are central considerations in the development and application of European human rights law, contributing to the overarching aim of promoting human dignity and freedom.

17 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

These regional instruments collectively affirm the importance of the family across diverse legal and cultural landscapes, advocating for family protection that encompasses legal recognition, social support, and economic assistance. The convergence of these regional commitments reflects a shared global vision for the protection of family life, demonstrating an understanding that the well-being of families is inseparable from the broader objectives of human rights protection, social stability, and development. It calls for a concerted effort among states to implement these provisions, ensuring that families, in all their diverse forms, receive the protection and support necessary to fulfil their role within society.

4. The Right to Family Life under the ECHR

The right to family life, as enshrined in Article 8 of the ECHR, represents a foundational principle in the protection of personal and familial integrity within the member states of the Council of Europe. This provision, deeply embedded within the ECHR, underscores the human need to establish and maintain personal relationships, thereby facilitating individual development through the prism of family bonds. The significance of Article 8 extends across various dimensions of legal and social life, impacting both the jurisprudential landscape and the legislative frameworks of European countries.

Article 8 mandates the right of every individual to respect for their private and family life, their home, and their correspondence. It delineates a clear boundary against arbitrary interference by public authorities, ensuring that any encroachment upon this right is strictly justified on legitimate grounds such as national security, public safety, or the protection of health or morals. This provision thus serves as a guardian of intimate personal relationships, acknowledging the broad spectrum of family structures and the evolving understanding of what constitutes a family in contemporary society.

The overarching importance of the right to family life lies in its role in balancing individual rights against the collective interests of society. Through the principles of proportionality and the doctrine of the margin of appreciation, Article 8 grants states a certain latitude to navigate the complex interplay between safeguarding personal freedoms and upholding public interests. This nuanced balance ensures the adaptability of the right to family life to the diverse cultural, social, and legal contexts across Europe, making it a versatile tool in the protection of human rights.

Moreover, the evolving jurisprudence of the European Court of Human Rights (ECtHR) on Article 8 has influenced the understanding and application of this right. Through its decisions, the ECtHR has addressed a wide array of issues, from family reunification and parental rights to adoption, surrogacy, and the rights of sexual minorities. These rulings have not only clarified the scope and content of Article 8

but also prompted member states to reform their laws and practices to align with modern human rights standards.

The impact of Article 8 extends into the domestic legal systems of Council of Europe member states, compelling them to amend legislation and judicial practices that contravene the principles enshrined in this article. Such reforms have touched upon various aspects of family law, including child custody arrangements, immigration laws, and the recognition of diverse family formations. This illustrates the direct and tangible influence of Article 8 on national legal frameworks, fostering legal environments that respect and protect the right to family life.

Furthermore, the right to family life under Article 8 is connected to other fundamental rights protected by the convention, such as the right to marry and the rights of children. This interconnectedness highlights the comprehensive approach of the ECHR in safeguarding human dignity and freedoms, emphasising the interdependent nature of human rights.

Article 8 stands as a testament to the enduring importance of the right to family life in the European human rights landscape. Its broad interpretation by the court has been instrumental in advancing the protection of family life, reflecting changing societal norms and values. Through its ability to mediate between individual rights and societal interests, Article 8 continues to shape the legal recognition and protection of family relationships in their diverse forms, marking a pivotal contribution to the development of human rights jurisprudence in Europe.

Building upon the foundational significance of Article 8, the jurisprudence of the ECtHR has been instrumental in shaping the evolving interpretation of what constitutes family life. This evolution reflects a balance between societal values and individual rights, a central theme in the court's approach to cases involving family matters. The ECtHR's expansive interpretation of family life means a recognition of the diverse realities of families in contemporary society, marking a significant departure from traditional notions of the family.

Traditionally, the concept of family life was understood within a narrow framework, typically encompassing relationships based on marriage and blood ties. However, as societal norms and values have shifted, so too has the ECtHR's interpretation of family life. The court has progressively adopted a more inclusive approach, recognising that family bonds can form in various contexts beyond the traditional nuclear family structure. This broader interpretation includes *de facto* relationships, cohabitations and other forms of social and emotional bonds that manifest the essence of family life.

This evolving interpretation reflects the ECtHR's efforts to reconcile the diverse forms of family life with the principle of non-discrimination, ensuring that all individuals enjoy the rights and protections afforded by the convention, regardless of the nature of their family relationships. The court's jurisprudence emphasises the importance of considering the factual reality of personal bonds and commitments over formal or traditional definitions of family.

Over the past fifteen years, the ECHR has significantly broadened the protective ambit of Article 8. This reflects the article's inherent characteristics, which stands as an example of the convention's qualified rights. The essence of these rights lies in the necessity to strike a careful balance between safeguarding individual human rights and acknowledging the discretion afforded to contracting states, known as the margin of appreciation. Article 8, which guarantees the right to respect for private and family life, has been subject to a dynamic interpretation by the ECtHR, evolving to address the complexities of modern life and the diverse challenges facing individuals and families across Europe. This evolution is emblematic of the provision's flexibility and its capacity to adapt to changing societal norms, technological advancements, and shifts in legal and ethical understandings of privacy and family life. This evolution showcases the court's role in shaping a common European standard for the protection of human rights, while respecting the unique traditions and legal systems of its member states. By engaging in this balancing act, the court ensures that the application of Article 8 remains relevant and responsive to contemporary challenges, thereby reinforcing the living instrument doctrine that characterises the ECHR.

Moreover, the ECtHR has navigated the delicate balance between societal values and individual rights by employing the principles of proportionality and the margin of appreciation. This allows member states a degree of discretion in determining how best to reconcile local norms and values with the convention's requirements. However, this discretion is not unfettered; the court has consistently held that any interference with the right to family life must be justified by a pressing social need and must be proportionate to the legitimate aim pursued. The significance of the margin of appreciation becomes particularly pronounced when examining Article 8 through the lens of Central Europe. In regions where societal norms and cultural values deeply influence legal and social frameworks, the leeway granted to states under the margin of appreciation doctrine can be notably broad. This is especially true for matters lacking a pan-European consensus, often due to their deeply ingrained social and cultural implications. In such instances, it is acknowledged that state parties possess a closer affinity with and understanding of their societal dynamics, positioning them as the most appropriate entities to evaluate and address the specific needs and preferences of their communities.

When issues arise that touch on sensitive areas of social and cultural life, the court defers to the judgment of national authorities, recognising their superior capacity to gauge the public sentiment and ethical standards prevailing within their territories. This deference is rooted in the principle that national governments and legislatures, being on the front lines of societal change and cultural contexts, are in a better position to navigate the interplay between human rights protections and societal values.

This approach is of critical importance in Central Europe, where countries may exhibit unique historical, social, and cultural landscapes that shape public attitudes and legal norms. For instance, issues related to family life, reproductive rights, and

the recognition of non-traditional family structures often evoke varied responses across the continent, reflecting divergent cultural and moral values. In such contexts, the ECtHR's application of the margin of appreciation allows for a nuanced recognition of these differences, ensuring that the interpretation and application of Article 8 are sensitive to the regional specificities of Central European states.

Moreover, this tailored application of the margin of appreciation underscores the principle of subsidiarity inherent in the European human rights system, which posits that decisions should be made as closely as possible to the citizens they affect. By permitting a broader margin of appreciation in areas where there is no consensus, the court not only respects the diversity of European societies but also encourages a dialogue between national legal systems and European human rights standards. This dialogue is essential for advancing a balanced approach to human rights protections, one that harmonises the universal principles enshrined in the convention with the rich tapestry of cultural and social norms present across Europe.

The margin of appreciation is a foundational principle within the framework of the Convention, granting states a certain level of discretion, especially in matters of deep sensitivity. Crucially, however, this principle does not provide states with unfettered freedom to act as they please. As a consensus begins to form, particularly on sensitive issues or those where legal norms are evolving, the scope of this discretion narrows. Eventually, it becomes untenable for a state to act in ways that diverge from the rights outlined in the convention, as interpreted through the lens of common European practices.

This brings us to a crucial question regarding family life, a domain deeply enmeshed with cultural norms and values that markedly differ between Central and Western Europe. The question arises: can a consensus on these delicate matters ever be achieved across such diverse cultural landscapes?

Family life presents a complex arena for the application of universal human rights principles. The variations in cultural and social norms between Central and Western Europe underscore the challenge of reaching a consensus on issues related to family life. These differences not only reflect distinct historical and cultural trajectories but also influence contemporary attitudes towards marriage, parenthood, and the legal recognition of various family forms.

Given the deeply rooted nature of these cultural and societal norms, achieving a comprehensive consensus on family-related matters may seem daunting. However, the changing societal values and the ongoing dialogue facilitated by the convention's framework suggest that convergence in certain areas is possible. As states engage with each other and with the ECHR, they contribute to a dynamic process of mutual influence and adaptation. This process, while respectful of national sovereignty and cultural diversity, encourages a gradual alignment with fundamental human rights principles, including those related to family life.

Countries in Central and Eastern Europe are bound by a shared historical background, which sets them apart from the political and welfare cultures characteristic of 'Western' democracies. This distinct historical context has given rise to divergent

value systems and interpretations of fundamental concepts, including that of family life. The unique experiences and developments these nations have undergone influence their societal norms and legal frameworks, leading to perceptions and definitions of family life that may contrast with those prevalent in Western societies. This difference in historical experience contributes to a varied landscape of cultural and social values, reflecting in the distinct approaches to and understandings of key societal constructs such as family.

In conjunction with the principle of dynamic interpretation, the margin of appreciation aims to ensure that the essence of rights aligns with current moral standards. However, the question arises: do contemporary moral values in Hungary, Poland, and Slovakia mirror those in Belgium, the Netherlands, or the United Kingdom? It appears unlikely. The varying historical, cultural, and social backgrounds of these countries contribute to distinct moral landscapes, suggesting that a uniform application of contemporary morality across such diverse contexts may not be feasible.

The objective of the protections afforded by Article 8 is to safeguard individuals from arbitrary interference by public authorities. This goal is realised by defending the four facets of an individual's personal autonomy: private life, family life, home, and correspondence.

Like other qualified rights within the convention, Article 8's framework is bifurcated: the initial paragraph delineates the scope of the right being guaranteed, while the subsequent derogation clause outlines the broad conditions and particular justifications a state party might cite to justify limitations on the rights and freedoms concerned.

While the court often does not question the legitimacy of a state's legal intervention into an individual's exercise of their rights, it does mandate the state to demonstrate that the contested measure is necessary in a democratic society. This necessity is gauged by whether the measure addresses a pressing social need and aligns with collective values, with proportionality being a crucial aspect of this necessity. Thus, the concept of necessity, incorporating proportionality, frequently becomes the arena where disputes between individuals and states are contested.

Over time, the boundaries of this arena have shifted, reflecting ongoing social and economic evolution within society. Consequently, the practical enforcement of Article 8 poses a significant challenge, particularly in forecasting its application in situations of social controversy. This challenge is accentuated when considering the divergent value systems between Western Europe and Central and Eastern Europe. In this light, Article 8 emerges as one of the convention's most flexible provisions, having expanded over the years to encompass an increasingly broad array of issues and extend its protection to interests not explicitly covered by other articles. This flexibility is partly due to the Strasbourg bodies' deliberate avoidance of a comprehensive definition of key concepts under Article 8, such as family life or the family itself, allowing these concepts to evolve with changing societal norms. In recent years, there have been concerted efforts to broaden the scope of Article 8 even further.

A key aspect to address when examining the family life element of Article 8 is the interpretation of the term 'family'. The definition employed by the court has evolved over time, mirroring shifts in the societal attitudes of Europe, and will surely continue to adapt in response to further changing social norms. The court has consistently articulated in its jurisprudence that the concept of family life under Article 8 extends beyond traditional marriage-based families to include various *de facto* relationships.

In determining whether a relationship qualifies as family life, several criteria may be considered significant - such as cohabitation, the duration of the relationship, and evidence of commitment between the partners, which could be demonstrated through having children together or through other means. This adaptable approach by the court acknowledges the diverse forms of family configurations present across the Council of Europe's member states and their ongoing evolution.

Thus, *de facto* family arrangements are recognised under the convention just as formally established familial bonds are. Given that the court evaluates the presence of family life on an individual basis by examining the intimate connections between individuals involved, it is impractical to catalogue all possible relationships that might be deemed as constituting family life. Nevertheless, in instances where a particular situation does not meet the criteria for family life, it may still be afforded protection under Article 8 through the provision related to private life.

Within the court's body of law, the interpretation of family life under Article 8 extends beyond the traditional marriage-based family framework to include various *de facto* familial relationships. This broader interpretation accommodates arrangements outside the conventional marriage structure. Jurisprudential examples demonstrating the ECtHR's inclusive approach to family life under Article 8 include:

- The relationship between children and their grandparents, as established in the case of Marckx v. Belgium.[18]
- Sibling relationships, irrespective of age, highlighted in Olsson v. Sweden,[19] and in the context of adult siblings, as seen in Boughanemi v. France.[20]
- Bonds between an uncle or aunt and their nephew or niece, recognised in Boyle v. the United Kingdom.[21]
- Connections between parents and children from subsequent relationships or those resulting from extramarital relationships, especially when paternity is acknowledged and there exists a close personal relationship, as noted in X v. Switzerland.[22]
- The relationship between adoptive or foster parents and their children, as seen in Jolie and Lebrun v. Belgium.[23]

18 Marckx v. Belgium, Application No. 6833/74, Eur. Ct. H.R. (1979)
19 Olsson v. Sweden, Application No. 10465/83, Eur. Ct. H.R. (1988)
20 Boughanemi v. France, Application No. 15432/89, Eur. Ct. H.R. (1996)
21 Boyle v. the United Kingdom, Application No. 9659/82, Eur. Ct. H.R. (1988)
22 X v. Switzerland, Application No. 16744/14, Eur. Ct. H.R. (2017)
23 Lebrun v. Belgium, Application No. 15576/89, Eur. Ct. H.R. (1996)

These instances reflect the ECtHR's commitment to recognising the complexity and diversity of family life, acknowledging that meaningful familial bonds extend beyond the confines of marriage and traditional family structures.

The core element of family life encompasses the right to cohabit, facilitating the natural development of familial relationships (Marckx v. Belgium, § 31) and allowing family members to cherish each other's presence. The principles of maintaining family unity and facilitating family reunification in case of separation are integral to the right to respect for family life under Article 8.

The concept of family life is understood as an autonomous notion within the court's jurisprudence. Thus, the existence of family life is primarily a matter of fact, hinging on the actual presence of close personal bonds in practice. Consequently, the court evaluates *de facto* family connections, such as cohabitation, even in scenarios where the law does not formally recognise these as a family. Other considerations may include the duration of the relationship and, for couples, evidence of commitment, such as having children together. Therefore, Article 8's definition of family encompasses not only marital relationships but also other *de facto* family ties, where individuals coexist outside of marriage or exhibit other signs of enduring partnership (Paradiso and Campanelli v. Italy, §140[24] and Oliari et al. v. Italy, §130).[25]

Merely having a biological connection between a natural parent and a child, without additional legal or factual evidence of a close personal relationship, does not guarantee the application of Article 8's protections. Typically, family life under Article 8 presupposes living together. However, there can be exceptional circumstances where other aspects might reveal that a relationship possesses enough stability to constitute *de facto* family ties. Furthermore, the court has acknowledged that in certain situations, intended family life may exceptionally come under Article 8's protection, particularly in instances where the inability to fully establish family life cannot be ascribed to the applicant.

Therefore, is a biological connection necessary or adequate for the establishment of family life? A biological link between a parent and a child, by itself, does not automatically equate to family life under the court's scrutiny. Conversely, the lack of genetic ties does not inherently exclude a relationship from being considered as family life. In essence, the court posits that the simple existence of biological kinship, without additional legal or factual indicators of a close personal bond, is insufficient to warrant the protection afforded by Article 8.

Is it essential for marriage to exist for the establishment of family life? The existence of a lawful and authentic marriage automatically qualifies for the protection under Article 8 for all associated parties: children are deemed to be part of such a relationship from their birth. Although a valid marriage is a sufficient condition for the recognition of family life, it is not a prerequisite: the bond between a mother and her child is protected by the convention, irrespective of the mother's

24 Paradiso and Campanelli v. Italy, Application No. 25358/12, Eur. Ct. H.R. (2015)
25 Oliari et al. v. Italy, Application No. 18766/11, Eur. Ct. H.R. (2015)

marital status. The court has consistently indicated that unmarried couples living together in a stable and continuous manner with their children are generally recognised as having family life, making them socially comparable to married couples. Furthermore, living together is not a mandatory criterion for the existence of family life. The court has stated that the definition of family life in Article 8 encompasses the relationship between a parent and child, even in the absence of cohabitation, and this applies regardless of the child's legitimacy. While such a bond can be dissolved under extraordinary circumstances – events like a father's delayed acknowledgment of a child, lack of financial support, or decision to leave the child with relatives upon moving to a convention state – are considered exceptional situations that do not inherently end family life.

It is elucidated that formal marriage is not an indispensable factor for constituting family life under the convention. It is pertinent to note the societal shifts and the increasing divergence between Western European nations and those in Central and Eastern Europe regarding this issue. In the latter region, the traditional definition of marriage as a union between a man and a woman is deeply embedded. The court has recognised that some states have broadened the definition of marriage to include same-sex couples, attributing this to their individual perceptions of marriage's societal role, rather than deriving directly from a conventional interpretation of fundamental rights as established by the convention's signatories. Slovakia provides a compelling example of how legal instruments in Central Europe often not only protect but also prioritize certain forms of family structures. The Slovak Family Act explicitly establishes in its Art.2. that *"the family founded on marriage is the fundamental unit of society"*. This legislative declaration illustrates a clear normative preference for families formed through marriage, while also acknowledging other forms of family life. Slovak law uses specific terminology that reinforces the privileged position of marital families within the broader legal framework. In Slovakia, marriage is defined both in the Family Act and in the Constitution as a monogamous union between a man and a woman, formalized in a manner prescribed by law. Although the Family Act extends its protective reach to all forms of family life, the deliberate use of terminology suggests a legislative inclination to favor families based on traditional marriage. This approach reflects broader societal attitudes in Slovakia and other Central European nations, where traditional family values remain influential. These norms stand in contrast to the evolving definitions of family life seen in many Western European countries, where legal recognition of non-traditional family structures, including same-sex unions and cohabitation, has expanded significantly. While the ECtHR emphasizes the autonomy of states in interpreting the concept of family life under the ECHR, Slovakia's legislative framework illustrates how national laws can simultaneously adhere to the Convention's principles while reflecting deeply ingrained societal values. This duality highlights the ongoing tension between universal human rights standards and regional particularities in Central Europe.

In recent times shifts in societal attitudes, an expanded conception of family, increased global mobility, and the impacts of economic crises have significantly

influenced all matters related to family, including how the right to family life is understood and applied. The family unit plays an indispensable role in raising children, shaping future generations, and facilitating the social and personal growth of its members. Hence, it is deeply intertwined with cultural values and national traditions. This connection underscores the importance of considering these foundational elements when delving into the right to family life, emphasising the need to respect and understand the diverse manifestations of family across different societies.

The considerable extension of the protective scope of Article 8 over the last fifteen years highlights the ECtHR's commitment to ensuring that the convention remains a dynamic tool for the protection of human rights in Europe. It exemplifies the court's proactive approach in interpreting the provisions in light of evolving societal values and legal developments, thereby contributing to the ongoing development of human rights standards across the continent.

The court's approach to family life underlines the dynamic nature of human rights jurisprudence, reflecting an understanding that legal interpretations must evolve in tandem with societal changes. By fostering a jurisprudence that respects the diversity of family forms and the depth of personal relationships, the court contributes to the broader aim of the ECHR: to protect fundamental human rights and freedoms in a manner that is both meaningful and relevant to the lives of individuals across Europe.

In conclusion, the ECtHR's evolving interpretation of family life serves as a testament to its commitment to balancing societal values with the protection of individual rights. Through its case law, the court has expanded the scope of Article 8, ensuring that the right to family life remains a living instrument, capable of accommodating the complex and varied forms of family relationships that exist in modern society.

5. Conclusions

The exploration of the right to family life, particularly within the context of Central Europe, reveals an area where legal interpretations, societal values, and cultural traditions intersect. This article has sought to illuminate the right to family life as protected under Article 8 of the ECHR, highlighting the interplay between evolving societal norms and established legal frameworks. Through examining issues such as adoption, immigration, reproductive technologies, and the recognition of various forms of relationships, we gain insight into the broader implications of the right to family life and its critical role in ensuring the well-being and development of individuals and societies.

As societal attitudes continue to shift and legal paradigms evolve, the interpretation of family life remains a vital area of discourse and legal examination.

The challenges posed by changing social dynamics, technological advancements, and global mobility call for a responsive and thoughtful legal approach that respects the diversity of family configurations while upholding fundamental human rights. The role of the family in nurturing the next generation, guiding societal progress, and supporting the personal development of its members is undeniable, which is why we need to protect and promote the right to family life across all cultures and legal systems.

This article advocates for a balanced and informed approach to the right to family life, one that acknowledges all family forms and the varying cultural and legal landscapes across Europe. As we move forward, it is crucial for legal scholars, policymakers, and societies to engage in continuous dialogue and reflection to ensure that the protection of family life remains adaptable, inclusive, and reflective of contemporary values. By doing so, we can better support the diverse needs of families and create environments where every individual has the opportunity to thrive within the context of their own familial relationships. Hopefully this article prompts the readers to delve deeper into the comprehensive understanding of the right to family life from a Central European perspective, hoping to contribute to a broader conversation on how we view the right to family life.

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Chapter 12

One for all, all for one? Supposing the ECtHR's position on COVID-19 vaccines

Nóra Béres

Abstract

At the time of writing, COVID-19 no longer constitutes a public health emergency of international concern. However, the compatibility of coronavirus vaccines with the interests of the European Court of Human Rights (ECtHR) is still worth mentioning. In 2020 and 2021, while humanity struggled with the pandemic, the long list of fundamental rights dilemmas expanded – with the issue of human rights certainly generating the most relevant public resonance. Alongside curfews and less stringent restrictions on the freedom of movement was the compulsory vaccination against COVID-19. Therefore, the decision of the ECtHR in Vavřička et al. v. the Czech Republic could hardly be more timely in helping us to take stock of the conditions under which compulsory coronavirus vaccination may be compatible with human rights law. Therefore, this paper seeks to provide a focused case analysis on the only decision of the court related to compulsory vaccines – and uses analogy to make conclusions on the compatibility of coronavirus vaccines with the European Convention on Human Rights (ECHR).

Keywords: compulsory vaccination, COVID-19, ECHR, ECtHR, right to private life

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1. Introduction: COVID-19 vaccines and the ECHR

The coronavirus was not the first time the international community had responded to a pandemic, but COVID-19 was certainly the most challenging health crisis humanity had faced in the last hundred years. According to recent World Health Organization statistics,[1] at the time of writing[2] 772,166,517 cases were confirmed; 6,981,263 deaths were reported; and 13,534,602,932 vaccine doses were administered so far. The numbers speak for themselves: the pandemic had a significant impact on multiple areas of our lives – and human rights were no exception. The compatibility of compulsory vaccination with contemporary human rights law was undoubtedly at the heart of heated public debates on the pandemic, besides the curfews and other restrictions of our freedom of movement, which served as an inspiration for this paper.

As far as the ECtHR is concerned, two aspects were touched upon by the pandemic. On the one hand was Art. 15 of the ECHR, concerning derogation in public emergency. In March 2020, ten contracting parties notified the Secretary-General of the Council of Europe of their decision to enact Art. 15. These were Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia, and San Marino.[3] Thanks to the leeway offered by the inherent limitations under the ECHR system – and probably to the relatively short period of time with derogations in effect – no decision was made by the court related to Art. 15. On the other hand, pandemic-adjacent applications reached the court concerning mostly the right to life (Art. 2), the prohibition of torture (Art. 3), the right to liberty and security (Art. 5), the right to a fair trial (Art. 6), and the right to respect for private and family life (Art. 8). Some applications related to compulsory vaccinations and COVID-19 certificates also reached the court, however no decisions were delivered in these cases since they were closed with admissibility decisions.

One of the applications related to COVID-19 was *Thevenon v. France,*[4] in which a firefighter refused to comply with the vaccination requirement imposed on certain workers by the French Public Health Emergency Act.[5] When Mr Thevenon refused vaccination without claiming a medical exemption, he was suspended from both his professional and volunteer duties. He referred to violations of Art. 8 (right to respect for private life) and Art. 14 (prohibition of discrimination) of the ECHR, as well as Art. 1 of Protocol No. 1 (protection of property). The court rejected his application

1 As of 23 November 2023.

2 WHO Coronavirus (COVID-19) Dashboard [Online]. Available at: https://covid19.who.int.

3 Council of Europe, Informal Chronology of Derogations under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS. No. 5) by Country between 1 January 2000 and 6 March 2022 [Online]. Available at: https://rm.coe.int/echr-table-derogations-2000-2022-06-03-2022/1680a5bd43.

4 *Thevenon v. France*, ECtHR, 22 October 2022, no. 46061/21.

5 LOI n° 2021-1040 du 5 août 2021 relative à la gestion de la crise sanitaire (1) [Online]. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043909676.

as inadmissible, for failure by the applicant to exhaust his domestic remedies before applying. The other application was *Zambrano v. France,*[6] in which a university lecturer complained about the 'health pass' introduced in France in 2021, and founded an online movement to protest against it. The court noted that Mr Zambrano's application was inadmissible for several reasons, specifically the failure to exhaust domestic remedies – as well as abuse of the right of application within the meaning of Art. 35 paras. 1 and 3 (admissibility criteria) of the convention. Therefore, applications relating to COVID-19 vaccinations reached the ECtHR, but no decision on the merits was delivered.

However, on 8 April 2021 the case law of the ECtHR reached a milestone, with the first Strasbourg decision on compulsory childhood vaccinations. The ECtHR's Grand Chamber ruled by 16-1 that compulsory childhood vaccinations did not violate Art. 8 of the ECHR, i.e., the right to respect for private life.[7] Although the case of *Vavřička et al. v. the Czech Republic*[8] had nothing to do with the coronavirus pandemic, due to the timing it is possible to conclude what position the court would have taken on compulsory vaccinations against COVID-19. In this vein, this paper seeks to provide a focused case analysis on the only decision of the court related to compulsory vaccines – and uses analogy with a detailed examination of the criteria in the Vavřička decision to conclude on the compatibility of coronavirus vaccinations with the ECHR.

2. The relevant facts of the Vavřička case

Before presenting the facts of the case, for the sake of methodological clarity it is necessary to highlight three essential features of the Vavřička case in order to avoid distortion of its comparison with the COVID-19 vaccines. First of all, the Vavřička case focused on vaccines that protect against well-known diseases. Second, the compulsory nature of the vaccines at issue in the Vavřička case was reflected in the fact that parents who fail to comply with the legal requirements were subject to administrative fines, and that unvaccinated children were not allowed to attend kindergarten. There was therefore no question of forced vaccination, i.e., administering the vaccine against parental wishes, nor of a minor who had not been vaccinated

6 *Zambrano v. France,* ECtHR, 7 October 2022, no. 41994/21.

7 Neither Art. 8 of the ECHR, nor any other article of the convention explicitly mention the right to health. However, according to case law of the ECtHR, the protection of health is implicitly covered by the right to respect for private life.

8 *Vavřička et al. v. Czech Republic*, ECtHR, 8 April 2021, no. 47621/13 (*Vavřička v. the Czech Republic,* no. 47621/13; *Novotná v. the Czech Republic*, no. 3867/14; *Hornych v. the Czech Republic,* no. 73094/14; *Brožík v. the Czech Republic,* no. 19306/15; *Dubský v. the Czech Republic*, no. 19298/15; *Roleček v. the Czech Republic,* no. 43883/15)

being prevented from starting primary school upon reaching compulsory school age. The third essential feature was that the Vavřička case related to childhood vaccinations, and therefore the applicants in the proceedings were the parents (legal representatives) of minors, and further striking questions arose as to the right of privacy of the parents and their freedom to bring up their children.

In Vavřička, the applicants complained to the court about the consequences of their failure to comply with childhood vaccine requirements. In the Czech Republic, the Act on the Protection of Public Health[9] and the Decree of the Minister of Health on vaccination against communicable diseases[10] provide for compulsory vaccination of permanent and long-term residents according to a fixed schedule.[11] In the case of minors, parents are responsible for ensuring compliance with the legal requirements, and failure to vaccinate is considered a minor offence. In addition, nurseries and kindergartens can only accept children who have received the required vaccinations, or who have been certified as otherwise immunised, or who cannot be vaccinated for health reasons. In the background to the Vavřička case, it should be highlighted that the Czech vaccination schedule only includes the administration of vaccines against well-understood childhood diseases, such as diphtheria, tetanus, whooping cough, Haemophilus influenzae B infections, poliomyelitis, hepatitis B, measles, mumps, rubella and, in certain special health indications, pneumococcal infections.

In Vavřička, the applicant was a father who had failed to vaccinate his 13 and 14-year-old children against tetanus, polio and hepatitis B, and was fined for committing an offence. In addition, there were also five other 'child applicants' on the plaintiff's side who were not enrolled in kindergarten or had their previous enrolment withdrawn because they had not been vaccinated. According to one complaint, the applicant's parents had concerns about the safety of measles, mumps and rubella (MMR) vaccinations, while other parents lacked the possibility of an individualised vaccination series for their child with health issues. Others refused to vaccinate their child on grounds of thought and conscience, while the sixth applicant's parents, who were biologists, gave their child a vaccination series determined by themselves, omitting several vaccines required by the Act on the Protection of Public Health. The applicants invoked Art. 2 (right to life), Art. 6 (right to a fair trial), Art. 8 (right to respect for private and family life), Art. 9 (freedom of thought, conscience and religion), Art. 13 (right to an effective remedy) and Art. 14 (prohibition

9 Zákon č. 258/2000 Sb., Zákon o ochraně veřejného zdraví a o změně některých souvisejících zákonů [Online]. Available at: https://www.epi.sk/zzcr/2000-258.

10 Vyhláška č. 439/2000 Sb., Vyhláška Ministerstva zdravotnictví o očkování proti infekčním nemocem [Online]. https://www.zakonyprolidi.cz/cs/2000-439.

11 The decree of the Ministry of Health referred to in the facts of the case is no longer in force, and the decree on vaccination against communicable diseases applies instead. See: Vyhláška č. 537/2006 Sb., Vyhláška o očkování proti infekčním nemocem [Online]. Available at: https://www.epi.sk/zzcr/2006-537.

of discrimination) of the ECHR.[12] Art. 14 (prohibition of discrimination) and Art. 2 (right to education) of the Protocol for failure to provide compulsory vaccinations. However, the ECtHR declared the applications inadmissible as regards the right to life, the right to a fair trial, freedom of thought, conscience and religion, the right to an effective remedy and the prohibition of discrimination,[13] and thus based its decision on the right to private life alone. In the light of the analysis carried out under Art. 8, the court also considered it unnecessary to examine the complaints separately in the context of the right to education.[14]

3. The findings of the ECtHR

When examining the ECtHR's conclusions, it shall be considered first (I) whether there was an interference with the right to private life, then (II) what was the legitimate aim pursued by the interference, and whether the interference was lawful in the light of the legitimate aim pursued. After that, it shall also be considered (III) whether the interference was necessary in a democratic society, and finally (IV) whether the interference was proportionate in the light of the legitimate aim pursued.[15]

a) Do compulsory vaccinations constitute an interference with the right to private life?

12 Although the court declared the relevant applications (*Brožík v. the Czech Republic,* no. 19306/15; *Dubský v. the Czech Republic*, no. 19298/15) inadmissible as regards freedom of thought, conscience and religion, it is worth considering the arguments put forward here. In examining the applicants' claims under Art. 9 of the ECHR, the court recalled that not all opinions or beliefs are protected ideas under the convention, and noted that the philosophical or religious underpinnings of the applicants' objections to vaccination were not consistent in the domestic proceedings. The court concluded that the applicants had failed to demonstrate that their critical views on the vaccine were sufficiently serious, well-founded, coherent and important to be protected under Art. 9 of the ECHR. (It should be noted that this latter approach represents a shift from the case law of the court so far, which could even open the door to the recognition of compulsory vaccination as an interference with Art. 9.) The ECtHR also stressed that Czech law allows, in exceptional cases, for an unvaccinated individual to be exempted from paying an administrative fine on grounds of conscience. Likewise, Judge Wojtyczek also pointed out in his dissenting opinion that this exception clause was a "very important argument" for the compatibility of the measure with the convention (Judge Wojtyczek's dissenting opinion, para. 17). These case law additions point to the fact that the court no longer upholds the findings in *Boffa et al. v. San Marino*, in which the European Commission of Human Rights found that the obligation to vaccinate everyone, irrespective of religion or personal beliefs, is compatible with Art. 9 of the convention. The decision in Vavřička, on the other hand, suggests that there may be a well-founded, serious, coherent and important core of thought which provides a possibility for exemption from the vaccination requirement. See Katsoni, 2021.

13 *Vavřička et al. v. the Czech Republic*, paras. 338 and 347.

14 *Vavřička et al. v. the Czech Republic*, para. 345.

15 Nugraha et al., 2022, pp. 579–585.

First of all, it should be expressed that in the Vavřička case the ECtHR established that compulsory vaccination, as an involuntary medical intervention, constitutes a fundamental interference with the right to private life, and in the present case such an involuntary medical intervention was also made – even though the vaccines were not in fact administered under duress.[16] Although the contours of the right to private life cannot be precisely defined, it is quite clear that the scope of this human right is sufficiently broad to apply to a wide range of life situations and encompass the right to individual self-determination. Since medical interventions necessarily affect bodily integrity, the right of individual self-determination in this area is also brought into focus, anticipating that medical interventions could only be lawfully carried out with the informed consent of the individual.[17] If this is not done, the right to bodily integrity is violated. The patient therefore has, in principle, the right to refuse consent to a medical intervention.[18] However, as the right to private life is not absolute, there may be cases where an intervention, such as vaccination, may be required in the absence of consent.

b) Is the aim of compulsory vaccination legitimate?

In relation to the legitimate aim of the intervention, it should be noted that immunisation and compulsory vaccination should be aimed at protecting all children against serious communicable diseases. In most cases, this can be achieved by ensuring that children receive the full range of vaccinations at an early age, while children who cannot receive such an intervention, e.g., for health reasons, are indirectly protected against serious communicable diseases as long as the necessary level of vaccination is maintained in their community (i.e., their protection is derived from the so-called 'herd immunity').[19] This approach to public health policy is based on medically sound arguments, and as such is in the best interests of the child.[20] In this light, the ECtHR accepted the respondent government's argument that the Czech legislature's decision to make vaccination compulsory was supported by relevant and sufficient reasons, and found that the vaccination requirements served a legitimate aim – namely the protection of public health and the rights of others.[21] The court found that the obligations laid down in the Act on the Protection of Public

16 *Vavřička et al. v. the Czech Republic*, para 263.
17 Hungler, 2022, p. 65.
18 Sulyok, 2021, p. 191.
19 *Vavřička et al. v. the Czech Republic*, para. 272.
20 The requirement to take the best interests of the child into account is inherent in the 1989 UN Convention on the Rights of the Child (promulgated in Hungary by Act LXIV of 1991), Article 3 para. 1 of which states that "in all decisions concerning children, public and private institutions of social protection, courts, administrative authorities and legislative bodies shall take into account the best interests of the child as a primary consideration."
21 *Vavřička et al. v. the Czech Republic*, para. 272.

Health and in the Decree of the Minister for Health on vaccination against communicable diseases were in accordance with Czech constitutional requirements, and that the restrictions imposed were derived from well-known and foreseeable legal provisions.[22]

c) Are compulsory vaccinations necessary in a democratic society?

The ECtHR has already developed a number of criteria for assessing the need for compulsory vaccination in its case law. For example, in *Solomakhin v. Ukraine*,[23] where the applicant was vaccinated against diphtheria against his will during an epidemic, the court took into account whether public health considerations made it necessary to control the spread of communicable diseases, and whether in that particular case the national authorities had taken the necessary precautions to ensure that vaccination was appropriate.[24] The same criteria were also taken into account by the European Commission of Human Rights in the case of *Boffa and Others v. San Marino*,[25] emphasising the margin of appreciation of contracting parties.[26] These criteria were further developed and refined by the ECtHR in the Vavřička decision, which assessed the necessity of compulsory vaccination in a democratic society by carefully weighing (I) the margin of appreciation of the contracting parties,[27] (II) the existence of an overriding public interest and the existence of substantial and sufficient reasons for the intervention,[28] and (III) the proportionality of the intervention to the legitimate aim pursued.[29] The criterion of necessity is analysed in this light.

According to ECtHR case law, public health policy issues are a matter for the margin of appreciation of national authorities, and in the Vavřička case – which specifically concerned the mandatory nature of childhood vaccinations – this margin is explicitly wide.[30] Since the present case did not involve a voluntary medical intervention, the obligation to vaccinate was in principle linked to the effective exercise of the individual's "intimate or key rights". The most intimate rights in general narrow the margin of appreciation of the state, although in bioethical matters this margin is usually wide – as it is in the case of compulsory childhood vaccination.[31] However, in the case analysed the latter was diminished by the fact that the vaccines

22 *Vavřička et al. v. the Czech Republic*, paras. 266–271.
23 *Solomakhin v. Ukraine,* ECtHR, 15 March 2012, no. 24429/03.
24 *Solomakhin v. Ukraine,* para. 36.
25 *Boffa v. San Marino,* EComHR, 15 January 1998, no. 26536/95. In this case, the applicants brought an action before the court concerning the compulsory vaccination of their children against Hepatitis B and the possible penalty of imprisonment in the event of failure to vaccinate.
26 *Boffa v. San Marino,* para. 35.
27 *Vavřička et al. v. the Czech Republic*, paras. 276–280.
28 *Vavřička et al. v. the Czech Republic*, paras. 281–289.
29 *Vavřička et al. v. the Czech Republic*, paras. 290–309.
30 *Vavřička et al. v. the Czech Republic*, para. 280.
31 *Vavřička et al. v. the Czech Republic*, paras. 273, 276 and 280.

were not actually administered against the will of the applicants, and that no such obligation, i.e., compulsory vaccination, was provided for under Czech national law. The court also noted that there is a general agreement that vaccination is one of the most successful and cost-effective health interventions, and that each contracting party must endeavour to achieve the highest possible level of vaccination coverage among its population.

However, as far as the most appropriate means to achieve the highest possible level of vaccination coverage are concerned, there is no consensus among contracting parties at the European level, but rather a wide range of vaccination policies for children.[32] The position of the Czech Republic is at the end of this range, which is a more prescriptive one – i.e., it contains obligations for legal subjects. The court also noted that several other contracting parties have recently changed their vaccination policy by adopting an approach similar to that of the Czech Republic – i.e., a shift from voluntary vaccination on the basis of recommendations to prescriptive provisions in order to maintain vaccination coverage and herd immunity.[33] While it is accepted that making vaccination compulsory raises sensitive issues, this is not done to pressure those who disagree with the vaccination obligation, but in the interests of social solidarity, with a view to protecting the health of the society as a whole. Consequently, the ECtHR found that the margin of appreciation of the contracting party in the present case must be a wide one.

The court also underlined that there are important public health reasons for making vaccines compulsory, and that there is a consensus on the effectiveness and safety of childhood vaccination and on achieving the highest possible vaccination coverage. The continuation of vaccination policy is supported by data provided by national and international experts. While compulsory vaccination is neither the only nor even the most widespread vaccination model in Europe, the court reiterated that public health policy is a matter for national authorities – and that the contracting parties should therefore be given a wide margin of appreciation in this respect. Furthermore, ECtHR case law has established that the best interests of the child are paramount in all decisions affecting minors.[34] It follows that the state has an obligation to place the best interests of the child as an individual and of the child as a group at the centre of all decisions affecting their health and development.

Art. 8 imposes a positive obligation on contracting parties to the ECHR, i.e., to take appropriate measures to protect the health of persons within their jurisdiction. In the course of the proceedings, the defendant government emphasised the position of the competent Czech health authorities[35] that the legal obligation to vaccinate children should be maintained, highlighting the individual and public health

32 European Centre for Disease Prevention and Control: Vaccine Scheduler [Online]. Available at: https://vaccine-schedule.ecdc.europa.eu.

33 Nugraha et al., 2022, 277.

34 Archard et al. 2021.

35 *Vavřička et al. v. the Czech Republic*, paras. 197–203.

risks that would result from a reduction in vaccination coverage following the repeal of the provisions. In the Czech Republic, the vaccination obligation is therefore a response by the national authorities to the overriding social interest in protecting public health and the individual against disease, and in preventing a decline in the vaccination rate among children.[36]

d) Are compulsory vaccinations proportionate to the aim to be pursued?

The Grand Chamber assessed the measures challenged by the applicants in the context of the national legal system, and found that they were reasonably proportionate to the legitimate aim pursued by the Czech legislature in imposing the vaccination obligation – and concluded that the national authorities had not exceeded the wide margin of discretion which they enjoyed in this area.[37]

Vaccines are mandatory in the Czech Republic for nine diseases for which vaccination is considered effective and safe, as well as for a tenth vaccine administered to children with special health conditions. Although the Czech model advocates compulsory vaccination, this is not an absolute obligation: exemptions may be granted, in particular for children for whom vaccination is contraindicated on a long-term basis.

It is undisputed that, although vaccines are completely safe for the vast majority of vaccinated people, in rare cases they can be harmful to the individual and cause serious or permanent damage to health. In the case, the defendant submitted that in the Czech Republic, of the ca. 100,000 children vaccinated each year (representing a total of 300,000 vaccinations), ca. five to six cases of serious and potentially life-long damage to health occur. In view of this sporadic but very serious health risk, the court stressed the importance of taking the necessary precautions before administering vaccines, consisting of checking in each case for possible contraindications and monitoring the safety of the vaccines used.[38] However, the ECtHR saw no reason to question the adequacy of the Czech national system in this respect.

As regards sanctions, it should be noted that their use is an indirect means of enforcing the vaccination obligation. In the Czech Republic, the sanction can be considered relatively moderate, as it consists of a one-off infringement fine, against which a full range of remedies is available. Moreover, in the case of Mr Vavřička, the amount of the fine was at the lower end of the range of possible fines and can therefore in no way be considered unduly severe or burdensome. As for the 'child applicants', by denying them access to nursery school they were deprived of an important opportunity to develop their personalities. However, this was a consequence of their parents' decision not to comply with a general legal requirement, which was particularly concerned with the protection of the health of young children and was

36 *Vavřička et al. v. the Czech Republic*, paras. 282–284.
37 *Vavřička et al. v. the Czech Republic*, paras. 290–309.
38 Krasser 2021, pp. 207–233.

essentially protective rather than punitive. According to the court, it cannot be regarded as disproportionate for a state – in fulfilment of its positive obligation under the convention and in the interests of social solidarity – to oblige individuals for whom vaccination poses only a remote health risk to accept this generally applied protective measure for the benefit of the small number of children at risk who cannot benefit from vaccination. The ECtHR concluded that the latter option is legitimately open to the Czech legislator and is fully in line with the logic of protecting the health of the population. The sanctions for non-vaccination were only temporary in their effects on 'child applicants', as when minors reached the age of compulsory schooling their vaccination status did not affect their admission to primary school.

With regard to forced vaccination, it is worth pointing out the parallel between the positions of the ECtHR and the Constitutional Court of Hungary (Hun. *Alkotmánybíróság*, hereafter: AB), which was explicitly highlighted by the Grand Chamber in the Vavřička decision.[39] Decision no. 39/2007. (VI.20.) of the AB examined a petition brought by a couple who had refused to vaccinate their child and challenged the constitutionality of the relevant provision of Act CLIV of 1997 on Health Care[40] (1997. évi CLIV. *törvény az egészségügyről*, hereafter: Eütv.). The main problem in the Hungarian case was that the failure to comply with the obligation entailed the adoption of a directly enforceable administrative decision requiring vaccination, the direct enforceability of which was not affected by the appeal against it. In this connection, the AB found an unconstitutionality of omission and annulled the relevant provision of the Eütv. on the ground that the legislator had not ensured the right to an effective remedy against the refusal to exempt from the compulsory vaccination. The important point already mentioned at the beginning of this study – namely that compulsory vaccination constitutes a more serious form of interference with fundamental rights than the imposition of a fine for failure to vaccinate – is thus once again highlighted by decision no. 39/2007. (VI.20.) of the AB. The latter is particularly true when the coercive nature is reinforced by the absence of an effective legal remedy.

Side notes to the Vavřička decision

The final decision of the ECtHR's Grand Chamber in relation to the enforcement of the rights of 'child applicants' has been heavily criticised by scholars. Despite the fact that the court emphasised the best interests of the child at more than one point in the decision, it failed to analyse the interference with the rights of minors in the light of the refusal or withdrawal of admission to kindergarten.[41] Other authors see the procedural representation of children by their parents as problematic in this case, as a conflict of interest can be identified between the pre-school child bearing

39 *Vavřička et al. v. the Czech Republic*, paras. 98–100.

40 1997. évi CLIV. törvény az egészségügyről [online]. Available at: https://net.jogtar.hu/jogszabaly?docid=99700154.tv.

41 Ważyńska-Finck, 2021; Vikarská, 2021.

the consequences of their parents' decision and the decision-making parents in the ECtHR proceedings. However, this aspect of the case, namely the fact that the consequences of the parents' decision are borne by the children and that the minors' right to health and education may be affected, was not addressed by the court at all.[42] Nor did the ECtHR explain what the situation is with regard to the parents' right to private life, i.e., how compulsory vaccination relates to the parents' freedom to bring up their children. It would have been useful for the subsequent application of the law if the court had also made a comparison of these aspects of the case. A related anomaly is the failure of the ECtHR to ask and answer the question: who is entitled to decide on the best interests of the child? Is it for the state or the parents to decide? And where is the line drawn between the decision-making powers of the state and of the parent?[43]

The Vavřička decision has not only been criticised in relation to 'child applicants', as there is also an opinion that criticises the Grand Chamber for failing to examine the least restrictive measures (as a means to achieve a legitimate aim), saying that their examination could have provided more convincing arguments in the proportionality assessment.[44]

This author further observes in line with para. 2 of Judge Lemmens' dissenting opinion that although the ECtHR referred several times in the Vavřička decision to 'social solidarity' in order to support the necessity of vaccines, the decision does not elaborate on this concept in any meaningful way. Similarly, the lack of an analysis of the best interests of the child is also lacking in the reasoning of the decision.

4. Conclusions

Although in the Vavřička decision the ECtHR did not leave much room for generalisations, pointing out that its findings relate to "the standard and routine vaccination of children against diseases that are well known to medical science",[45] and that "in the present case, which specifically concerns the compulsory nature of child vaccination, that margin should be a wide one",[46] the court's analysis is in several places replete with a detailed elaboration of the criteria already established for assessing the need for compulsory vaccination in democratic societies and, at the same time, the scope of the compatibility of compulsory vaccination against coronavirus with the convention.

42 Lápossy et al., 2022, p. 22.
43 *M.A.K. and R.K. v. the United Kingdom,* ECtHR, 23 March 2010, no. 45901/05, no. 40146/06.
44 Nilsson, 2021, pp. 331–334.
45 *Vavřička et al. v. the Czech Republic*, para. 158.
46 *Vavřička et al. v. the Czech Republic*, para. 280.

Relevant among the court's conclusions on the margin of appreciation in the Vavřička case is that there is consensus between states and the World Health Organization[47] on the effectiveness of COVID-19 vaccines,[48] but there is no inter-state treaty on the mandatory use of coronavirus vaccines.[49] These considerations, together with the ECtHR's statement that "in matters of health-care policy, it is the domestic authorities who are best placed to assess priorities, the use of resources and social needs"[50] lead us to conclude that the introduction of mandatory coronavirus vaccination is a matter for the margin of appreciation of contracting parties. The Grand Chamber also pointed out in its decision that in states with a vaccination policy favouring voluntary vaccination, the decline in vaccination uptake and thus in the vaccination coverage of the population is considered to be in the overriding social interest[51] and in cases where the nature of the disease does not allow for herd immunity, compulsory vaccination may be reasonably used to maintain an adequate level of protection.[52] Applying the same logic to the coronavirus vaccines, we can therefore arrive at the conclusion that where the number of voluntary vaccinators is not high enough and herd immunity is not relevant due to the nature of the virus, the imposition of compulsory vaccination is a reasonable response to COVID-19 and constitutes an overriding social interest. Furthermore, the Vavřička decision is a case in point regarding the need for vaccinations: in a democratic society, the less prescriptive vaccination policies of other states based on recommendations are not a decisive factor in determining the need for mandatory vaccines.[53] As regards proportionality, the possibility of exceptions[54] in the case of medical contraindications or reasons of conscience,[55] individualised assessment of the suitability of vaccination[56] and the availability of a legal provision for compensation in the case of vaccine-induced harm are essential factors to be assessed.[57]

47 World Health Organization, Coronavirus disease (COVID-19): Vaccines safety [Online]. Available at: https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-(covid-19)-vaccines-safety.

48 Although this consensus may be tempered by the rapid pace of coronavirus vaccine development and the lack of medical knowledge about the medium-term and long-term effects of vaccination.

49 *Vavřička et al. v. the Czech Republic*, paras. 277–278.

50 *Vavřička et al. v. the Czech Republic*, para. 285.

51 *Vavřička et al. v. the Czech Republic*, paras. 283–284.

52 *Vavřička et al. v. the Czech Republic*, para. 288.

53 *Vavřička et al. v. the Czech Republic*, para. 310.

54 In the context of conscientious objection, it is worth reflecting once again on the provisions of the 39/2007 (VI.20.) AB decision, where the Hungarian Constitutional Court pointed out that although the protection of children's health justifies mandatory vaccination at a certain age, and accepted the legislator's position based on scientific knowledge that the benefits of the vaccine are both for the individual and for the child, outweigh the potential harm to the individual and society from adverse reactions, the AB also recognised that the system of compulsory vaccination may cause greater harm to parents who, for reasons of religious belief or conscience, do not agree with the intervention.

55 *Vavřička et al. v. the Czech Republic*, para. 292.

56 *Vavřička et al. v. the Czech Republic*, para. 301.

57 *Vavřička et al. v. the Czech Republic*, para. 302.

In conclusion, the contours of the Vavřička case suggest that making vaccination against COVID-19 compulsory is in line with the convention[58] if the vaccine is considered safe[59] by the scientific community, administered only indirectly by the state, health authorities take the necessary precautions – which are reflected in particular in the individualised assessment of the suitability of the vaccine – and the legislator also provides for the possibility of claiming compensation in the event of damage to health caused by the vaccine.[60]

58 That conclusion is in line with the decisions of the Austrian, German and Hungarian constitutional courts regarding the compatibility of COVID-19 vaccines with national constitutions. See Horváth 2022, 37.

59 Challenging the safety of COVID-19 vaccines was one of the key issues of the decisions of the Italian constitutional court as well. Horváth, Ungvári, 2023, pp. 11–12.

60 Vinceti, 2021.

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Part V

SAFEGUARDING SELF-EXPRESSION

Chapter 13

Freedom of Thought, Conscience, and Religion under the ECHR, with Special Regard to Central Europe

Dalibor Đukić

Abstract

The European Convention on Human Rights (ECHR) was drafted under the auspices of the Council of Europe (CoE) and specifies the fundamental substantive rights to be protected for citizens of CoE member states. This paper scrutinizes the ECHR provisions dealing with freedom of thought, conscience, and religion, and the relevant European Court of Human Rights (ECtHR) judgments concerning freedom of religion with a special emphasis on central European countries. The paper begins with a brief history of religious tolerance across the region of Central Europe. Considering the close relationship between the legal framework to protect religious freedom and the model of state-religion relations, the paper explores the system of cooperation between the state and religion, problems of concluding agreements between the state and religious groups, issues stemming from the multi-tiered registration systems, and conflicts between freedom of expression and freedom of religion. The analysed case law emphasises the importance of equal treatment of religious organisations, while the cooperation model of state-religion relations, which accommodates diverse religious needs, should be implemented in a manner that allows balancing between cooperation and discrimination concerns, as highlighted in the ECtHR rulings.

Keywords: Freedom of thought, conscience, and religion, State-religion relations, multi-tiered registration systems, Central Europe

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1. Introduction

Religion has always played a role in international relations. The freedom of religion stands as one of the oldest internationally protected rights, albeit with initial protections differing considerably in scope and regulatory mechanisms. Post-World War II, the freedom of thought, conscience, and religion was protected as a fundamental human right. Basic human rights instruments encompass norms safeguarding religious freedom, including regional human rights regimes. In the same period, various multinational organisations that focus on human rights issues were established. From a human rights perspective, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, is the most effective of the regional instruments.

Central Europe boasts a longstanding tradition of religious tolerance. Since 1990, all states within the region are members of the Council of Europe and helped ratify the ECHR. In the early 21st century, the first complaints regarding alleged violations of religious freedom in these countries were brought before the European Court of Human Rights (ECtHR). This paper analyses the ECHR provisions safeguarding religious freedom, the challenges arising from their implementation in central European countries, and the relevant ECtHR jurisprudence in the field of religious freedom protection.

Consequently, the paper commences with a concise history of religious freedom protection in Central European countries (2.1). Recognising the vastness of the historical legal regulations concerning religious tolerance and freedom across the region, this paper focuses on crucial legal sources and historical developments impacting religious freedom at regional and universal levels. The subsequent section presents an analysis of the relevant ECHR provisions (2.2). Given the close relationship between the legal framework to protect religious freedom and the model of state-religion relations, one section of this paper is dedicated to exploring the system of cooperation between the state and religion, which is characteristic of all Central European countries (3). Following this, the paper scrutinizes one of many important aspects of religious freedom protection in Central Europe: the multi-tiered registration systems (4). The last two sections address agreements (concordats) between states and religious organisations within the same region (5) and the issues arising from the conflict between freedom of religion and freedom of expression (6). Finally, the conclusion synthesises the findings derived from the analysis.

2. International protection of religious freedom

2.1. Brief historic overview

Religions played a specific role in ancient and medieval societies, as well as in the relations between different states and their rulers. Historical analysis of religious freedom evolution typically includes the treaties of Augsburg (1555) and Westphalia (1648) that allowed Lutherans and Calvinists to freely practice their religion with certain limitations.[1] This perspective on the influence of religion on European public order should be supplemented by documents from the Central European region. Among these, the Edict of Torda should be mentioned as one of the earliest European documents to promote the *idem quam vellet* principle.[2]

The freedom of communities to freely choose and maintain their religious affiliations was protected by the following statement: "preachers should voice the Gospel everywhere, each as he understands it, and if the community wants to receive it, then, it is fine, but if not: no one should force them if their soul is unhappy; the community shall be able to belong to the preacher whose teaching she (the community) likes. For this, no one from the superintendents or others shall be able to offend the preachers; no one shall be mocked on religious grounds, according to the previous constitutions. No one is allowed to threaten someone with prison or with deprivation of his place, for his teachings; because faith is God's gift, it comes from hearing, and hearing comes from the Word of God."[3] It is evident that this regulation enshrined the collective aspect of religious freedom, granting religious communities the right to choose their pastors and confessions. However, the rights of Jews, Muslims, and Orthodox Christians, who constituted the majority, were not safeguarded by this edict.[4] Even though the Edict of Torda did not protect individual freedom of religion or conscience – and left outside of the scope of protection the adherents of three traditional Transylvanian religious communities – at the time it represented a unique regulation of religious matters in the multi-religious principality of Transylvania.

Despite the Empire's legal system being based on Islamic law, various religious groups in the Ottoman Empire, primarily Christians and Jews, enjoyed special autonomy through the millet system.[5] By virtue of the capitulations and peace treaties between the Ottoman Empire and Christian European states, various privileges were established for Christian merchants, pilgrims, and even holy places. Notably, not only did the treaties of the 18th and 19th centuries affirm the provisions of the capitulations and previous peace agreements, but they also granted Christian emperors

1 Evans, 2004, pp. 4–5.
2 Rotaru, 2013, p. 18.
3 *Monumenta Comitialia Regni Transsylvaniae. Erdélyi Országgyűlesi Emlékek*, p. 78.
4 Peicu, 2018, p. 360.
5 Emon, 2012, p. 44; Braude, 2014, p. 65.

the authority to intercede for Catholics (such as the Austrian emperor) and Orthodox Christians (like the Russian tsar) residing within the Ottoman Empire.[6] Some religious freedom issues were strategically leveraged in international politics to advance diplomatic and political objectives. Nevertheless, religious freedom emerged as an important issue of European public order and was regulated by international peace treaties.

Following the First World War, the development of international religious freedom was closely tied to the Central European region. The formal recognition of Poland was coupled with the establishment of a minority treaty that safeguarded the religious rights of minority groups in Poland, with a particular focus on the Jewish community. This system of minority protection was subsequently expanded to other Central European states, including Czechoslovakia, the Serb-Croat-Slovene State, Greece, and Romania. A key provision of the treaties that safeguarded religious freedom stipulated that "All inhabitants shall be entitled to the free exercise, whether public or private, of any creed, religion, or belief, whose practices are not inconsistent with public order or public morals."[7] While efforts were made to extend the scope of minority protection to all members of the League of Nations, they did not ultimately achieved the desired results.[8]

In the aftermath of the Second World War, freedom of religion or belief was protected as a fundamental human right. During the Cold War era, Central Europe witnessed the systematic violation of fundamental human rights, with religious freedom being suppressed on ideological grounds. Furthermore, religious freedom assumed a pivotal role in delineating what is often referred to as the 'spiritual' or 'moral' Cold War frontlines. A significant incident in Central Europe, occurring shortly after the adoption of the Universal Declaration of Human Rights (UDHR), had a profound influence on the future safeguarding of religious freedom. The imprisonment of Hungarian Cardinal József Mindszenty in December 1948 – on fabricated charges of treason – triggered an international outcry. The Mindszenty affair initiated the adoption of one of the UN's earliest country-specific resolutions on human rights. The resolution, passed by the UN General Assembly in April 1949, condemned the "suppression of human rights and fundamental freedoms" in Hungary and Bulgaria. It underlined the obligations of these states, as stipulated in the Peace Treaties of 1947, to uphold, *inter alia*, religious freedom. This episode underscored the vital importance of religious freedom in the broader mid-20th century discourse on human rights.[9]

The shift from the protection of group and minority rights to individual rights and freedoms was articulated in what is commonly referred to as the International Bill of Rights. This framework consists of the UDHR (1948), the International Covenant

6 Evans, 1997, pp. 59–63.
7 Durham, Scharffs, 2019, p. 81.
8 Evans, 1997, p. 142.
9 Lindkvist, 2017, pp. 2–3.

on Economic, Social and Cultural Rights (ICESCR, adopted in 1966 and in force from 1976), and the International Covenant on Civil and Political Rights (ICCPR, adopted in 1966 and in force from 1976). These pivotal human rights instruments enshrine the freedom of religion alongside the freedom of conscience. During the drafting of the UDHR, P.C. Chang – the Human Rights Committee delegate from China – proposed the inclusion of the Chinese word 'ren' as a guiding principle in the preamble. Ren is a fundamental concept in Confucianism emphasising the responsibilities and duties of superiors toward their subordinates. The literal translation of this word is 'two-man mindedness', often interpreted in English as empathy or compassion.[10] This serves as just one example of the influence of religion on the formulation of human rights protection instruments. However, the term 'ren' was translated in the first article of the UDHR as conscience, while the freedom of thought and conscience was guaranteed in Article 18, along with the freedom of religion. Nonetheless, had 'ren' as a principle been adopted by the committee, it would have contributed to a balance between rights and responsibilities in the text of the UDHR.

Nevertheless, the protection of religious freedom as outlined in the UDHR impacted not only universal but also regional human rights protection instruments. Similarities in wording can be observed between the UDHR and human rights conventions in Africa, the Americas, and Europe. This paper will primarily concentrate on the European system of human rights protection, with a specific focus on the protection of religious freedom in Central European states.

2.2. The European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was opened for signature by the Council of Europe (CoE) on September 4 1950, and entered into force on September 3 1953. The Council of Europe, from a human rights perspective, stands as the most effective among regional organisations dedicated to human rights issues, and plays a pivotal role in the promotion of freedom of religion or belief. The ECHR delineated the fundamental substantive rights that require protection, and established mechanisms for enforcing these rights. Three key institutions were established for enforcement: the European Commission of Human Rights, the European Court of Human Rights (ECtHR, established in 1959), and the Committee of Ministers of the Council of Europe. While the ECtHR occasionally faces criticism for its "growing backlog of cases",[11] its extensive jurisdiction is particularly noteworthy given the substantial number of states that have consented to its jurisdiction.[12]

10 Durham, Scharffs, 2019, p. 83.
11 Helfer, 2008, p. 127.
12 Durham, Scharffs, 2019, p. 94.

Religious freedom is safeguarded under Article 9 of the ECHR, which states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[13]

Furthermore, Article 14 ensures the enjoyment of all rights without discrimination on any grounds, including religion. Additionally, for the protection of religious freedom Article 2 of the First Protocol holds special significance. This provision had to be included in a separate protocol due to the inability to reach an agreement on its wording in time for the signing of the main instrument.[14] Article 2 of the First Protocol states: "No person shall be denied the right to an education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

There are textual and substantive similarities between Art. 9 and neighbouring guarantees in the ECHR. Art. 9 guarantees not only the internal aspect of freedom of thought, conscience, and religion, but also the external – i.e., the manifestation of internal beliefs. This connection, both in terms of the text's formulation and its substantive content, is notably apparent when considered in conjunction with the freedoms of expression and of assembly and association, as articulated in Articles 10 and 11. In fact, many cases alleging a violation of Art. 10 and 11 relate to the protection of religious freedom.[15] The use of the terms 'thought, conscience and religion' indicate a wide scope of protection provided by Art. 9. Nevertheless, the court has adopted a narrower approach in practice. Be that as it may, the protection provided by Art. 9 extends not only to religious beliefs but also to non-religious convictions.[16] It is important to note that the ECtHR has refrained from providing a definitive interpretation of what qualifies as 'religion'. The court has explicitly recognised that: "it is clearly not the Court's task to decide *in abstracto* whether or not a body of beliefs and related practices may be considered a religion."[17]

The first case delivered by the ECtHR under Article 9 was Kokkinakis v. Greece in 1993, nearly 35 years after the court's establishment.[18] The European Commission

13 *European Convention* [Online]. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG.

14 Durham, Scharffs, 2019, p. 102.

15 Murdoch, 2012, p. 12.

16 Murdoch, 2012, pp. 16–17.

17 ECtHR, Kimlya and others v. Russia, Application Nos. 14307/88, Judgment of 1 October 2009, para. 79.

18 ECtHR, Kokkinakis v. Greece, Application No. 76836/01 and 32782/03, Judgment of 25 May 1993.

of Human Rights functioned as a screening body for the court and was empowered to resolve numerous cases. During its early years the commission refused standing to religious organisations under Art. 9, acknowledging the right to religious freedom exclusively for individuals and not for religious communities.[19] Until its abolition in 1998, the commission had previously handled several Article 9 cases, while the European Court had addressed various cases involving religious matters but decided under alternative ECHR provisions. Since 1993, there has been a noticeable proliferation in the jurisprudence concerning Article 9.

The Kokkinakis case involved a Greek citizen who faced conviction for proselytism, an activity proscribed by Greek law. The court acknowledged the state's margin of appreciation "in assessing the existence and extent of the necessity of an interference", and underlined the state's obligation to neutrality and impartiality in religious matters. Employing the test of proportionality, the court concluded that the Greek government's actions had infringed upon the freedom to manifest one's religion.[20] The court adopted the dichotomy between proper and improper proselytism, which has been applied in other cases as well.[21] It is a noteworthy coincidence that the first case in the United States establishing the applicability of the Free Exercise Clause to the states – and the first Article 9 case in Europe – both involved evangelism.[22]

3. The model of cooperation in Central Europe

Even in the first case that was delivered by the ECtHR for an alleged violation of Art. 9, the court accorded a certain margin of appreciation to domestic authorities.[23] Neither the ECHR nor the court have specified which model of state-religion system should be considered as proper or aligned with the provisions of the ECHR. In Europe, it is possible to identify a wide range of different configurations of state-religion relationships. An extreme example is the states with positive identification of state and religion which maintain an established or official church. The most prominent example is the United Kingdom, in which the monarch is the head of the Church of England, bishops are members of the House of Lords, and the Anglican Church has the status of an established church. Conversely, just across the Channel, since the 18th century the rigid system of separation of religion and state has been implemented in France, known also as *laïcité*.

19 Evans, 1997, p. 286.
20 ECtHR, Kokkinakis v. Greece, Application No. 14307/88, Judgment of 25 May 1993, paras. 45–49.
21 Ahdar, Leigh, 2013, p. 464.
22 Supreme Court of the United States, Cantwell v. Connecticut, 310 U.S. 296 (1940).
23 Legg, 2012, p. 61.

Between those extreme models, there is a number of different configurations of state-religion relations. For example, the model of historically favoured and endorsed churches can be found in Roman-Catholic countries, in which the Roman Catholic Church acquires a special place in the country's history and traditions and sometimes enjoys special benefits and favoured status. The model of a preferred set of religions is interconnected with the multi-tier systems of registration of religious organisations, which have been operating in all Central European countries. A variation of this model is the system of traditional churches, in which several religious organisations are distinguished and enjoy a preferable status. Finally, the most prominent system in Europe is the model of cooperation between the state and religious organisations. The state and religion are formally separated, but they cooperate in a variety of ways. Religious instruction in public schools is usually subsidised by the state, while the maintenance of religious buildings and payments of religious servants are provided from public funds. The cooperation between the state and certain religious organisations is usually regulated in detail by special agreements.[24]

The selection of a model of state-religion relationship remains within the scope of domestic authorities' margin of appreciation.[25] The ECtHR has repeatedly stated that "states enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities."[26] This does not mean, however, that a specific model can be used as a ground for discrimination against certain religious groups. Each of the mentioned models shall guarantee the neutrality of the state in religious affairs and equality of all religious organisations, despite all the differences in their legal status that each of the models implies.

Central European states have adopted the cooperation model of state-religion relations,[27] even though they tend to incline towards models with a stronger identification of the state and religion. This model comes with numerous variations and allows the state to tailor its support to the specific requirements of various religious organisations, enhancing their status to fulfil their unique social roles. Most of the countries of the region have selected this model because it was perceived as appropriate in order to revitalise religious communities after decades of persecution during communist rule.[28] For the purposes of this paper, a few key characteristics of this model in Central Europe will be scrutinised. These characteristics include the multi-tiered system for registering religious organisations and the implementation of special agreements between the state and specific religious organisations. These aspects are chosen because they have been assessed by the ECtHR and are regarded

24 More on the mentioned Durham, Scharffs, 2019, p.
25 Martínez-Torrón, 2019, p. 161.
26 ECtHR, Supreme Holy Council of the Muslim Community v. Bulgaria, Application No. 39023/97, Judgment of 16 December 2004, para. 96.
27 Sobczyk, 2021, p. 112; Đukić, 2021, p. 148; Vladar, 2021, p. 201; Staničić, 2021, p. 229; Savić, 2021, p. 25; Nemec, 2021, p. 67; Csink, 2021, p. 84.
28 Torron, Durham, 2015, p. 16.

as particularly challenging to align with international standards for the protection of religious freedom.

4. Multi-tiered systems of registration of religious organisations

The so-called multi-tiered systems of registration of religious communities are among the most controversial issues in the field of legal recognition of religious groups. As the Organization for Security and Co-operation in Europe has noticed, the obstacles to the acquisition of legal entity status can "negatively affect the rights of a wide range of religious or belief communities."[29] Those systems are intertwined with the already-mentioned model of cooperation between the state and religion. Even though cooperationist countries tend to cooperate with religions, they are not able to establish cooperation of exactly the same extent with all of them. There are various reasons that can justify this different treatment of diverse religious group - such as historical reasons, the importance of certain religions for national identity and statehood, social roles and activities of certain religions, etc. The ECtHR view is that "States must be left considerable liberty in choosing the forms of cooperation with the various religious communities, especially since the latter differ widely from each other in terms of their organisation, the size of their membership and the activities stemming from their respective teachings."[30] Furthermore, not all religious organisations want to have the same extent of cooperation with the state. For some of them, there are doctrinal obstacles that do not allow them to establish close relations with the state, or they do not possess the resources to operationalise the cooperation to a great extent. The multi-tiered systems of registration provide for both state and religious organisations the possibility to select an appropriate extent of cooperation and the legal status of a religion that can accommodate it.

Different tiers or categories of religious organisations should serve as a basis not for the separation between 'privileged' and 'unprivileged' religious groups, but as a tool for the state to "provide adequate answers to their needs, which can be different according to the size, history, and cultural roots of each group."[31] This holds exceptional significance, considering that the organisational autonomy of religious communities encompasses the freedom to structure themselves according to

29 *Guidelines on the Legal Personality of Religious or Belief Communities* [Online]. Available at: https://www.osce.org/files/f/documents/9/9/139046.pdf.

30 ECtHR, Magyar Keresztény Mennonita Egyház and Others v. Hungary, Applications Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, Judgment of 8 April 2014, para. 108.

31 Durham, Scharffs, 2019, p. 489.

their own preferences.[32] Nevertheless, the varying legal statuses among different religious groups may suggest that these recognition systems discriminate against non-traditional religious groups.[33] Therefore, in this paper Durham and Scharffs' 'adequate needs argument' will be used to assess if it applies without problems in Central Europe.

To establish a similar extent of cooperation with religious communities that have similar needs, states can provide religious groups with different types of legal recognition. Those are so-called multi-tiered registration systems. They have the following structure: there is a top tier limited to a few religious organisations which enjoy numerous advantages such as tax exemptions, state funding, access to public institutions, etc. Then, there is usually an intermediate category that is less exclusive and does not provide many benefits. Finally there is the last tier, which is easily accessible and provides only a basic form of legal personality. The advantage of multi-tiered registration systems is that they secure the right of religious communities to obtain (at least basic) legal personality, without fulfilling burdensome requirements. The right of religious organisations to acquire legal personality is part and parcel of the protection of freedom of religion or belief.[34] Those systems - in many variations - are operating in almost all Central European countries.

When it comes to the Central European states, there is a problem not only of the multi-tiered registration systems and their alignment with the provisions of the ECHR, but also the problem of the deregistration and re-registration of religious communities. After the collapse of the Soviet regime, many of those countries introduced an extremely liberal system of religious organisation recognition. Therefore, in some of them, there was a notable increase in the number of officially recognised religious organisations, particularly after 1989. Nonetheless, at the beginning of the XXI century new pieces of legislation were enacted in most of those countries. More restrictive regulations were applied concerning the registration of religious groups, and many previously recognised religious groups lost their legal personality.

In 2011 Hungary adopted a new Church Act, which replaced the liberal 1990 Church Act that recognised as Churches all religious organisations whose membership exceeded one hundred persons. In January 2012 the multi-tier system of recognition came into force, according to which religious organisations could exist either as 'churches', which were the top tier, or 'associations carrying out religious activities', which were the lower level. The number of churches was reduced from 358 to 14, which were listed in the Appendix to the 2011 Church Act. This list was extended in 2012, raising the total number of recognised churches to 32. The Constitutional Court of Hungary stated in its verdict that the legislation provides incorporated churches with additional rights that place them in advantageous situations as compared to the religious associations. Therefore, in 2013 the Constitutional Court

32 Doné, 2016, p. 24.
33 McFaul, 2017, p. 27.
34 Bielefeld, Ghanea, Wiener, 2016, p. 217.

of Hungary annulled all the provisions that deprived religious organisations of their church status. For that reason the act was amended, but the distinction between churches and religious associations was kept. Incorporated churches in Hungary enjoy numerous benefits in the fields of taxation, education, media, cooperation with state institutions, etc.

Several religious organisations that had lost their status challenged the 2011 Church Act before the ECtHR.[35] The court noted that states have a 'positive obligation' to set up the system that provides for religious organisations the legal personality status underlining that their duty of neutrality and impartiality is incompatible with any assessment of the legitimacy of religious beliefs. According to the court's view, the convention (Art. 11 of the ECHR) does not imply that states must provide specific legal status to religious communities, but they must ensure that religious organisations are able to obtain "legal capacity as entities under the civil law". Furthermore, any distinctions in the legal status of religious communities must not negatively affect their reputation in public opinion, whereas this differentiation has an impact on their organisation and subsequently on their individual and collective practice of religion.[36] Furthermore, the court relates the multi-tiered systems with the 'historical-constitutional traditions' that were operating in European countries before the ratification of the convention. Even though this practice is aligned with the provision of the convention, the category of privileged religious communities must encompass recent historical developments. However, the court assessed that multi-tier registration systems do not violate the ECHR *per se,* and affirmed that states enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities.[37]

In the concrete case, the court implemented the proportionality test, concluding that legitimate concerns of the government over the huge number of religious organisations in the country could have been resolved by less rigid solutions, such as judicial control of religious organisations that have abusive character. The ECtHR concluded that "the advantages obtained by incorporated Churches are 'substantial and facilitate their pursuance of religious aims on account of their special organisational form'." Therefore, the court found a violation of Art. 11 in light of Art. 9 of the ECHR. [38]

35 ECtHR, Magyar Keresztény Mennonita Egyház et al. v. Hungary, Applications Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, Judgment of 8 April 2014.

36 ECtHR, Magyar Keresztény Mennonita Egyház and Others v. Hungary, Applications Nos. 70945/11, 3611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, Judgment of 8 April 2014, paras. 91–91.

37 Coleman, 2020, p. 128.

38 ECtHR, Magyar Keresztény Mennonita Egyház and Others v. Hungary, Applications Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, Judgment of 8 April 2014, paras. 110–115.

It could be concluded that – according to the court's interpretation of the ECHR – multi-tiered systems should be structured in a non-discriminatory manner, whereas any differences in treatment and legal status must be based on objective and reasonable criteria.

5. Agreements between states and religious organisations

Another characteristic of the Central European countries is the system of agreements established between the state and various religious organisations. Virtually all countries in Central Europe have executed such agreements, governing the involvement of religious groups in public services, state subsidies, and more. Even states with non-Catholic majorities, like Serbia, have engaged in agreements with the Holy See to regulate cooperation in higher education.[39] These agreements are interlinked with the system of cooperation between the state and religious organisations, as well as with state neutrality and religious autonomy.[40] They serve to deepen cooperation between the state and religious organisations and to regulate in detail, on one hand, various privileges and benefits afforded to religious organisations and, on the other hand, their specific obligations *vis a vis* the state.

Similar to other aspects of cooperationist regimes, the primary issue with the system of agreements is that states typically do not engage in agreements with all religious organisations. These agreements could potentially be utilised to discriminate against one or more religious organisations or to disadvantage a particular religious community.[41] In certain jurisdictions, there exist stringent regulations outlining the requirements that a religious community must fulfil to enter into an agreement with the state. Those requirements could be the number of adherents, the period of existence within a certain jurisdiction, the social aims, and activities of the religious group, etc. However, the fact that certain religious communities have entered into agreements with the state differentiates them from the rest of the religious organisations that have not signed such an agreement. The ECtHR noted that "the conclusion of agreements between the State and a particular Church establishing a special tax regime in favour of the latter does not, in principle, contravene the requirements of Articles 9 and 14 of the Convention, provided that there is an objective and reasonable justification for the difference in treatment and that similar agreements may

39 Agreement between the Republic of Serbia and the Holy See on the Cooperation in Higher Education, *Official Gazette of the Republic of Serbia*, No. 17/2014.

40 Đurić, 2019, p. 361.

41 This was the case in Montenegro, where the government had been refusing to enter into an agreement with a major religious organisation for years. Robbers, 2021, p. 55.

be entered into by other Churches wishing to do so."[42] Consequently, the system of agreements should be accessible to all religious organisations, and any distinctions among them must be based on objective and reasonable justifications.

An issue usually appears when the state denies the request of a particular religious organisation to enter into an agreement. A consortium of registered religious organisations in Croatia sought to conclude an agreement with the Croatian government in June 2004. This agreement would allow them to provide religious instruction in public schools, conduct religious marriages with civil effects, and offer pastoral care in public institutions. After six months the relevant authority informed them that they did not meet the newly established requirements set by the government. Subsequently, this group of churches lodged an application with the ECtHR. The court examined the case and found that the applicants were treated differently compared to religious organisations that had previously concluded agreements with the government. Therefore, the court had to evaluate whether this differentiation "had 'objective and reasonable justification', that is, whether it pursued a 'legitimate aim' and whether there was a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised." The court noted that the Croatian government had entered into agreements with religious organisations that did not fulfil the newly established criteria before the applicants had submitted their request. The court concluded that the criteria established by the government were not equally applied, and that the differential treatment lacked any objective and reasonable justification. Consequently, the court found a violation of Article 14 in conjunction with Article 9 of the ECHR.[43]

The analysed case endorses the equal treatment of religious organisations seeking agreement with the state. It underscores the need for consistent application of criteria by governments when entering into agreements with religious organisations. Differential treatment without valid justifications constitutes a breach of human rights protections outlined in the ECHR. One could conclude that when a state enters into an agreement with a religious community, it holds the obligation to engage in similar agreements with any other religious community that seeks this type of relationship with the state.

42 ECtHR, Alujer Fernández and Caballero García v. Spain, Application no. 53072/99, Judgment of 14 June 2001.

43 ECtHR, Savez crkava 'Riječ Života' and others v. Croatia, Application no. 7798/08, Judgment of 9 March 2011.

6. Freedom of religion and freedom of expression

Freedom of expression shares a historical connection with freedom of religion, originating from the struggle of religious dissenters to freely express their beliefs. However, modern societies face two distinct tensions between these rights. One involves religiously motivated speech that offends others, while the other entails offensive speech against religion causing harm to believers or the religion itself.[44] Balancing between freedom of religion and freedom of expression poses diverse challenges globally.[45]

A recent case involving a Central European state drew attention due to the ECtHR's inconsistent approach. Many European countries have criminal laws where offending religious feelings or inciting religious hatred constitutes an offense. In the case of Rabczewska v. Poland, a renowned Polish singer was convicted for insulting the Holy Bible during an interview for a news website. After the publication of the interview, two individuals filed a complaint with the prosecutor, who indicted the singer for "offending the religious feelings of the two individuals by insulting the object of their religious worship." Polish courts of all instances found her guilty of insulting an object of veneration.[46]

The ECtHR, referencing the Handyside case, reiterated that freedom of expression – as a foundation of democratic society – encompasses both acceptable and offensive ideas. The court restated that states have a positive obligation to ensure peaceful coexistence and tolerance among all religions and those who are not affiliated with any religion. Also, it acknowledged the state's broader margin of appreciation when regulating expression connected to religion. However, in the court's opinion the domestic courts had not assessed properly whether the applicant's statements constituted factual statements or value judgments, and they failed to weigh competing interests – i.e. they did not scrutinise whether the applicant's statements were capable of inciting hatred or disturbing religious peace and tolerance in Poland. The court concluded that the statements under consideration "did not amount to an improper or abusive attack on an object of religious veneration, likely to incite religious intolerance or violating the spirit of tolerance, which is one of the bases of a democratic society."[47] Therefore, the court found a violation of Art. 10 of the ECHR.

It should be noted that in other similar cases, the ECtHR delivered decisions in favour of what was defined as 'the protection of religious feelings',[48] even though it

44 Durham, Scharffs, 2019, pp. 199–200.

45 E.g. see: ECtHR, Vejdeland v. Sweden, Application No. 1813/07, Judgment of 9 February 2012; Supreme Court of Sweden, The Pastor Green case, Case No. B 1050-05, Judgment of 29 November 2005; Supreme Court of the United States, Joseph Burstyn, inc. v. Wilson, 343 U.S. 495 (1952).

46 ECtHR, Rabczewska v. Poland, Application No. 8257/13, Judgment of 30 January 2023.

47 ECtHR, Rabczewska v. Poland, Application No. 8257/13, Judgment of 30 January 2023, para. 64.

48 ECtHR, Otto-Preminger-Institut v. Austria, Application No. 13470/87, Judgment of 20 September 1994; ECtHR, İ.A. v. Turkey, Application No. 4257/1998, Judgment of 13 December 2005; ECtHR, E.S. v. Austria, Application No. 38450/12, Judgment of 18 March 2019.

had been noted that ECHR does not guarantee such a right, nor can it be derived from Art. 9 of the ECHR.[49] Tommaso Virgili has emphasised that "'religious feeling' is a vague phrase hard to define and inevitably linked to the ethos and sensitivity of the individual or of that (allegedly) prevalent in the group'."[50]

The inconsistency of the court's jurisprudence in blasphemy cases becomes even more evident when comparing the case under scrutiny with E.S. v. Austria, where the applicant was convicted for blasphemous remarks against the Prophet Mohamed. The primary difference between these cases is in the context in which the statements were made.[51] E.S.'s statement occurred during a seminar hosted by the right-wing Freedom Party Education Institute, while Rabczewska's remarks were part of an interview conducted for a news website. It could be argued that interviews with singers are typically perceived as less impactful than seminars organised by institutes, potentially justifying the court's conclusion that E.S.'s statement "contained elements of incitement to religious intolerance", whereas similar blasphemy against the Bible's authors did not.[52] However, the court overlooked some crucial facts, namely the wide accessibility of Rabczewska's interview compared to the limited audience of less than 30 people for E.S.'s statement. Additionally, the continuous public impact of Rabczewska's interview contrasts with the one-time use of E.S.'s statement. To ensure a more consistent jurisprudence and coherent reasoning, the court should refrain from implementing vague standards like 'religious feelings', 'religious peace', and 'factual accuracy' in blasphemy-related cases. This approach could ensure a higher degree of consistency of the court's decisions.

7. Conclusions

The analysis indicates that the Central European region demonstrates a positive track record in protecting freedom of religion. Instances of cases falling under Article 9 are relatively infrequent, and actual infringements upon religious freedom are uncommon. The jurisprudence established by the ECtHR reveals that the majority of issues stem from other rights interlinked with Article 9, such as the freedom of association and assembly, freedom of expression, and the prohibition of discrimination on grounds of religion or belief. In essence, the court has found violations relating to the collective rights of religious organisations rather than individual aspects of religious freedom.

49 Abdou, 2022, p. 142.

50 Virgili, T. (2022) Rabczewska v. Poland and Blasphemy before the Ecthr: a Neverending Story of Inconsistency [Online]. Available at: https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/.

51 For the opposite opinion see: Virgili 2022.

52 Compare E.S. v. Austria, para. 57 with Rabczewska v. Poland, para. 64.

Central European states typically adopt a model of cooperation between the state and religious organisations, with inclination toward stronger state-religion identification models. This cooperative model permits tailored state support for religious organisations, aiming to revive religious communities following historical periods of persecution, particularly during communist rule. The challenge persists in aligning these models with international standards of religious freedom protection, ensuring state neutrality in religious affairs and equal treatment of all religious organisations.

Central to this context are multi-tiered systems for registering religious organisations, which remain prone to arbitrariness. While these systems protect the autonomy of diverse religious organisations, they can foster discrimination against non-traditional religious groups. The ECtHR acknowledges states' wide margin of appreciation in their relationships with religious communities, but emphasises the need to be operated in a non-discriminatory manner. The ECtHR's scrutiny, evident in cases like Hungary's Church Act, underlines the requirement for objective and reasonable criteria in differentiating legal statuses among religious entities.

The multi-tiered registration systems, while intended to accommodate diverse religious needs, should be implemented in a manner that allows balancing between cooperation and discrimination concerns, as pointed out in ECtHR rulings. The court's emphasis on non-discrimination within these systems underlines the necessity for fair and justified differentiation among religious groups, echoing the principles of the ECHR in protecting religious freedom.

All Central European states have entered into agreements with various religious organisations. The ECtHR has stressed the necessity for fair access to these agreements, emphasising that any differentiation among religious groups must be objectively justified, aligning with Article 9 and Article 14 of the European Convention. A case involving Croatia highlighted the importance of consistent criteria and unbiased treatment when entering into agreements with religious entities. Differential treatment by states in accepting agreements was challenged before the ECtHR, resulting in the court finding a violation of Article 14 taken in conjunction with Article 9 where legitimate justifications were lacking. The court reiterated that states engaging in agreements with one religious community hold the obligation to provide similar opportunities to other religious organisations seeking a similar arrangement.

The intersection between freedom of expression and freedom of religion is evident in cases where offensive speech affects religious beliefs. The ECtHR's varied rulings on blasphemy cases underscore inconsistencies in its jurisprudence. While the court recognises the importance of freedom of expression, it also attempts to achieve a balance between protecting religious feelings and ensuring freedom of speech. This is especially evident in contrasting cases like Rabczewska v. Poland and E.S. v. Austria, where context and perceived impact played pivotal roles. The court should establish explicit criteria in handling blasphemy issues to ensure a more consistent application of human rights protections.

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Chapter 14

Case Law of the European Court of Human Rights on Freedom of Expression in the Online environment with Special Regard to Central Europe

János Szinek

Abstract

The online space raises trending issues related to freedom of expression, such as fake news, radical and extremist content, hate speech, and even excessive limitations imposed by the platforms. This new digital environment poses several unique challenges for the European Court of Human Rights: it is exceedingly complicated to consider all the specific features of the digital realm alongside the basic principles outlined in the Article 10 of the European Convention on Human Rights. Since the European Court of Human Rights serves as the most important interpreter of human rights standards in Europe, it plays a vital role in interpreting the right to freedom of expression in the digital environment. The case law of the European Court of Human Rights also affects its territorial jurisdiction, making the court an influential norm entrepreneur. This paper aims to analyse three crucial cases of the European Court of Human Rights concerning liability for comments and hyperlinking in the online space.

Keywords: online platforms, freedom of expression, liability for comments, liability for hyperlinking, European Court of Human Rights

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1. Introduction

Article 10 of the European Convention on Human Rights[1] (hereinafter referred to as the ECHR) declares that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[2] Nowadays, complying with this declaration in the online era is not easy, especially for online platforms, including news agencies and social media. While online platforms have undoubtedly enhanced democracy on the internet, they have also given rise to new, unprecedented threats that also challenge traditional doctrines of freedom of expression in complex ways.[3]

The European Court of Human Rights (hereinafter referred to as the ECtHR) has repeatedly affirmed that online platforms serve as a means of exercising freedom of expression. It has held that the protection of Article 10 of the ECHR applies not only to the content of the information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to know and communicate information.[4,5] A substantial portion of global social discourse now unfolds online. These platforms wield significant influence over the exercise of fundamental rights, including freedom of expression, through actions such as comment deletion, moderation, user bans, or repositioning of comments within discussion threads.[6] There is an urgent need to safeguard the freedom of online media, establish comprehensive regulations, and address the considerable power they currently hold in shaping democratic processes.

The online sphere confronts the ECtHR with novel challenges concerning the right to freedom of expression. The ECtHR has consistently affirmed that the fundamental principles and standards articulated in Article 10 of the ECHR are fully applicable to the online environment. However, it is worth noting that the internet represents a unique tool within the information and communication framework, with vastly greater capacities for storing and disseminating information and expressions compared to traditional media. In numerous cases, particularly those involving hate speech, the ECtHR has acknowledged that "the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms is certainly higher than that posed by the press, as unlawful speech, including hate speech and calls to violence, can be disseminated as never before,

1 The Convention for the Protection of Human Rights and Fundamental Freedoms
2 The Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10 (1) and (2).
3 See Pew Research Center 2020, Chapter 3.
4 For more, see Cengiz and Others v Turkey (Applications nos. 48226/10 and 14027/11.), and Ahmet Yildirim v Turkey (Application no. 3111/10.) cases.
5 For more on this topic, see Jørgensen, 2019, pp. 191–316.
6 Balkin, 2009, pp. 427–444.

worldwide in a matter of seconds, and sometimes remain persistently available online."[7]

The online space also raises new issues related to freedom of expression, such as fake news, radical and extremist content, hate speech, and even overboard limitations. The new environment also poses several unique challenges for the ECtHR: it is very complicated to consider all of the specific features of the digital environment along with the basic principles formulated in the Article 10 of the ECHR. As the ECtHR is the most important interpreter of the human rights standards in Europe, the court plays a vital role in interpreting the right to freedom of expression in the digital environment. It can be seen that the case law of the ECtHR impacts its territorial jurisdiction, and as a result, it can be said that the court acts as an 'influential norm entrepreneur'.[8,9]

The ECtHR has consistently recognised that the internet dramatically supports freedom of expression and is a complementary tool to traditional media. Examining the case law of the ECtHR, we can see that the court tries to limit the authorities' possibilities to interfere with the freedom of expression, as the internet is of public-service value, and it adherently supports the enjoyment of human rights. In its case law, the ECtHR found many times that the interference with internet content related to explicit sexual content, even child pornography, copyright infringements, breach of privacy law, and hate speech were in line with Article 10 (2) of the ECHR, as they were found ultimately necessary in the democratic discourse in a democratic society, and the right to freedom of expression in the digital environment was justified to a pressing social interest.[10]

This paper delves into the liability of online media platforms and internet intermediaries concerning user-generated content like blog posts, comments, and hyperlinks. It places a particular emphasis on Central Europe and scrutinises the case law of the European Court of Human Rights. In the upcoming chapters, following a concise introduction to intermediary liability on online platforms, three significant cases from the ECtHR[11] – one from Estonia and two from Hungary – will be introduced and analysed to demonstrate how the court has contributed to guaranteeing the right to freedom of expression in the digital era under Article 10 of the ECHR.[12]

7 Delfi AS v Estonia, application no 64569/09. See O'Boyle, 2020, pp. 10–11.

8 About the concept of a 'norm entrepreneur', see Oster, 2020, pp. 165–184.

9 It is worth mentioning that the ECtHR find the first violation of freedom of expression in Sunday Times v United Kingdom in 1979. The ECtHR found 925 violations of Article 10 ECHR in the period 1979–2020. For further information, please refer to the European Court of Human Rights Annual Report 2021, where you can find additional details and insights on this topic.

10 Voorfoof, 2020, p. 11.

11 For more relevant cases concerning freedom of expression in the digital world outside the European Union, see: 21-1333 Gonzalez v Google LLC (18/05/2023) and 21-1496 Twitter, Inc. v Taamneh (18/05/2023).

12 See also Benedek & Ketterman, 2020.

2. Directive on Electronic Commerce

As online platforms and social media platforms provide their services remotely, electronically, and at the individual request of the service user, they are considered information society services. According to the regulatory framework of the European Union, their activity is governed by the Directive on Electronic Commerce (hereinafter referred to as the e-Commerce Directive).[13] Analysing the key elements of the definition one by one, the e-Commerce Directive defines a service as being provided at a distance if the parties are not simultaneously present at the same time of the provision of the service; it is provided by electronic means if the communication between the origin and the destination is by wire, radio, optical, or other electromagnetic means; and it is provided at the individual request of the recipient of the service in a non-linear, continuous manner.[14] Consequently, online platforms are considered information society services.

Within this legal framework, Member States of the European Union are prohibited from requiring prior authorisation for online services. They can, however, request service providers to offer general information.[15] According to the e-Commerce Directive and its Hungarian transposition,[16] hosting providers bear no liability for infringing content or information as long as they are unaware of any unlawful conduct or infringement on the rights or legitimate interests of any party regarding the content or information. However, once the provider becomes aware of such conduct, they must immediately take measures to remove the information (content) or terminate access to it. The hosting provider is also obligated to notify the content uploader about the removal request within three days. The uploader can object to the removal; if the uploader objects, the hosting provider will reinstate the content, and only the court can order its removal. Therefore, the obligation to remove the infringing content falls on the hosting provider when it becomes aware of it. This so-called 'notice and take-down' procedure essentially focuses on the legal relationship between the user and the platform, with the courts only intervening if the content is not removed or if the content previously removed is restored by the provider based on the user's objections.[17]

It is essential to emphasise that, according to the e-Commerce Directive, service providers are not generally obligated to monitor content, and Member States cannot impose mandatory rules requiring them to do so. In itself, the notice and take-down procedure cannot provide a complete solution, as it forces online platforms to make decisions that often lead to severe dilemmas of human rights and other rights,

13 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce)

14 Hernández Sánchez, 2005, p. 21.

15 e-Commerce Directive, Sections (4) and (5).

16 Act CVIII of 2001 on Electronic Commerce and on Information Society Services

17 Julià-Barceló & Koelman, 2000, pp. 231–239.

including freedom of expression. In these matters, a platform operator cannot be expected to apply a comprehensive human rights assessment to decide on issues that often give rise to interpretative disputes between judges in an international or constitutional court.[18] In addition to the current procedural principles, there is a need for more detailed and robust legislative action, considering local cultural and legal contexts, to make it much more straightforward for platforms to determine exactly what kind of content is believed to be infringing in their country and under what conditions they can be held liable for the opacity or error of their moderation decisions. The current uncertainty poses challenges for online platforms, placing them in an almost impossible situation. Establishing an appropriate legal framework is not only in the best interest of the state and users but also ultimately beneficial for the platforms themselves.[19]

In conclusion, as per the e-Commerce Directive, platforms enjoy immunity from liability, provided they remove defamatory content as soon as they receive notice. It is only if they fail to act upon notice that they become liable for third-party content. The shortcomings of this system are well-known. In order to avoid liability, intermediaries tend to remove legitimate content. That was the situation in the Delfi case, analysed below in the following chapters. As the UN Special Rapporteur noted in his 2011 report, this has a serious chilling effect on freedom of expression.[20] This shows that determining the liability for comments and hyperlinking is a very sensitive question.

3. The Digital Services Act

In 2020, as part of the Digital Agenda for Europe for the period 2020–2030, the European Commission announced two key legislative initiatives: the Digital Services Act[21] (hereinafter referred to as the DSA) and the Digital Markets Act[22] (hereinafter referred to as the DMA), as components of the Digital Services Package. These acts were designated to fulfil the objectives set out in the Commission's previous resolution, which included maintaining competitiveness and unifying digital markets. The need for the DSA was also prompted by the issue of the exponential speed at which online platforms are developing and expanding, the complexity of their

18 Bartóki-Gönczy & Pogácsás, 2019.
19 Ibid.
20 See OHCHR 2011, 8.
21 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).
22 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

organisational structures, the complexity of their technological operations, and the speed with which infringements can be detected in large and complex companies operating globally in an online space. Following extensive negotiations, the DSA officially came into effect in November 2022. The DSA relies on the principles of the e-Commerce Directive.[23]

The prevailing legal structure for digital services has primarily been outlined in the e-Commerce Directive up to this point.[24] The regulation is of general application, binding and directly applicable in the member states of the European Union. The DSA creates numerous new obligations for service providers; however, the providers still do not have a general monitoring obligation, and one of the exculpatory grounds for liability for illegal content is that they have no knowledge of infringing content. Several times, the court has declared certain obligations in the event that the provider has been notified of infringing content or has not removed the content in question after having specific knowledge of it.[25]

The DSA enables content moderation for the purpose of content removal while also emphasizing the importance of legal assurance in questioning the motives and effectively probing the operational methods of the online platforms. However, for example, the very large online platforms deal with millions of posts and user profiles per year, and it will be extremely expensive for the platforms to operate an entire contact centre to which users can refer their requests.[26] The recently introduced legislation from the Digital Services Package establishes a broad legal framework that operates independently from, and does not conflict with, the existing laws.[27] As can be seen, by adopting the DSA, it seems that the European Union made a step forward in strengthening the system established by the e-Commerce Directive.

As a result, the intermediary service providers are still not obliged to actively monitor transmitted or stored information, and the current 'notice and takedown' principle is preserved. It means that a hosting service provider must expeditiously remove or disable access to hosted content when notified of any alleged illegality; if a hosting service provider fails to remove or disable access to the content expeditiously, the provider becomes liable for the respective allegedly illegal content.

23 For more information, see the European Parliament 2024.

24 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on electronic commerce), OJ L 178 2000, 1–16.

25 E.g., Judgment of the Court of 22 June 2021, YouTube and Cyando, C-682/18, EU:C:2021:503.

26 Opinion of Advocate General G. Pitruzzella, delivered on 7 April 2022, C-460/20, para.3, EU:C:2022:271.

27 See the European Commission 2024.

4. Delfi AS v Estonia

The Delfi AS v Estonia[28] decision is of significant importance as it addresses issues related to responsibility for online comments.

Delfi is one of Estonia's most popular online news portals. The website allows comments to be automatically published without prior moderation. However, the portal operates automated comment moderation in three ways. The first method is the so-called 'notice and take-down' system inspired by the e-Commerce Directive, whereby anyone can report an offensive comment to the editors, which is then investigated and removed if necessary. The second way is a direct notification of the person whose rights have been infringed, and the third method is an automatic filtering system that deletes comments containing certain vulgar words. The news portal has stated on its website in a disclaimer, that Delfi is not responsible for third-party comments and reserves the right to delete offensive comments. In January 2006, Delfi published an article on its website entitled SLK destroys planned ice road. The article attracted numerous comments, of which about 20 contained personal threats and abusive language against the owner and operator of the ferry company. Among the comments were several that called for the owner's death, in addition to a number of very rude and highly offensive comments. In March 2006, the ferry company owner's lawyer asked Delfi to remove the offensive comments and demanded compensation of around 32,000 euros. The offensive comments were deleted by Delfi on the same day, at which point they replied to the owner's lawyers confirming that the comments had been removed but rejecting the claim for damages. Subsequently, the owner filed a lawsuit against Delfi.[29]

The first instance county court found that the site could not be considered as the publisher of the comments and was therefore not obliged to moderate them. However, following an appeal by the owner, the county court ultimately held that the company itself should be considered the publisher of the comments and could not avoid liability by posting a disclaimer. The county court also found that the article itself was balanced but that many of the comments were vulgar and defamatory. The judgment ruled that freedom of expression did not extend to the protection of the comments concerned and awarded the owner damages of 320 euros.

In December 2008, the Court of Appeal of Tallinn upheld the judgment of the county court. The Court of Appeal stressed that the company was not obliged to exercise prior control over the comments published on its news portal, but having decided not to do so, it should have put in place some other effective system to ensure that unlawful comments were quickly removed from the portal. The Court of Appeal noted that the applicant company was not a technical intermediary for comments and that its activities were not merely technical, automatic and passive; instead, it invited users to add active comments. Thus, the applicant company was a content

28 Delfi As v Estonia, application no. 64569/09.
29 Ibid., para. 18.

provider rather than a technical provider. In June 2009, the Supreme Court rejected the appeal of the company. It upheld the judgement of the Court of Appeal but partially modified its reasoning. According to the Supreme Court, the number of comments had an impact on the number of visits to the portal and the company's revenue from the advertisements published on the portal, so the applicant company had an economic interest in publishing comments. The fact that the applicant company did not write the comments itself does not mean that it did not have control over them. Therefore, the applicant company had the right to control which comments would remain available and which would not. In addition, the Supreme Court held that in the present case, both the applicant company and the authors of the comments should be considered as the publishers of the comments. The applicant was free to choose against whom to file a lawsuit, while the owner chose the company operating the portal.[30]

Delfi referred the case to the ECtHR, arguing that the decision holding Delfi liable for the period during which the comment was available on its portal violated its right to freedom of expression under Article 10 of the ECHR. Delfi also argued that it should have been exempted from liability under EU rules on hosting providers. The key issue in the application to the ECtHR was whether holding Delfi civilly liable for the defamatory remarks disproportionately infringed its right to freedom of expression. The court concluded that the findings of the national court justified the restriction of Delfi's right to freedom of expression.

The ECtHR found that, as Delfi is a professional news publisher and operates one of the largest news portals in the country, it should have been aware of the legal context and practice regarding offensive comments. The ECtHR held that it was not disputed that the comments made by readers in response to the news published on the applicant company's internet news portal were clearly unlawful. In order to resolve the issue of balance, the ECtHR analysed four salient factors.[31]

The ECtHR first looked at the context of the comments and found that the article on the news portal Delfi dealt with a matter of public interest. The portal should have been aware that the article could provoke negative reactions and that "there was a greater than average risk that the negative comments might go beyond the limits of acceptable criticism and rise to the level of unjustified offensive statements or hate speech".[32] Secondly, the ECtHR examined the measures taken by the applicant company to prevent or remove the defamatory remarks. It concluded that, although it could not be said that Delfi had not taken steps to prevent offensive remarks, they were inadequate.[33] The court then went into more detail on the notice and take-down system applied by the applicant company, mainly because the main point of disagreement between the parties was whether the applicant company had exercised due

30 Pinto, 2015.
31 Nádori, 2015, p. 227.
32 Delfi As v Estonia, para. 156.
33 Nádori, 2015, p. 230.

diligence in applying the system.[34] The ECtHR had previously stated that it agrees with the national courts that the notice and take-down procedure applied did not ensure adequate protection of third parties' rights and, in determining the proportionality of the interference with the applicant company's freedom of expression, it also took into account the interest of the news portal in the high number of comments as this contributed to the increase in its advertising revenues. According to the court, the company must have anticipated that the comments received might include offensive remarks and could have prepared in advance to prevent this. As an alternative to the liability of the applicant company, in relation to the liability of the actual authors of the comments, the court noted that it is very difficult for an individual to establish the identity of the persons being sued and that it seems disproportionate to place the burden of doing so on the injured party. Finally, as regards the consequences of the legal proceedings for the applicant company, the court held that the fine of 320 euros awarded as damages was not disproportionate, given that Delfi is one of the largest operators of an internet news portal in Estonia.[35]

The judgment also clarifies somewhat what can be expected of a large, commercial online news portal in terms of tackling hate speech: "If accompanied by effective procedures that allow for a rapid response, the notice and take-down system may in many cases work and be an appropriate means of balancing the rights and interests of all concerned." However, in cases where a third party's comment takes the form of hate speech and direct threats to the physical safety of individuals, the rights and interests of others and of society as a whole may entitle Contracting States to hold internet news sites liable, without violating Article 10 of the ECHR, if they fail to take measures to remove clearly unlawful comments without delay, even without notifying the alleged victim or third parties.[36] According to the court, "given the specific nature of the internet, the obligations and liabilities which can be transferred to online news portals for the purposes of Article 10 may differ to some extent from those of traditional publishers in respect of third-party content."[37] At the same time, the court stressed that "the case does not concern other internet forums where third-party comments may be distributed, such as an internet forum or bulletin board where users are free to share their ideas on any topic without the discussion being in any way controlled by the platform operator; or a social media platform where the platform provider does not offer any content and where the content provider may be an individual who runs the platform or blog as a hobby."

An important element of the judgment is that the ECtHR based Delfi's liability mainly on the fact that the portal was operated for commercial purposes and that the publication of the article was justified by economic objectives. The court stressed that the judgment is not applicable to social networking sites, but it is not clear why

34 Delfi As v Estonia, para. 157.
35 Delfi As v Estonia, para. 160.
36 Delfi As v Estonia, para. 159.
37 Delfi As v Estonia, para. 113.

not. The difference may be that the offending comments in this case are not generated by the content produced by the social networking site, but social networking sites are nevertheless one of the most important means of distributing content from news portals online. However, many news sites now allow comments only on articles shared on social networking sites.

The decision imposes liability on a news portal for the comments of its users, which not only flies in the face of regulation on intermediary liability but is likely to discourage news portals from maintaining comments sections in which users can post freely or anonymously. This would interfere with a valuable forum for expression, discussion, and engagement with issues online and constitutes a significant limitation on the freedom of expression online.

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5. Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary

This case is of significant importance because it clarified that internet content providers are not objectively liable for potentially infringing content of comments posted by users on their websites. Additionally, it provides clear guidance on the actions content providers should take to avoid liability for user-generated content that may infringe on rights or regulations.

In 2010, the Association of Hungarian Content Providers (MTE)[38] expressed its opinion regarding the advertising practices of a real estate company on the company's website. In the article, the MTE criticised the company for its unethical and misleading practices, namely that the originally free real estate advertising service became a paid service after 30 days without notifying and providing clear and adequate information to users. The resolution was also published on vg.hu and on a consumer protection blog site, named 'Tékozló Homár', which was managed by the Index.hu news portal. While the article generated comments that were predominantly critical of the company and its practices, some comments used very vulgar language, including phrases like "Let them shit hedgehogs and spend all their earnings on their mothers' graves until they die [...]". It is important to note that both websites included disclaimers stating that the comments did not necessarily represent the views of the website operators. Additionally, a notice and take-down system was operating, allowing users to report comments for removal. Furthermore, Index.hu engaged in partial moderation and occasionally deleted comments, and

38 Magyar Tartalomszolgáltatók Egyesülete (MTE)

both websites had publicly available codes of ethics that explicitly prohibited users from posting comments that violated the rights of others.[39]

The case was referred to the ECtHR, which found that the freedom of expression guaranteed by Article 10 of the ECHR had been violated.[40] In this case as well, the ECtHR had to determine whether the restriction was imposed by law, whether it had a legitimate aim and whether it was necessary in a democratic society.[41]

Regarding the first criterion, the court determined that the operators of the website had the capacity to evaluate the risks linked to their operations and, to a reasonable degree, anticipate the outcomes of their conduct. As a result, the court concludes that the interference in this instance violated Article 10 of the ECHR. The court accepted the Hungarian Government's view that the interference carried out served the legitimate aim of protecting the rights of others,[42] and the only question was whether the measure was necessary in a democratic society.[43] The ECtHR, referring to the Delfi case, reiterated that internet news portals provided a forum for the exercise of the right to freedom of expression, allowing the public to communicate information and ideas, and thereby assumed certain obligations and legal responsibilities.[44] However, the court stressed that the present case must be assessed differently. This is because, while the criticised comments are offensive and vulgar, they do not qualify as unlawful expressions and certainly do not constitute hate speech or incitement to violence. Furthermore, while the second applicant is a media service provider – which is to be regarded as a company with a commercial interest – the first applicant is a self-regulatory body set up by internet content providers, which has no such known interest'.[45]

According to the ECtHR, the criteria set out in the Delfi Decision are applicable in cases where a news portal does not immediately remove content that is manifestly seriously infringing. Referring to its previous case law,[46] the court identified five factors to be applied in assessing whether a balance of competing interests has been struck.[47] These are: the context and content of the contested comments; the legal liability of the authors of the comments; the actions taken by the defendants and the conduct of the injured party; the consequences of the comments for the injured party; and the consequences for the defendants.

Regarding the context of the comments, the court found that the original article concerned a matter of public interest and could not be considered provocative.

39 Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v. Hungary (hereinafter referred to as MTE-Index v. Hungary)
40 MTE-Index v Hungary, para. 45.
41 Ibid., para. 46.
42 Ibid., para. 52.
43 Ibid., para. 53.
44 Ibid., paras. 60. and 61.
45 Ibid., para. 64.
46 Delfi v Estonia, Von Hannover v Germany (no. 2), Axel Springer v Germany, Couderc v France.
47 MTE-Index v Hungary, para. 71.

As regards their content, it considered that, although they were sometimes offensive and vulgar, they were, in fact more likely to express value judgments and opinions prompted by personal disappointment.[48] The court deems that, despite the coarse language employed in the comments, these terms are commonly found in online portal discussions, a factor that may diminish the significance ascribed to such expressions.[49]

The ECtHR noted that the national courts had not taken sufficient account of the responsibility of the authors of the comments. The national courts were convinced that the defendants were liable to a certain extent because they had 'disseminated' defamatory statements without a proportionate analysis of the liability of the actual authors of the comments.[50] The court criticised the reasoning of the domestic courts that by allowing unfiltered comments, the defendants should have expected that some of them would be in breach of the law. The court also noted that the offending company never asked the applicants to remove the comments, instead seeking redress directly through the courts, although the Hungarian courts did not assess this. In fact, the Hungarian courts found the applicants objectively liable, based on the fact that they had given space to comments that were seriously offensive to the applicant and degrading, and did not examine the conduct of either the applicants or the applicant.[51]

In relation to the fourth criterion, the ECtHR stated that the domestic courts also failed to take into account whether the comments reached a sufficient level of seriousness and whether they were made in a manner that might actually infringe a legal person's right to professional reputation. However, according to the court, the contested comments were unlikely to have had a significant impact on consumers' attitudes towards the companies in question.[52] As regards the last factor, the court found that the Hungarian courts had not paid attention to what was at stake for the applicants as key players in the free electronic media. According to the court, such objective liability could have negative consequences for the comment environment of an internet portal in the future, for example by forcing them to ban commenting altogether.[53]

According to the court, the notice and take-down procedure is an appropriate and rapid measure to balance the competing rights and interests of the parties concerned. The court sees no reason why this procedure could not have provided adequate protection for the victim's reputation. It is true that, in cases where "comments posted by third-party users take the form of hate speech and pose a direct threat to the physical integrity of individuals, the rights and interests of others and society as a whole, the Contracting States would be justified in imposing liability on internet

48 For further information, see Angelopoulos 2016, pp. 582–584.
49 MTE-Index v Hungary, para. 77.
50 Ibid., para. 79.
51 Ibid., para. 83.
52 Ibid., para. 85.
53 Ibid., para. 86.

news portals if they failed to take measures to remove the manifestly offensive comments, even without notice from the alleged victim or third parties. However, in the present case, no such communications have been made."[54]

The Strasbourg ruling shows that, if effective procedures allow for a rapid response, the notice and take-down system can be an appropriate means of balancing the rights and interests of all concerned. However, where a comment is hateful and directly threatens the physical safety of individuals, service providers may be held liable if they fail to take measures to remove clearly unlawful comments without delay, even without notice or request from the victim or a third party. The decision leaves the application of the criteria to the courts. However, individual discretionary decision-making does not necessarily provide a predictable legal and liability framework. One solution could be for the legislator to follow the logic of the Strasbourg ruling and supplement the rules on liability for comments. Such a solution, while not ruling out subjective application of the law, could certainly reduce the number of potentially conflicting individual judgments that unduly restrict freedom of expression.

6. Magyar Jeti Zrt. v Hungary[55]

Magyar Jeti Zrt. is the managing operator of the Hungarian online news portal 444.hu, with 250,000 unique visitors per day, on average. The site has a staff of 24 people and publishes 75 articles per day in a wide range of topics, including politics.[56] The news portal, like many online news sites, often uses hyperlinks or embeds videos via hyperlinks in the content published on its website. By clicking on the anchored (embedded) link, the site navigates the reader to an external page that is different from the online portal.

In September 2013, a group of football fans travelling from Hungary to Romania stopped at a primary school in Konyár, Hungary. The pupils were predominately of Roma origin. The supporters disembarked from the bus and proceeded to sing, chant and shout anti-racist, mostly anti-Roma remarks and make threats against the students who were playing outside of the building. The supporters also waved flags and threw beer bottles. To protect the children, the teachers called the police, took the children inside the building and made them hide under tables and in the bathroom. After the police arrived, the football supporters boarded the bus and left the area.[57]

54 Ibid., para. 96.
55 Magyar Jeti Zrt. v Hungary, application no. 11257/16 (hereinafter referred to as Magyar Jeti Zrt. v Hungary)
56 Ibid, para. 6.
57 Ibid, para. 7.

Later that day, the leader (J. Gy.) of the Roma minority local government in Konyár gave an interview to Roma Produkciós Iroda Alapítvány. J. Gy. stated that the political party Jobbik 'came in' and attacked the school. Many times J. Gy. referred to Jobbik, which is a right-wing political party in Hungary that had previously been criticised for its anti-Roma and anti-Semitic stance. On the same day, the media outlet uploaded the video of the interview to YouTube. The next day, the Magyar Jeti Zrt. published an article on the incident in Konyár on the 444. hu website with the title 'Football supporters heading to Romania stopped to threaten Gypsy pupils'. In the article, the Jobbik political party was not mentioned or even referred to by the 444. news portal: however, the interview made with J. Gy. by the Roma Produkciós Iroda Alapítvány, which was uploaded to YouTube, was linked (anchored) in the article. The link, which led to YouTube, was in a green colour, indicating that it served as anchor text to a hyperlink to the YouTube video. By clicking on the green text, readers could open a new web page leading to the video hosted on the youtube. com video-sharing social media website. The article was subsequently updated three times – on 6 and 12 September and 1 October 2016 – to reflect newly available information, including an official response from the police. The hyperlink to the YouTube video was further reproduced on three other websites operated by other online media outlets.[58]

In October 2013, the Jobbik political party brought defamation proceedings under Article 78 of the Hungarian Civil Code before the Debrecen High Court against eight defendants, including J. Gy., the Roma Produkciós Iroda Alapítvány, the applicant company, and other media outlets which had provided links to the impugned video. It argued that by using the term 'Jobbik' to describe the football supporters and by publishing a hyperlink to the YouTube video, the defendants had infringed its right to reputation, which is a particularly sensitive matter in political life.[59] In March 2014, the High Court upheld the plaintiff's claim, finding that J. Gy.'s statements falsely conveyed the impression that Jobbik had been involved in the incident in Konyár. It also found it established that the applicant company was objectively liable for disseminating defamatory statements and had infringed the political party's right to reputation, ordering it to publish excerpts of the judgment on the 444. hu website and to remove the hyperlink to the YouTube video from the online article.[60] The Magyar Jeti Zrt. appealed against the decision, arguing that public opinion associated the notion of 'Jobbik' not so much with the political party but with anti-Roma ideology, and the name had become a collective noun for anti-Roma organisations. The applicant company also emphasised that by making the interview with the first defendant available in the form of a link but not associating the

58 Ibid, paras. 8–11.
59 Ibid., para. 12.
60 Ibid., para. 13.

applicant company with the video's content, it had not repeated the statements and had not disseminated falsehoods.[61]

In December 2014, the applicant company filed a constitutional complaint to the Constitutional Court. They argued that, under the Civil Code, media outlets assumed objective liability for dissemination of false information, which according to judicial practice, meant that media outlets were held liable for the veracity of statements that clearly emanated from third parties. Consequently, even if a media organ prepared a balanced and unbiased article on a matter of public interest, it could still be found to be in violation of the law. This would result in an undue burden for publishers since they could only publish information whose veracity they had stablished beyond any doubt, making reporting on controversial matters impossible. The applicant company argued that the judicial practice was unconstitutional since it did not examine whether a publisher's conduct had been following the ethical and professional rules of journalism, but only whether it had disseminated an untrue statement. In the area of the Internet, where the news value of information was very short-lived, there was simply no time to verify the truthfulness of every statement. In December 2017, the Constitutional Court dismissed the applicant company's constitutional complaint. It reiterated the second-instance court's finding that providing a hyperlink to content qualified as dissemination of facts. Furthermore, dissemination was unlawful even if the disseminator had not identified itself with the content of the third party's statement and even if it had wrongly trusted the truthfulness of the statement.[62]

Two of the defendants also lodged a petition for review with the Kúria. The applicant company argued that the second-instance judgment restricted the freedom of the press in a disproportionate manner, as the company had only reported on an important issue of public concern in compliance with its journalistic duties. The Kúria upheld the second-instance judgment in a judgment, reiterating that J. Gy.'s statements were statements of fact and that the defendants had failed to prove their veracity. Although the term 'jobbikos' was used in colloquial language, in the case at issue J. Gy. had explicitly referred to the political party and its role in the incident. As regards the question of whether the applicant company's activity constituted dissemination of information The Civil Code has established objective liability for dissemination, irrespective of the good or bad faith of the disseminator. In the view of the Kúria, requiring media outlets not to make injurious statements accessible does not constitute a restriction of freedom of the press or freedom of expression; nor is it an obligation on them which in practice cannot be satisfied.[63]

In the Magyar Jeti Zrt. v Hungary case, the ECtHR opted for a different approach. Summarising the above mentioned, Magyar Jeti Zrt. published an article on the incident that included a hyperlink in the text to the interview on YouTube, but

61 Ibid., para. 15.
62 Ibid., paras. 17 and 20.
63 Ibid., paras. 18 and 19.

the article itself did not refer to Jobbik. Jobbik subsequently filed a defamation suit against Magyar Jeti Zrt. and others (including operators of other Hungarian news portals and the mayor). The first instance court held that in making the YouTube video available through the hyperlink, Magyar Jeti Zrt. had disseminated the defamatory statements. This decision was upheld on appeal all the way to the Hungarian Supreme Court before the case was taken to the ECHR.

The ECtHR found that making a media company automatically liable for defamatory content hyperlinked on their websites violates their right to freedom of expression under Article 10 of the ECHR. The court referred to the purpose of the hyperlinks to allow users to navigate online material and to contribute to the operation of the internet by making information accessible through linking information to each other.[64] The ECtHR did not accept the objective liability for media platforms embedding a hyperlink to defamatory or other illegal content in their editorial content. The court found that the strict or objective liability applied in the case "may have, directly or indirectly, a chilling effect on freedom of expression on the internet." According to the case law of the ECtHR, inserting a hyperlink into a news article is not the same as publishing or endorsing what is said on the hyperlinked website. Nobody should be liable for using a hyperlink where they did not know or had no reason to believe that they technically contributed to the dissemination of unlawful content.[65]

The ECtHR, however, did not exclude that in certain particular constellations of elements, the posting of a hyperlink may potentially raise liability questions, for instance, in a case where a journalist does not act in good faith and their action is not in line with the diligence expected in responsible journalism. The following aspects were identified by the ECtHR as relevant while analysing the liability of the publisher of a hyperlink: (a) did the journalist endorse the impugned (unlawful) content; (b) did the journalist repeat the impugned content without endorsing it; (c) did the journalist merely insert a hyperlink to the impugned content without endorsing or repeating it; (d) did the journalist know or could reasonably have known that the impugned content was defamatory or unlawful; (e) did the journalist act in good faith, respect the ethics of journalism, and perform the due diligence expected in responsible journalism?[66]

64 Ibid., para. 73.
65 Ibid., paras. 50–51.
66 For more detailed approach, see Council of Europe 2013.

7. Conclusions

In its case law, the ECtHR has expanded the scope of Article 10 of the ECHR to protect the integrity of online media platforms within the digital environment. The court generally accepted court-ordering anonymisation of additional qualifications and removing comments was taken only in exceptional cases.

The ECtHR confirms that online media platforms are not obliged to proactively seek out unlawful content, meaning that there is no prior monitoring obligation for user-generated content. Making online media strictly liable for user-generated content (comments) is considered excessive and impracticable, undermining the freedom of the right to impart information on the internet. Moreover, the court held that strict liability for commenting or hyperlinking may negatively affect the free flow of information, as online media have no control over the content of comments or hyperlinks. It is also essential that the ECtHR, in several cases, based its finding of a violation of Article 10 of the ECHR on the risk of a chilling effect.

Enforcing principles of free speech online differs significantly from offline contexts. Agreeing with Oster, the right to freedom of speech on the internet appears to be entering a new phase of development. The legal framework needs to adopt a systemic approach that takes into account the distinctive features of online activities, keeps track of their changes, and provides an accurate definition of what online platforms are expected to do and what they might expect from the law. Recent case law addressing freedom of expression in the online era indicates that the mission of the ECtHR, as a norm entrepreneur for online freedom of expression, will introduce numerous novel interpretations in the near future.

Studying the latest case law, it can be seen that the dilemmas outlined in the three cases still persist and remain absolutely valid today. In 2023, in the Sanchez v France case, the ECtHR found that prosecuting a local councillor for not deleting the comments posted by users on Facebook under his post did not violate the councillor's right to freedom of expression. This case highlights exactly the same problems as the cases analysed in the study. The Court based its conclusions on the fact that, although Sanchez's original post was not at issue, he lacked 'vigilance' and failed 'to react in respect of comments posted by others'. Allowing states to hold individuals liable for online comments is very shaky ground and it will have negative effect on freedom of expression online by preventing users to write comments. As a result, robust discussions and democratic discourse will be endangered. This uncertainty obviously has a negative effect on freedom of expression, and the ECtHR should reconsider its approach.

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Chapter 15

The Freedom of Assembly and Association under the ECHR with Special Regard to Central Europe

Bojan Tubić

Abstract

The freedom of assembly and association represents one of the foundations of every democratic society. State authorities have a duty to take all adequate measures in relation to lawful demonstrations or other forms of assembly in order to ensure their peaceful organisation and the security of citizens. The freedom of association also includes the right to form, join and refuse to join an organisation. This freedom is realized through political parties, trade unions, minority organisations, etc. These freedoms are not absolute and the States may impose certain restrictions on their enjoyment. These restrictions must be prescribed by law, which is necessary in a democratic society, and they must pursue a legitimate aim. The restrictions can be imposed for the protection of public order, rights and interests of others and they must be proportionate to the aims pursued. Moreover, these freedoms are closely related to other rights and freedoms enshrined in the Convention, like the freedom of expression, which also have a significant role in modern democratic societies.

Keywords: freedom of assembly, freedom of association, ECHR, human rights

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1. Introduction

Modern democratic society recognizes human rights and freedoms as one of the key elements of its very existence. In the second half of the 20th century, the international human rights treaties have become the foundations of internationalisation of human rights protection. The States have allowed a certain interference in their sovereignty by international courts and tribunals founded by the relevant Conventions. Among these human rights, the freedom of peaceful assembly and association appeared as one of the most important element of democratic society. It is guaranteed in international human rights instruments such as the Universal Declaration on Human Rights,[1] the International Covenant on Civil and Political Rights[2] and the International Covenant on Economic, Social and Cultural Rights.[3] Also, certain regional human rights conventions envisage these freedoms. The most important is the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention"),[4] but it is worth mentioning another European instrument proclaimed at the level of the European Union – the Charter of Fundamental Rights of the European Union (hereinafter referred to as the "Charter").[5] Also these freedoms are included in the American Convention of Human Rights and the African Charter on Human and Peoples' Rights.[6] The freedom of assembly and association is defined in a similar manner in these international instruments.[7]

1 United Nations, 1948, Article 20.
2 United Nations, 1966a, Articles 21 and 22.
3 United Nations, 1966b, Article 8.
4 Council of Europe, 1950, Article 11.
5 European Union, 2000, Article 12.
6 Organization of American States, 1969, Articles 15 and 16, African Union, 1981, Articles 10 and 11.
7 Article 11 of the Convention includes the definition that "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests […].". Article 12 of the Charter envisages that "Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right to everyone to form and to join trade unions for the protection of his or her interests." In Article 21 of the International Covenant on Civil and Political Rights it is stated that "The right of peaceful assembly shall be recognized […]" and in Article 22 "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests […]." In the American Convention on Human Rights, the freedom of assembly and the freedom of association are also regulated in two Articles. In Article 15 it is stated that "The right of peaceful assembly, without arms, is recognized […]." and in Article 16 it is stated that "Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes […]". The restrictions and limitations of these freedoms are envisaged in every cited Article except in Article 12 of the Charter. In Article 11 of the Convention and Article 12 of the Charter, both freedoms are regulated together, unlike in the other two mentioned international instruments, where they are subject to separate provisions. Regarding the substance, in all four instruments peaceful assembly is protected and the possibility to join trade unions is mentioned in the first three instruments. From this brief analysis, we could conclude that the definition of these two freedoms is almost the same in all four mentioned international instruments.

This paper will focus on the European system of human rights protection, namely the one before the European Court of Human Rights. Article 11 of the Convention comprises of two rights – assembly and association which will be explained separately. Additionally, the relationship with the other rights and freedoms enshrined in the Convention will also be analysed.

2. The Freedom of Peaceful Assembly

2.1. Definition of Assembly

The Court has refrained from defining the notion of assembly or from formulating a detailed list of criteria which would define it. Assembly is approached to the purpose of its participants and it should be treated differently from random assembly of individuals where everyone follows his or her own goal. For example, the long-lasting occupation of a space, which is peaceful, even when it is contrary to domestic law, can be regarded as peaceful assembly, like in the case of occupation of one church in Paris.[8]

In its jurisprudence, the Court has stressed that Article 11 protects the right to "peaceful assembly" and do not cover demonstrations where participants and organizers have violent intentions which result in public disorder,[9] or when they incite violence or in some other way reject the foundations of democratic society.[10] The burden to prove the violent intentions of the organizers lies on the authorities.

The concept of assembly covers gatherings irrespective of whether they require notification or authorisation. The key feature of an assembly is the common purpose of its participants, regardless if it is a private meeting or a meeting in public places.[11] It is not important whether the participants are in movement or they demonstrate without changing position. It is primarily envisaged to protect the right to peaceful political demonstrations and participation in a democratic process. However, this narrow interpretation would be unacceptable. The Court has determined that Article 11 can be applied in the cases of assemblies which are essentially of social character. It has applied this Article in relation to the intervention of the police at an assembly held in a private café in Baku where a group of Che Guevara fans gathered.[12]

8 Application no. 51346/99, *Cisse v. France*, Judgment of 9 April 2002, paras. 39–40.

9 Application no. 13079/87 *G. v. Germany*, Decision of 6 March 1989; Applications nos. 29221/95 and 29225/95, *Stankov and The United Macedonian Organisation Ilinden v. Bulgaria,* Judgment of 2 October 2001, *para. 77.*

10 Application no. 37553/05, *Kudrevičius and Others v. Lithuania*, Judgment of 15 October 2015, para. 92.

11 Zdraveva, 2021, p. 3.

12 Application no. 59135/09, *Emin Huseynov v. Azerbaijan*, Judgment of 7 May 2015, para. 91.

Moreover, official assemblies as parliament sessions fell under the scope of Article 11, according to the jurisprudence of the Court.[13]

This right includes also the right to choose the time, the place and the form of assembly, with the limitations established in Article 11(2). If the place of assembly is crucial for the participants, the order on its change may represent an interference in their freedom of assembly. That was the case in Bulgaria where the police prevented members and followers of Ilinden from holding the meeting at their chosen site. They were diverted to a different location.[14]

Even when there is a real danger that a certain assembly could lead to riots out of the control of the organizers, it is not outside the scope of Article 11(1) and, its limitation has to be in accordance with the requirements laid down in Article 11(2). That was the case in Germany during the demonstrations against the G8 summit.[15] The individual continues to benefit from the protection of the right to freedom of peaceful assembly because of sporadic violence or other punishable acts committed by others during the demonstrations, if the individual stays calm in his or her intentions and behaviour.[16]

2.2. Obligations of States Regarding the Freedom of Assembly

The right to freedom of peaceful assembly includes positive and negative obligations of a State Party. States have to refrain from implementing unlawful indirect restrictions of the right to peaceful assembly in order to protect them from arbitrary interference of public authorities with this right. Moreover, they have to protect this right and States have positive obligations to provide efficient enjoyment of these rights.[17] This is of special importance for persons holding unpopular positions or belonging to vulnerable minorities, like in the case of *Baczkowski and Others v. Poland* in which the applicants sought permission from the Warsaw municipal authorities to organize a march through the city and hold a series of meetings about discrimination against various minority groups and women. The municipal authorities refused permission for the march and some of the meetings. Although these decisions were quashed on appeal, the applicants complained that remedy had come too late because the dates planned for demonstrations had already passed. Parts of the related legislation was ruled unconstitutional before the Constitutional Court. Therefore, the interference was not "prescribed by law" and represented an unlawful interference in the freedom of assembly.[18]

13 Application no. 75147/17, *Forcadell i Lluis and Others v. Spain*, Decision of 7 May 2019, para 24.
14 Application no. 44079/98, *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, Judgment of 20 October 2005, para. 103.
15 Applications nos. 8080/08 and 8577/08, Case of *Schwabe and M.G. v. Germany*, Judgment of 1 December 2011, para. 103.
16 Application no. 11800/85, *Ezelin v. France*, Judgment of 26 April 1991, para. 53.
17 Application no. 37553/05, *Kudrevičius and Others v. Lithuania*, op.cit., para 158.
18 *Baczkowski and others v. Poland*, 2007, para 64., *Identoba and others v. Georgia*, 2015, para 99.

State authorities have a duty to take all adequate measures in relation to lawful demonstrations in order to ensure their peaceful organisation and the citizens' security. However, they cannot guarantee this absolutely and they have wide discretion in choosing the means they will use. In this field the obligation is to take the measures and not to achieve the results.[19]

Moreover, one of the obligations of a State is to take preventive security measures, for example to ensure the presence first-aid services at the site of demonstrations.[20] In addition, the duty to communicate with the organizers of the protests is an important part of positive obligations of the authorities to ensure the peaceful conduct of the assembly and to prevent riots and secure the safety of all persons involved.[21]

Demonstrations can distress or insult persons who oppose the ideas promoted in the demonstrations. However, the participants must have possibilities to have demonstrations without the fear that they will be exposed to physical violence of their opponents. That fear can prevent some groups from openly expressing their opinion on certain controversial issues related to community. The State has a positive obligation to protect the right to freedom of assembly of both groups that demonstrate and has to find the less restrictive measures which would enable that both demonstrations are held.[22] When assessing the situation, the authorities have to take into consideration violence at similar events in the past as relevant and also the impact of counter-demonstrations on given demonstrations, when dealing with the danger of violent confrontation between two groups. That was the case in Hungary, where the Court found that the applicant who had not behaved violently and had not posed a threat to public order, should not have been sanctioned for merely displaying a flag during the demonstrations of two opposing groups.[23]

2.3. Restrictions of the Right to Assembly

Prohibition of holding public events can be introduced for security reasons.[24] Also, that can be the case at the locations in the vicinity of court buildings, in order to ensure that judicial proceedings in a concrete case are free from the external influences. In that way, the rights of others are protected, especially parties to the proceedings. That prohibition must be precisely defined in order to achieve that goal.

A State Party can require that the holding of meetings be subject to authorisation. The purpose of this procedure is to allow the authorities to take reasonable

19 *Kudrevicius and Others v. Lithuania*, op.cit., para 159.
20 Application no. 74552/01, *Oya Ataman v. Turkey*, Judgment of 5 December 2006, para 39.
21 Application no. 74568/12, *Frumkin v. Russian Federation*, Judgment of 5 January 2016, paras 128–129.
22 Application no. 40721/08, *Fáber v. Hungary*, Judgment of 24 October 2012, para 43.
23 Ibid. para 44.
24 Applications nos. 26258/07 and 26255/07, *Rai and Evans v. the United Kingdom*, Decision of 17 November 2009.

and appropriate measures to guarantee a peaceful assembly or meeting.[25] The organizers must respect the regulations in force. However, in the absence of prior authorisation, the authorities are still restricted by the proportionality requirement of Article 11.[26]

The subjection of meetings to an authorisation procedure does not normally encroach upon the essence of the right to freedom of assembly. That procedure enables the authorities to ensure the peaceful meeting and it does not constitute any interference in the exercise of the right.[27] This position has been confirmed in the subsequent jurisprudence of the Court.[28]

There are some examples in the Court's jurisprudence regarding peaceful demonstrations. Therefore, the interference in traffic as a part of demonstrations is considered, *per se*, peaceful. Similarly, the occupation of public buildings is considered as peaceful behavior, despite its unlawfulness and the problems they may cause.[29]

In certain cases in which the protesters participated in acts of violence, the Court held that the given demonstrations fell under the scope of Article 11, but that interference with the right guaranteed by Article 11 would be justified to prevent unrest or crime and protection of the rights and freedoms of others. When analysing the issue of interference in connection with Article 11, the Court focuses on the proportionality of the punishment. The Court accepts that State authorities enjoy a wide margin of appreciation when deciding on the need for interference in the freedom of assembly in cases when individuals are involved in violent acts. Therefore, the sanctions imposed for these acts can be regarded in accordance with the guarantees of Article 11 of the Convention. For example, in the case of *Gülcü v. Turkey*, a minor was convicted and detained for two years for membership of the Kurdish Workers' Party, an illegal armed organisation, after he participated in a demonstration in 2008. During the demonstrations, he threw stones at police officers. The Court noted that there was nothing to suggest that when joining the demonstration, he had violent intentions. Also, it noted that the extreme severity of the penalty – a total of seven years and six months imprisonment. The Court concluded that the severity of the sentences imposed to Mr Gülcü who was only 15 years old, was not proportionate to the legitimate aims pursued.[30]

This right can be submitted to limitations in accordance with Article 11(2). The interference in the exercise of this right does not have to be a full prohibition, *de*

25 Application no. 37553/05, *Kudrevičius and Others v. Lithuania*, op. cit., para. 147.
26 Ibid., para 151; Application no. 17391/06, Case of *Primov and others v. Russia*, Judgment of 12 June 2014, para. 119.
27 Application no. 8191/78, *Rassemblement Jurassien and Unite Jurassienne v. Switzerland*, Commission (Plenary), Decision of 10 October 1979 on the admissibility of the application, para. 3.
28 Application no. 61821/00, *Ziliberberg v. Moldova*, Decision of 4 May 2004.
29 *Cisse v. France*, 2002, paras 39–40.
30 Application no. 17526/10, *Gülcü v. Turkey*, Judgment of 19 January 2016, para. 116.

iure or *de facto*, but it can be comprised of various measures implemented by the authorities.[31]

The limitations should be interpreted in such a way to include the measures taken before, during or after the assembly. In the case of *Ezelin v. France*, punitive measures taken afterwards represented unlawful restrictions.[32] In the case of *Djavit An v. Turkey*, a Cypriot national of Turkish origin was unable to obtain a permit from the Turkish authorities in Cyprus to visit the southern part of Cyprus in order to participate in various meetings. His permission had been refused for security reasons in the public interest and because he made propaganda against the State. The Court stated that the refusal to allow the applicant to travel to be present at a peaceful assembly, also represents an interference contrary to the Convention.[33]

The Court reiterated in a case against Azerbaijan that restrictions of the Article 11 may also consist of various measures taken by the authorities during an assembly, like the dispersal of the rally or the arrest of participants, as well as penalties imposed for participating at an assembly.[34] In the given case, the demonstration was dispersed by the police and the applicant who participated in the demonstration was arrested and convicted.[35] The force, used by the police against peaceful participants for breaking the demonstrations or maintaining public order represents interference in the freedom of peaceful assembly.[36]

The interference is justified if it fulfils certain conditions. First, it should be prescribed by law, then it pursues one or more legitimate aims and it is necessary in a democratic society. One of the necessary conditions is that interference must be prescribed by law, which requires that the disputed measure must have a legal basis in domestic law. Also, the quality of the given national law is important. It must be available to individuals and predictable with regard to its consequences.[37] The law cannot be absolutely precise, especially in the areas where the situation changes in accordance with the leading positions of the society.[38] The law must provide for a measure of legal protection from arbitrary interference of public authorities with the rights guaranteed by the Convention.

Exceptions to the right to freedom of assembly must be interpreted narrowly. This principle is also applied to legitimate aims listed in paragraph 2 of Article 11. The protection of the rights of others is frequently listed as a legitimate aim. It is closely connected to the prevention of riots. In the *Kudrevičius and Others v. Lithuania* case, the applicants claimed that their conviction for rioting had violated their right to freedom of assembly and expression. They also claimed that the law under which

31 Application no. 37553/05, *Kudrevičius and Others v. Lithuania*, op.cit., para. 100.
32 Application no. 11800/85, *Ezelin v. France*, Judgment of 26 April 1991, para. 39.
33 Application no. 20652/92, *Djavit An v. Turkey*, Judgment of 20 February 2003, paras. 61–62.
34 Application no. 60259/11, *Gafgaz Mammadov v. Azerbaijan*, Judgment of 15 October 2015, para. 50.
35 Ibid., para. 51.
36 Application no. 41462/17, *Laguna Guzman v. Spain*, Judgment of 6 October 2020, para. 42.
37 Application no. 37553/05, *Kudrevičius and Others v. Lithuania*, paras. 108–110.
38 *Ezelin v. France*, 1991, para. 45

they had been convicted had not met the requirements under Article 7 of the Convention. The municipality in this case issued a permit to hold an assembly in the territory of a village close to the highway. The permit granted the right to organize a peaceful assembly in compliance with the Constitution and national law. The police received information about the demonstrator's possible intention to overstep the limits established in the permit. The farmers blocked highways which exceeded the allowed limitations. The argument of the Lithuanian Government was that the police had not received any prior notification of the demonstrators' intention to block these major roads. The applicants stated that they used a form of demonstration accepted in Europe, in situations where no other means of protecting the demonstrators' rights exist. In such circumstances the freedom of peaceful assembly prevails over any disturbances to traffic.[39] The respondent government maintained that the intervention pursued the legitimate aims of preventing disorder and the protection of the rights and freedoms of others. The applicants were convicted for having participated in protest actions, but for their specific criminal behaviour during the demonstrations. They had a negative influence on public life, which is not characteristic of regular peaceful assemblies. The Court held that interference with this freedom was not proportionate and that every demonstration provokes a certain level of disruption of ordinary life. The Court argued that the authorities were expected to show tolerance, although there were major disruptions of traffic in this case.[40]

The Court refused to invoke the aim of "protection of moral" as discriminatory, in the cases of limiting LGBT demonstrations. It has stated that there is a clear European consensus about the recognition of individuals' right to openly identify themselves as sexual minority and to promote their own rights

The limitations to the freedom of assembly must be necessary in a democratic society. States Parties enjoy a certain but not unlimited margin of appreciation in applying this standard. In each individual case the Court will decide whether a certain limitation is in accordance with the Convention, by analysing circumstances of the case.

The concrete measure must be a reaction on the urgent social need and must be proportionate to a legitimate aim and the reasons which are listed by the national authorities to justify it must be relevant and sufficient. National authorities must apply standards which are in accordance with the principles envisaged in article 11.

The freedom of assembly protects demonstrations that can disturb or offend persons opposing to ideas or messages which the demonstration in question wants to promote. Every measure which interferes into freedom of assembly and expression, except in cases of inciting violence, puts democracy in danger.[41]

39 Hajas and Török, 2016, p. 681.
40 *Kudrevičius and Others v. Lithuania*, 2015.
41 *Kudrevičius and Others v. Lithuania*, 2015, para. 145.

In a democratic society based on the rule of law, an opportunity should be given to express ideas provoking the existing order, by peaceful means, implementing the right to freedom of assembly and on other legal ways.[42]

The fact that a certain group calls for autonomy or even requires the separation of a part of a State, calling for fundamental constitutional and territorial changes, cannot automatically justify the prohibition of their assembly. Calling for territorial changes in speeches and at demonstrations does not represent automatically a threat to the territorial integrity of a State and national security.[43]

The general prohibition of demonstrations can be justified only if there is a real threat that they would result in an unrest which cannot be prevented by imposing other less strict measures. The authorities must take into consideration the effect of the prohibition of demonstrations which do not represent a threat to public order. Only if there is no possibility of avoiding the unwanted effects of prohibition by a narrow limitation of its scope in terms of territorial change and duration, then the prohibition could be considered as necessary in accordance with Article 11(2) of the Convention.[44]

The nature and severity of punishments are the facts that need to be taken into account in the assessment of the proportionality of interference in relation to the goal which needs to be achieved.[45] When the punishments imposed to demonstrators are of criminal nature, they require a certain explanation. For example, in the case of *Rai and Evans v. the United Kingdom*, the first applicant organized and together with the second applicant participated in a demonstration against the Iraqi conflict. They were arrested and convicted of having held an unauthorized demonstration. The first was sentenced to a fine of GBP 350 and was ordered to contribute to the prosecution costs in the sum of GBP 150, the second applicant was sentenced to a conditional discharge of twelve months and to contribute to the costs in the sum of GBP 100. The sanctions were not severe and the interference with the applicants' rights was not considered disproportionate.[46]

In the above-mentioned case of *Cisse v. France*, the applicant and a group of aliens occupied St Bernard's Church in Paris with the intention do draw attention to the difficulties encountered by aliens regarding their immigration status in France. The police evacuated the building because of the poor sanitary conditions and the serious risks to health, peace and public order. Certain protesters were detained and deported. The Court found that the legitimate aim was pursued, i.e. the prevention

42 Application nos. 29221/95 and 29225/95, *Stankov and United Macedonian Organisation Ilinden v. Bulgaria*, Judgment of 2 October 2001, para. 97.

43 *Stankov and United Macedonian Organisation Ilinden v. Bulgaria*, 2001, para 97.

44 Application no. 8440/78, *Christians against Racism and Fascism v. United Kingdom*, Decision of 16 July 1980.

45 *Kudrevičius and Others v. Lithuania*, 2015, para. 146.

46 Application nos. 26258/07 and 26255/07, *Rai and Evans v. the United Kingdom*, Decision of 17 November 2009.

of disorder and that the interference was proportionate due to the circumstances of the case.[47]

2.3.1. Limitations of the Freedom of Assembly during the COVID-19 Pandemic

During the COVID-19 pandemic, States restricted numerous human rights and freedoms. One of the freedoms that was limited is the freedom of assembly. For example, in Poland, the prohibition of assemblies during the COVID-19 pandemic was subject to many discussions. It was even addressed in a report of the Commissioner for Human Rights, in which it was stated that absolute prohibition of assemblies violates basic constitutional rights of individuals.[48] It was stated that less severe measures should be used. However, certain protests took place during the pandemic and there was an interference of State authorities when the participants could endanger health or life and public safety and order.[49]

In the case of the *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, the applicant complained that it had been deprived of the right to organise public events and to participate in such events following the adoption of government measures to address the COVID-19 Pandemic. An Ordinance was enacted to prohibit public and private events. Failure to comply with this prohibition was punishable by a custodial sentence or a fine. After two months, the prohibition was relaxed and gatherings could have a maximum of 30 participants. Events involving more than 1,000 participants continued to be prohibited until the end of August 2020, and on June 2020, the ban on public events was lifted. The Court found a violation of Article 11, concluding that Switzerland overstepped the margin of appreciation and that interference was not necessary in a democratic society. The Court recognised the threat posed by COVID-19 to public health and society. However, in the light of the importance of the freedom of peaceful assembly in a democratic society and in particular of the topics and values promoted by the applicant association, the blanket nature and significant length of the ban on public events falling within the association's sphere of activities, and the nature and severity of the possible penalties, the Court concluded that the interference with the enjoyment of the rights protected by Article 11 had not been proportionate to the aims pursued. The Court also noted that the domestic courts had not conducted an effective review of the measures at issue during the relevant period.[50]

47 Application no. 51346/99, *Cisse v. France*, Judgment of 9 April 2002, para. 53.
48 Syryt, Przywora and Dobrzeniecki, 2022, p. 64.
49 Ibid., p. 65.
50 Application no. 21881/20, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, Judgment of 15 March 2022.

2.4. Relationship between the Freedom of Assembly and Other Articles of the Convention

The right of assembly has to be interpreted in the light of Article 10 when the expression of a personal opinion represents the aim of realising the freedom of assembly.[51] Moreover, the connection between the two Articles can be examined in the need to provide a forum for public debate, especially in situations where the interference of the authorities with the freedom of peaceful assembly represents a reaction to the positions or statements of participants in demonstrations or members of an association.

Without freedom of expression, it is difficult to imagine participating in debates and solving public problems or participating in elections. It is one of the most important foundations of a democratic society. The Court attached a great importance to the freedom of expression in political debates. Political expression can be defined as an expression of a person's will to participate in solving public problems or to express an attitude towards certain general interests.[52]

In the case of a demonstration of primarily religious nature, the issue of violation of Articles 9 and 11 may arise. In case of the interruption of a religious assembly held at private places, the Court has decided only with regard to Article 9, like in the case of assault on a Congregation of Jehovah's Witnesses.[53] In a case in Bulgaria where the mayor or the national court refused to allow to this religious organisation to build its religious object, the Court decided to question relevant arguments on the violation of Article 9, interpreted in the light of Article 11.[54]

There is a relation with Article 10 of the Convention because the assembly can be as a form of expression. Whether an application will be analysed according to Article 10 or Article 11 depends on the given circumstances of each specific case. For example, the Court has held that violent unauthorized intrusion in the official premises, as a protest action, can be regarded as a form of expression, protected by Article 10, interpreted in the light of Article 11.[55] That was established in a case against Russia and the Court decided that interference was not "necessary in a democratic society".

51 *Ezelin v. France*, para. 37.
52 Černy, 2020, p. 234.
53 Application no. 71156/01, *Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, Judgment of 3 May 2007, paras. 143–144.
54 Application no. 5301/11, Case of the *Religious Denomination of Jehovah's Witnesses in Bulgaria v. Bulgaria*, Judgment of 10 November 2020, para. 80.
55 Application no. 19554/05, *Taranenko v. Russia*, Judgment of 15 May 2014, para. 66.

3. The Freedom of Association

An association represents a voluntary grouping for a joined cause. It includes the right to establish or join a group or organisation which wants to achieve certain goals. The association must have private legal character to benefit from protection under Article 11. The criteria that identify an association as private or public are the following: whether it was founded by individuals or the State, whether it was integrated in State structures, whether it has been transferred administrative, discipline or regulatory powers and whether it strives to promote a cause in general interest.[56]

Public institutions, founded by a legislative authority does not represent an association within the meaning of Article 11 of the Convention.[57] Also, professional associations and bodies related to employment, like associations of doctors, lawyers, chambers of commerce, do not fall under the scope of this Article. Their goal is to promote and regulate professions while at the same time they perform important public functions and they cannot be compared to private associations and trade unions.

The right to establish an association is one of the aspects of Article 11, although it explicitly mentions only the right to establish trade unions.[58] The refusal of national authorities to give legal personality to an association of persons represents an interference in the exercise of their right to freedom of association. [59]

The right guaranteed by Article 11 of the Convention is not limited to the foundation of an association, but it protects the association during its existence, to carry on its political activities freely.[60] This right does not entail the right to become a member of a certain association, nor the right to perform a certain function in the association. However, the exclusion from an association could represent the violation of the freedom of association of a given member, if it is contrary to the rules of the association, or if it is arbitrary.[61] This right includes certain measures of the freedom of choice with regard to its realisation that means the right not to be a member of an association or to leave it. In a case of *Vörður Ólafsson v. Iceland*, the Court stated that the statutory obligation of the applicant to make a financial contribution to a private law organisation that was not his own choice, represents an unlawful interference with his right to join an association.[62]

56 Application no. 29389/11, *Mytilinaios and Kostakis v. Greece*, Judgment of 3 December 2015, para. 35.

57 Application no. 60781/00, *Slavic University in Bulgaria and Others v. Bulgaria*, Judgment of 18 November 2004.

58 *Sidiropoulos and Ohers v. Greece*, 1998, para. 40.

59 Application no. 40269/02, *Koretskyy and Others v. Ukraine*, Judgment of 3 April 2008, para. 39.

60 Application no. 19392/92, *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30 January 1998, para 33.

61 Application no. 38458/15, *Lovrić v. Croatia*, Judgment of 4 April 2017, paras. 54 and 72.

62 Application 20161/06, *Vörður Ólafsson v. Iceland*, Judgment of 27 April 2010, para. 45.

The freedom of association belongs to civil and political rights, and it consists of the right to form, join and refuse to join an association. It represents the right to establish a group or organisation that pursues a certain objective, or to affiliate with them.

The freedom of association is closely related to democracy and pluralism, and the way it is implemented by a State is of great importance for democracy.[63] In this sense, the political parties have a special role, as well as associations founded for other purposes, including the ones that protect cultural or spiritual heritage, that have different socio-economic purposes, which promote ethical or minority or religious positions. This freedom is of particular importance for persons belonging to national and ethnic minorities, in order to promote their identities and to protect their rights.[64]

However, associations involved in activities contrary to the values of the Convention cannot benefit from the protection of Article 11. For example, the activities of an Islamic association were prohibited in Germany for inciting violence. It advocated the overthrow of non-Islamic governments and the establishment of an Islamic Caliphate. The Court rejected the application.[65]

An association assumes the establishment of a permanent purpose. This right allows the individual to join any form of organisation, party or body through which he or she can participate in public and political activities.[66]

3.1. Forms of Association

Associations having a significant role in the jurisprudence of the Court are political parties, minority and religious associations as the most important actors in a democratic society. Trade unions also constitute an important form of association and they are explicitly listed only in Article 11.

Political parties have an essential role in the functioning of a democracy. Every measure taken against them also affects the freedom of association and consequently democracy in a given country. Therefore, the exceptions listed in Article 11 need to be interpreted strictly. Only compelling and convincing reasons could justify restrictions on the freedom of association of such parties. The States have only a limited margin of appreciation in these situations.[67] The ultimate measures, for example the dissolution of the party or the refusal to register a party could be done only in the most serious cases in which the political pluralism or basic democratic principles

63 Application no. 44158/98, *Gorzelik and Others v. Poland*, Judgment of 17 February 2004, para. 88, Application nos. 57/1997/841/1047, *Sidiropoulos and Others v. Greece*, Judgment of 10 July 1998, para. 40.

64 *Gorzelik and Others v. Poland*, para. 93.

65 Application no. 31098/08, *Hizb ut-Tahrir and Others v. Germany*, Judgment of 12 June 2012.

66 Zdraveva, 2021, p. 3.

67 Application nos. 133/1996/752/951, *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30 January 1998, para. 46.

were endangered. In the case of *Refah Partisi (the Welfare Party) and Others v. Turkey*, the party was dissolved by the Constitutional Court with the explanation that it has become a centre of activism against the principle of secularism. The Court did not establish the violation of Article 11 of the Convention, because it stated that the acts and speeches of the leaders and members of this party had revealed its long-term policy of establishing a regime based on Sharia in the legal pluralism and that the party had not excluded use of force for implementing its policy. These plans were not in accordance with the concept of "democratic society" and the party had real possibilities to implement them. Therefore, the Court stated that it could be reasonably considered that the decision of the Constitutional Court satisfied an "urgent social need".[68]

The freedom of association is of special importance for the members of minority groups. The establishment of an association for the purpose of expressing and promoting the identity of a minority can be essential for it, helping it to preserve and defend its rights and identity.[69] National courts in Greece have refused to register a Macedonian cultural society, claiming that it had the intention to affect the territorial integrity of Greece. The Court found that the aims of the society were completely legitimate, i.e. the protection and development of the Macedonian minority's traditions and culture. There were no indications that the latter represented a threat to the territorial integrity of Greece.[70]

3.2. Restrictions of the Freedom of Association

Interference with the right of association is justified if it fulfils the conditions laid down in Article 11 (2), i.e. if it is prescribed by law, pursues one or more legitimate aims and if it is necessary in a democratic society. These conditions are the same as in the cases of some other rights set forth in the Convention, and the right to assembly as well.

The disputed measure of a State that interferes with the right of association must have a legal basis in domestic law, which has to be accessible to a given person and predictable with regard to its consequences. The law is predictable if it is formulated precisely to enable an individual to adjust his or her behaviour. The given law has to provide a measure of legal protection from arbitrary interference of public authorities in the rights guaranteed by the Convention. The law must prescribe, clearly enough, the limits of each of such discriminatory authorisation and the ways of its realisation. In the case of *Koretskyy and Others v. Ukraine*, the Court held that the provisions of domestic law governing the registration of an association were insufficiently clear to

68 Application nos. 41340/98, 41342/98, 41343/98, *Refah Partisi (the Welfare Party) and Others v. Turkey*, Judgment of 13 February 2003.

69 Nemtoi, 2022, p.7.

70 Application nos. 57/1997/841/1047, *Sidiropoulos and Others v. Greece*, Judgment of 10 July 1998.

be considered predictable and that the authorities were given excessive discretional powers to decide whether a certain association could be registered.[71]

Every interference with this freedom must have one of the legitimate aims established in Article 11(2), such as: national security or public safety, preventions of unrest or criminal, protection of health or morals and protection of rights and freedoms of others. These exceptions must be interpreted narrowly and restrictively.[72] Moreover, every interference needs to be necessary in a democratic society, which means that every interference needs to respond to a pressing social need and that any interference must be proportionate to a legitimate aim protected. The exceptions to the freedom of association must be established strictly and only convincing reasons can justify the limitations of that freedom.[73] The Court determines in each case whether a given interference is proportionate to a legitimate aim and whether the reasons listed by national authorities in to justify it are relevant and sufficient. These decisions need to be based on an acceptable assessment of relevant facts. The level of interference cannot be considered in abstract terms and must be assessed in the circumstances of each individual case. Criminal conviction represents one of the most serious ways of interference with the right to freedom of association, which aims at protecting an opinion and the expression of that opinion, especially with regard to political parties.

There are restrictions to the freedom of association for public service employees (police, armed forces and the State administration), explicitly envisaged in Article 11, paragraph 2. The Court has stated that those restrictions should be construed strictly and should be confined to the "exercise" of the rights in question. These restrictions must not impair the very essence of the right to organize.[74] In its jurisprudence, the Court has found that lawful restrictions imposed on these three categories of persons must also meet a pressing social need and be necessary in a democratic society.[75]

3.3. Relationship between the Freedom of association and Other Articles of the Convention

The protection of personal opinions, provided for in Articles 9 and 10 of the Convention is also one of the aims of the freedom of association.[76] The Court stated that the protection of the freedom of thought, conscience and religion could be effectively provided only by guaranteeing also the positive and negative right to freedom of

71 *Koretskyy and Others v. Ukraine*, para. 48.
72 *Sidiropoulos and Others v. Greece*, para. 38.
73 Application no. 44158/98, *Gorzelik and Others v. Poland*, Judgment of 17 February 2004, paras. 95–96.
74 Application no. 34503/97, *Demir and Baykara v. Turkey*, Judgment of 12 November 2008, para. 97.
75 Application no. 11828/08, *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, Judgment of 25 September 2012, para 66.
76 Application no. 20161/06 *Vörður Ólafsson v. Iceland*, Judgment of 27 April 2010, para. 46.

association.[77] Article 11 applies not only to persons and associations whose opinions are well accepted or considered inoffensive and do not cause any reaction, but also to the ones which could offend, shock or disturb.[78]

The principle of pluralism cannot be realised if the association is not allowed to freely express its ideas and opinions.[79] That is the reason why the protection of an opinion and expression of that opinion is applied on political parties so they could perform their essential role of enabling the pluralism and proper functioning of democracy.[80]

4. Conclusions

The freedom of assembly is a political right under which individuals can express their views and participate in political and social life. It is closely related to other rights and freedoms like the freedom of thought and the freedom of expression. Therefore, the Court often decided on these rights together.

The freedom of peaceful assembly and the freedom of association work in conjunction. They are autonomous rights differentiated by the fact that an association involves a group of people with permanent links, unlike an assembly. Moreover, associations establish a precise goal, and a meeting or an assembly does not aim at achieving a permanent goal.

The freedom of assembly and the freedom of association are not absolute. They can be limited if the requirements of legality, proportionality and necessity in a democratic society have been fulfilled. The Court's jurisprudence has been extensive regarding these conditions.

In the last few years, the COVID-19 pandemic had a strong influence on almost all human rights and specifically on the freedom of assembly. We are waiting for the judgments of the Court with regard to these circumstances. The urgent need to protect the rights and freedoms of others was a legitimate aim. However, the Court will establish how the States answered to that pressing social need, whether the restrictions had fulfilled all the criteria of the Article 11(2) of the Convention.

77 Application nos. 52562/99 and 52620/99, *Sorensen and Rasmussen v. Denmark*, Judgment of 11 January 2006, para. 54.

78 Application no. 35943/10, *Vona v. Hungary*, Judgment of 9 July 2013, para. 57.

79 *Gorzelik and Others v. Poland*, 2004, para. 91.

80 Application no. 23885/94, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Judgment of 8 December 1999, para. 37.

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Slavic University in Bulgaria and Others v. Bulgaria, Judgment of 18 November 2004;
Sorensen and Rasmussen v. Denmark, Judgment of 11 January 2006;
Stankov and the United Macedonian Organisation Ilinden v. Bulgaria, Judgment of 2 October 2001;
Taranenko v. Russia, Judgment of 15 May 2014;
The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria, Judgment of 20 October 2005;
Trade Union of the Police in the Slovak Republic and Others v. Slovakia, Judgment of 25 September 2012;
United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998;
Vona v. Hungary, Judgment of 9 July 2013;
Vörður Ólafsson v. Iceland, Judgment of 27 April 2010;
Ziliberberg v. Moldova, Decision of 4 May 2004.

Part VI

EFFECTIVENESS OF LEGAL PROTECTION

Chapter 16

The Effectiveness of Constitutional Complaint as a Domestic Remedy for the ECHR Violations

Lessons Learned from the ECtHR's Jurisprudence Regarding Constitutional Complaint in Hungary and in Poland

Katarzyna Zombory

Abstract

This article explores the effectiveness of constitutional complaint procedures as domestic remedies within the meaning of Articles 13 and 35 para. 1 of the European Convention on Human Rights (ECHR). It examines the standards applied by the European Court of Human Rights (ECtHR) to domestic remedies in general, as well as the specific criteria relating to constitutional complaints, in order to determine what criteria are applied to assess their effectiveness. The paper focuses on the Hungarian and Polish models of constitutional complaint and analyzes the ECtHR's relevant case-law to establish whether, and under what circumstances, constitutional complaint procedures in these two Central European countries can be considered effective domestic remedies within the meaning of Articles 13 and 35 para. 1 of the ECHR. The analysis shows that the ECtHR's assessment of the effectiveness of constitutional complaints can shift over time, departing from an objective legal framework toward a broader and more ambiguous evaluation of institutional and political developments affecting constitutional adjudication.

Keywords: right to effective remedy, Article 13 ECHR, constitutional complaint, Poland, Hungary, European Court of Human Rights

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1. Introduction

The European Court of Human Rights (ECtHR) has been committed to rendering the European Convention on Human Rights (ECHR)[1] a practical and effective instrument of human rights protection, and not a 'theoretical or illusory' set of declarations by Member States of the Council of Europe. It should not come as a surprise that the existence of domestic remedies, explicitly required under Article 13 ECHR and presumed in Article 35(1) ECHR, has continuously been scrutinised by the ECtHR, as an inherent element of the preliminary examination of complaints, and often at the merit stage, as well. As Shelton noted, the availability of effective domestic remedies has become a crucial factor for the entire ECHR system after its expansion into Central and Eastern Europe, increasing the ECtHR's caseload at an unprecedented rate from the late 1990s (the number of decisions passed from 5,979 in 1998 to 86,063 in 2014).[2]

An important domestic remedy capable of enhancing the overall protection of human rights in the Member States of the Council of Europe is the constitutional complaint procedure. In Poland and in Hungary, the right of individuals to have recourse to a constitutional court was introduced after the democratic transformation in 1989, as an element of protecting the fundamental rights of individuals as well as the constitutional order of the State. The ECtHR's examination of constitutional complaint carried out under Article 13 and Article 35(1) ECHR sheds light on how to interpret the notion of effective remedy in the context of constitutional adjudication of human rights.

This paper examines the ECtHR's standards relating to a constitutional complaint to determine what criteria are applied in the assessment of the effectiveness of a constitutional complaint. The author focuses on the Hungarian and Polish models of constitutional complaint and explores the ECtHR's relevant case-law to establish whether, and under what circumstances, constitutional complaint in these two Central European countries can be considered effective domestic remedy within the meaning of Article 13 and Article 35 (1) ECHR.

1 *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, ECHR), adopted under the auspices of Council of Europe in Rome on 4 November 1950, ETS No. 005.

2 Shelton, 2017, p. 211.

2. The Right to an Effective Remedy under the ECHR

2.1. Article 13 ECHR

Article 13 ECHR states that "Everyone 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". Its purpose is to ensure that the substance of the rights and freedoms guaranteed by the ECHR are enforced at national level, regardless of the form in which those rights are secured within the domestic legal system.[3] Morawska argues that the right to an effective remedy permeates the entire ECHR system and gives it a real and effective dimension.[4] The meaning and role of the right to an effective remedy can be better understood in the light of the principle of subsidiarity, which requires that the rights and freedoms guaranteed by the ECHR are protected in the first place at national level and applied by national authorities, in accordance with Article 1 ECHR.[5] As a consequence of the subsidiary nature of the ECHR's supervisory mechanism, individual complaints on human rights violations can be brought before the ECtHR only after all available national remedies have been exhausted, as required by Article 35(1) ECHR.[6] The provisions of Article 13 and Article 35(1) ECHR, in conjunction with the obligation of States Parties to protect human rights within their own jurisdiction (Article 1 ECHR), and to execute final judgments of the ECtHR (Article 46, paragraph 1 ECHR) are the key procedural elements meant to secure the practical effectiveness of the human rights framework set up by the ECHR.

Over the years, the ECtHR in has clarified the normative content of Article 13 ECHR and the scope of the obligations it imposes on States. The ECtHR has declared that Article 13 ECHR requires the availability in domestic law of a remedy capable of dealing with the substance of an arguable claim under the ECHR and of granting

3 Schabas, 2015, p. 550; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, judgment of 24 July 2014, Application no. 7511/13, para. 540.

4 Morawska, 2019, p. 166.

5 According to para. 3 of the 2012 Brighton Declaration of the High Level Conference on the Future of the European Court of Human Rights, "The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, *inter alia*, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level (…)." Text of the Brighton Declaration available online at: https://www.echr.coe.int/documents/d/echr/2012_brighton_finaldeclaration_eng. On the principle of subsidiarity in relation to human rights protection, see e.g.: Vila, 2017; Morawska, 2019.

6 Pursuant to Article 35(1) ECHR, "The Court may only deal with the matter after all domestic remedies have been exhausted."

appropriate redress.[7] According to Shabas, the 'arguable claim' standard limits the scope of Article 13 ECHR in that that there is no right to require a remedy with respect to every supposed violation, however frivolous it might be.[8] The domestic remedy required by Article 13 ECHR must be effective both in legal and practical terms, meaning that it shall be accessible and capable of providing redress in respect of the applicants' complaints, regardless of the nature of violation and the right at stake.[9] An effective remedy must offer reasonable prospects of success, meaning that its effectiveness cannot be linked to the certainty of a favourable outcome for the applicant. According to the ECtHR, the effectiveness of a remedy manifests itself rather in the sense of preventing the alleged violation of law or its continuation, or in providing adequate redress for any violation that had already occurred.[10] The practical effectiveness of a remedy requires that its exercise cannot be unjustifiably hindered by the acts or omissions of State authorities.[11]

The wording of Article 13 ECHR does not require from States Parties any particular type or form of remedy. Where a single remedy does not by itself entirely satisfy the requirements of Article 13 ECHR, the aggregate of remedies provided for under domestic law may be satisfactory.[12] It is accepted that States Parties are free to decide which system is the most suitable for ensuring the necessary protection of ECHR rights, taking into consideration their constitutional traditions and particular circumstances.[13] In the light of the admissibility criteria requiring the exhaustion of effective remedies, the respondent State must be able to prove that the requirements under Article 13 ECHR have been satisfied, and that the domestic legal system provided for accessible and effective remedies for the alleged violations of rights. Therefore, the Government claiming non-exhaustion of remedies is expected to prove that the remedy was an effective one, available in theory and in

7 According to the ECtHR, Article 13 ECHR "requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have their claim decided and, if appropriate, to obtain redress.", see ECtHR, *Klass and others v. Germany*, judgment of 6 September 1978, Application no. 5029/71, para. 64.

8 Schabas, 2015, p. 552.

9 E.g. ECtHR, *Kudła v. Poland*, judgment of 26 October 2000, Application no. 30210/96, para. 157; ECtHR, *Nicolae Virgiliu Tănase v. Romania*, judgment of 25 June 2019, Application no. 41720/13, para. 218, ECtHR, *Sejdovic v. Italy*, judgment of 1 March 2006, Application no. 56581/00, para. 46. See also Shabas, Article 35, pp. 764–766.

10 See e.g. *Kudła v. Poland*, paras. 157–158; ECtHR, *Sürmeli v. Germany*, judgment of 8 June 2006, Application no. 75529/01, para. 99.

11 *Nicolae Virgiliu Tănase v. Romania*, para. 218, *Husayn (Abu Zubaydah) v. Poland*, para. 540.

12 ECtHR, *De Souza Ribeiro v. France*, judgment of 13 December 2012, Application no. 22689/07, para. 79.

13 Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, adopted on 12 May 2004, Appendix, para. 11.

practice at the relevant time.[14] Once this burden of proof has been satisfied, it is the applicant's responsibility to establish that the remedy referred to by the Government was exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case.[15]

In the domestic context, violations of ECHR rights may be challenged and redressed either through right-specific remedies or general remedies. *General remedies* are intended to seek redress for a violation of a Convention-based right or freedom by public authorities without being limited in application to any particular factual or legal context.[16] General domestic remedies have two broad forms: constitutional complaints, on the one hand, and direct invocation of the ECHR provisions in the course of ordinary litigation before domestic courts, on the other hand.[17] At this point it is worth mentioning that the direct applicability of the ECHR, whose purpose is to enable individuals to directly assert their claims arising from international law before a domestic court, is contingent upon numerous conditions, including the proper constitutional anchorage, the framework of the State's legal and political system, as well as the constructional quality of the provisions contained in an international treaty.[18]

Specific remedies are domestic remedies with targeted scope of application, i.e. remedies responding to the violation of a specific ECHR right.[19] The general principles and standards of effectiveness under Article 13 ECHR apply equally to special and to general remedies, all of them need to be effective, sufficient and accessible.[20] Whatever type of remedy is used by the State to redress a violation of the ECHR, particular attention should be paid to the promptness of the remedial action itself,

14 ECtHR, *McFarlane v. Ireland*, judgment of 10 September 2010, Application no. 31333/06, para 107; ECtHR, *Vučković and Others v. Serbia*, judgment of 25 March 2014, Application No. 17153/11 and 29 others, para. 77.

15 *Vučković and Others v. Serbia*, para. 77.

16 Council of Europe (2013), *Guide to Good Practice in Respect of Domestic Remedies*, adopted by the Committee of Ministers of the Council of Europe on 18 September 2013, available at: https://rm.coe.int/guide-to-good-practice-in-respect-of-domestic-remedies/1680695a9f, p. 45.

17 Ibid.

18 Muszyński, 2023, p. 33. Direct invocation of the ECHR is possible in legal systems where the ECHR has the status of domestic law and it is directly applicable by court in the course of ordinary legal proceedings, e.g. in Austria, Ireland, the Netherlands, Norway, the United Kingdom, see: *Guide to Good Practice in Respect of Domestic Remedies*, p. 45, footnote no. 191.

19 For example, in cases concerning the breach of Article 6 ECHR as regards the excessive length of proceedings, the most suitable form of redress is prevention. However, depending on the circumstances of the case, the compensation or a combination of a preventive and a compensatory remedy may also be considered as an effective redress by the ECtHR, see: *Sürmeli v. Germany*, para. 100; ECtHR, *Gazsó v. Hungary*, judgment of 16 July 2015, Application no. 48322/12, para. 39. For further examples of right-specific remedies, see: *Guide to Good Practice in Respect of Domestic Remedies*, 2013, pp. 15–43.

20 *Sürmeli v. Germany*, paras. 97-101. See also: *Guide to Good Practice in Respect of Domestic Remedies*, p. 45

because even the adequateness of the remedy can be undermined by its excessive duration.[21]

The Committee of Ministers of the Council of Europe has observed that if properly interpreted and implemented, specific remedies can be very efficient and reduce the number of complaints submitted to the EtCHR, as well as the number of cases requiring a time-consuming examination.[22] Another observation is that States in which general remedies such as constitutional complaint exist, tend to have fewer cases before the ECtHR.[23]

2.2. Constitutional Complaint as an Effective Remedy under Article 13 ECHR

In many European jurisdictions, individuals can apply to a constitutional court for a remedy against alleged violation of rights protected under the national constitution by filing a constitutional complaint.[24] In this sense, the constitutional courts are national human rights courts, as Balcerzak pointed out, arguing against the idea of setting up separate domestic human rights courts in the States Parties to the ECHR.[25] Through their rulings on individual cases that are later the subject of applications to the ECtHR, the domestic constitutional courts can engage directly in the judicial dialogue between the national and European levels.[26]

The role of a constitutional complaint as a tool of protecting and enforcing human rights can be understood in two ways. On the one hand, it provides an ultimate domestic level of recourse for judicial examination of a complaint concerning an allegation of human rights violation. On the other hand, it contributes to ensuring consistency in the interpretation and application of human rights and freedoms at national level, with the overall result of enhancing their protection, in line with the principle of subsidiarity.[27]

The European legal systems have different modalities for the constitutional complaint procedure, creating broader or narrower possibilities for seeking redress for

21 *De Souza Ribeiro v. France*, para. 81.

22 Recommendation Rec(2004)6, Appendix, para. 9.

23 Recommendation Rec(2004)6, Appendix, para. 10.

24 E.g. in Croatia, Cyprus, the Czech Republic, Germany, Hungary, Poland, Slovakia, Slovenia, Spain, Switzerland. The constitutional complaint procedure is specifically designed to adjudicate and protect fundamental rights; and has the main purpose to safeguard individual liberties and rights as well as to determine (through its case law), the possible grounds and scope of lawful limitation. The institution of constitutional complaint, by which natural and legal persons may initiate a constitutional review, plays a key role in fundamental rights adjudication. In some models, constitutional complaint may be closely connected to the constitutional court's competence of norm control, i.e. deciding on the constitutionality of legislation, that is the most traditional function of constitutional adjudication, according to the Kelsenian model. For more information on the legal institution of constitutional complaint and its place within the constitutional system, see: Tóth J., 2022, pp. 371–376; Sándor, 2022, pp. 388–389; Dürr, 2014, pp. 72–73.

25 Balcerzak, 2006, pp. 24–25.

26 *Guide to Good Practice in Respect of Domestic Remedies*, 2013, p. 46.

27 Ibid.

fundamental rights violations in different countries.[28] Depending on the competences of the constitutional court in the given country, the constitutional complaint procedure may extend to legal norms which affect the petitioner's rights (either directly or through the application by courts and other authorities), and to the decisions of ordinary courts as well. The so-called 'full' (or 'real') constitutional complaint includes both types of examination, as opposed to the normative constitutional complaint, which allows tom challenge allegedly unconstitutional normative provisions, but not their application.[29]

The ECtHR's assessment of effectiveness of constitutional complaint as a remedy takes place on a case-by-case basis and does not allow for making definitive conclusions as to whether constitutional complaint in general can be considered as an effective remedy that needs to be exhausted before bringing a case before the ECtHR. Nevertheless, the ECtHR provides for certain general indications as to when a constitutional complaint can be recognised as an effective remedy within the meaning of Article 13 ECHR and Article 35 ECHR.

The primary requirements include that the rights protected by the national Constitution explicitly include or correspond in substance to ECHR rights. If the national Constitution enshrines a given human right in a wording very similar to those of the ECHR, the ECtHR is satisfied that a relevant constitutional right exists.[30] By contrast, constitutional complaint does not amount to an effective remedy for the purpose of Article 13 and Article, 35(1) if a national Constitution does not set forth guarantees which are at least remotely comparable to those provided for in the ECHR or developed in the ECtHR's case-law.[31] In addition, so as to be considered an effective domestic remedy under Article 13 ECHR, the procedure of constitutional complaint must be directly accessible for individuals, meaning that the applicant must be able to seize the constitutional court directly, and not via the judge hearing their case. Furthermore, it is essential that a remedy before the national constitutional court guarantee the right to have a final determination on a matter submitted to a court, in other words, effective decision-making.[32] Finally, the standard of effectiveness under Article 13 ECHR requires that the constitutional complaint be able to provide effective redress for a violation. It may imply, *inter alia*, the power of the constitutional court to quash the impugned decision or measure, to remit the case to the relevant authority for further proceedings based on the finding of the constitutional court,

28 For more information on different models of constitutional complaint in Central European countries, see: Tóth J., 2022; Sándor, 2022.

29 Sándor, 2022, p. 399. As Tóth has explained, a 'real' constitutional complaint is a legal institution where the person concerned, following a final court decision on the merits of the case affecting their rights, obligations and legal situation, may appeal to the constitutional court not against the law applied by the court but against the court's decision itself and the interpretation of the law contained therein, which they consider unconstitutional, see: Tóth J., 2022, p. 374.

30 ECtHR, *Szalontay v. Hungary*, judgment of 12 March 2019, Application no. 71327/13, para. 34

31 ECtHR, *Apostol v. Georgia*, judgment of 28 November 2006, Application No. 40765/02, para. 38.

32 ECtHR, *Marini v. Albania*, judgment of 18 December 2007, Application No. 3738/02, paras. 119–123.

to order payment of compensation, or to order *restitutio in integrum*.[33] Such powers, aside from existing in theory, must also be effective in practice.[34]

The requirement that the constitutional court be able to order appropriate individual relief manifests itself in the ECtHR's differentiated approach to 'abstract' and 'concrete' constitutional complaints. While individual applicants may resort to 'abstract' constitutional complaint to question the constitutionality of the legislation without necessarily being affected by its implementation, they cannot challenge decisions issued by the courts or the public authorities that directly affect their specific circumstances. Therefore, such constitutional complaint, according to the ECtHR, does not meet the criteria of effective remedy in terms of Article 13 and Article 35(1) ECHR.[35] In contrast, a 'concrete', i.e. specific constitutional complaint makes it possible to seek remedy for violations of rights and freedoms committed by State authorities or, where the infringement of a right guaranteed by the Constitution is the result of an interference other than a decision, to prohibit the authority concerned from continuing to infringe the right, and to order it to re-establish the *status quo* if it is possible.[36] Such type of constitutional complaint also makes it possible to seek remedy for violations resulting immediately and directly from an act or omission of a judicial body, regardless of the facts that had given rise to the proceedings; the abrogation of an unconstitutional law results in the annulment of all the final decisions made by the courts or public authorities on the basis of that law.[37]

Dürr argues that only 'full' constitutional complaints, allowing to challenge both the legislation and the unconstitutional application of law, complies with the requirements set forth in Articles 13 and 35 ECHR.[38] The European Commission for Democracy through Law (Venice Commission is also in favour of the full constitutional complaint, because it provides comprehensive protection of constitutional rights, on the one hand, and because of the subsidiary nature of the relief provided by the ECtHR and the desirability to settle human rights issues on the national level, on the other hand.[39] The full constitutional complaint has the following advantage: when the constitutional court holds that there has been a violation of human rights, it may directly set aside the final judgment or decision, no matter whether the norm

33 *Guide to Good Practice in Respect of Domestic Remedies*, 2013, p. 49.
34 Ibid, p. 50.
35 *Apostol v. Georgia*, para. 40.
36 *Apostol v. Georgia*, para. 42, Coe, p. 51.
37 ECtHR, *Voggenreiter v. Germany*, judgment of 8 January 2004, Application No 47169/99, para. 23.
38 Dürr, 2014, pp. 74–75.
39 The European Commission for Democracy through Law, *Compilation on the Venice Commission Reports, Opinion and Studies on Constitutional Justice (Updated)*, Strasbourg, 14 April 2020, CDL-PI(2020)004), p. 49.

or its application is unconstitutional.[40] Nonetheless, the ECtHR's case law does not prove definitely that the existence of a 'full' constitutional complaint within the domestic legal system is a *sine qua non* condition for the ECtHR to consider constitutional complaint an effective remedy within the meaning of Articles 13 and 35 ECHR.[41]

3. Constitutional Complaint Procedure in Hungary

The judicial review procedure was introduced to the Hungarian legal system following the political transition in 1989, and since then its legal framework has undergone a major change, landmarked by the adoption of the Fundamental Law of Hungary[42] in 2011. In the period between 1990 and 2011, the most prominent procedure before the Hungarian Constitutional Court was the *ex-post* abstract constitutional review of legislation initiated by individuals within the *action popularis* procedure, which did not require applicants to show personal injury. As a result, the Constitutional Court's caseload was very high.[43] Apart from the *ex-post* abstract review, concrete constitutional review in specific cases was also possible, either on the judicial initiative in a pending case, or following a constitutional complaint filed by individual applicants. In the latter case, the Constitutional Court reviewed the constitutionality of the legal provisions applied by ordinary courts, and not whether the specific court decision or administrative act violated the constitutional rights of the applicant.[44] As a result, the remedy the Constitutional Court was competent to provide was the prohibition of further application of the legal provisions that were found unconstitutional. A constitutional review initiated by a constitutional complaint lodged according to the rules in force until the end of 2011 did not lead to the

40 The disadvantage of full constitutional complaints is that they significantly increase the workload of the constitutional court, sometimes representing more than 90 per cent of the caseload. As a result, the constitutional court may be overburdened by cases which lack any constitutional dimension, brought because the parties are dissatisfied with the judgment of the ordinary court. To avoid such situations, countries where a full constitutional complaint exists, have several legal filters in place, such as time limits, mandatory legal representation, simplified decisions on manifestly unfounded cases, etc., see: *Compilation on the Venice Commission Reports, Opinion and Studies on Constitutional Justice (Updated)*, pp. 51–52.

41 As will be discussed later, Poland has not introduced any 'real' constitutional complaint, but the aggregate of remedies provided for under Polish constitutional law may, under certain circumstances, amount to an effective remedy.

42 The Fundamental Law of Hungary (*Magyarország Alaptörvénye*), adopted on 25 April 2011, entered into force on 1 January 2012.

43 Paczolay, 2020, p. 159. According to Gárdos-Orosz, appr. 1,600 actions were brought annually before the Hungarian Constitutional Court within the *actio popularis* procedure, Gárdos-Orosz, 2012, p. 303.

44 Paczolay, 2020, p. 159.

retroactive exclusion of the applicability of the unconstitutional legal provisions in the specific case.[45] Another limitation was that the Constitutional Court was able to provide remedy against a judicial decision if the underlying legislation was unconstitutional, however, as Paczolay has noted, if the judicial decision violated the due process, but the underlying legislation was constitutional, the Constitutional Court could not review the decision.[46]

Against this backdrop, the constitutional complaint governed by the rules in force until the end of 2011[47] was not considered as an effective remedy for the purpose of Article 13 and Article 35(1) ECHR. The underlying reason was that it did not provide any guarantee for an applicant to obtain redress in their individual case. As the European Commission of Human Rights (ECmHR) summarised it in *Vén v. Hungary*, the Constitutional Court was only entitled to control the constitutionality of laws in their generality and could not quash or modify specific measures taken by the State authorities against an individual.[48] A similar stand was adopted by the ECtHR: while it considered the pre-2012 constitutional complaint as an ineffective remedy, because it did not provide any guarantee for successful complainants to have the appellate proceedings repeated and thereby to obtain redress for the violation of their ECHR rights (*Csikós v. Hungary*[49]). Similarly, a mere theoretical possibility for an ordinary court to suspend a pending case to initiate a constitutional review of a legislation before the Constitutional Court could not be considered by the ECtHR as a guarantee of an effective remedy, which would have justified the rejection of a claim under Article 35(1) ECHR for non-exhaustion of domestic remedies.[50]

The domestic legal environment changed in 2012 with the entry into force of the Fundamental Law of Hungary and the new Act on the Constitutional Court (hereinafter: 'ACC')[51], which have brought about important changes in the constitutional adjudication, and in the constitutional complaint procedure as well.[52] The provisions allowing anyone to initiate a posterior norm control within the *actio popularis* procedure were removed from the Hungarian legal system. At the same time, the constitutional complaint procedure was expanded: aside from the formerly existing procedure that allowed for a norm control in a specific case, two other types of proceedings were introduced, including a 'full' constitutional complaint. Consequently, from 1 January 2012, three different types of constitutional complaints have been available under Hungarian law: (i) Article 26(1) ACC allows for a complaint against a

45 Gárdos-Orosz, 2012, p. 303; Paczolay, 2020, p. 159.

46 Paczolay, 2020, pp. 159–160.

47 Article 48 of the Act no. XXXII of 1989 on the Constitutional Court.

48 ECmHR, *Vén v. Hungary*, decision of 30 June 1993, Application no. 21495/93, cf. ECtHR, *Apostol v. Georgia*, paras. 40–41.

49 ECtHR, *Csikós v. Hungary*, judgment of 5 December 2006, Application no. 37251/04, paras. 17-19.

50 ECtHR, *K.M.C. v. Hungary*, judgment of 10 July 2012, Application No. 19554/11, para. 28.

51 Act No. CLI of 2011 on the Constitutional Court (*2011. évi CLI törvény az Alkotmánybíróságról*), adopted on 14 November 2011, in effect from 1 January 2012 (hereinafter: 'ACC').

52 For more information on the changes in the powers of the Hungarian Constitutional Court in the light of the 2011 constitutional reform, see: Tóth J., 2018.

legal provision applied in court proceedings (pre-2012 constitutional complaint); (ii) Article 26(2) ACC provides for an exceptional form of the constitutional complaint to challenge allegedly unconstitutional legislation when, by virtue of their application or their effect, the fundamental rights of the applicant are violated, i.e. without a court decision (the so-called 'exceptional' or 'direct' constitutional complaint); and (iii) Article 27 ACC, providing for a 'full' constitutional complaint against final court decisions (the so-called 'real' constitutional complaint).[53] The Constitutional Court has the power and obligation to annul a legal regulation which has been declared contrary to the Fundamental Law within the proceedings initiated under Article 26(1) or Article 26(2) ACC.[54] If, based on a successful 'real' constitutional complaint procedure regulated in Article 27 ACC, the Constitutional Court declares a judicial decision to be contrary to the Fundamental Law, it has the obligation to annul such a decision.[55]

The competence to quash judicial decisions based on unconstitutional legislation or on unconstitutional interpretation of legislation has provided the Hungarian Constitutional Court with powers that are fundamentally different from those that it had before 2012.[56] As a consequence, the primary competence of the Constitutional Court shifted from the *ex-post* abstract review of legislation to the adjudication of constitutional complaints, i.e. fundamental rights adjudication.[57] That particular development of the legal context governing constitutional adjudication in Hungary has translated into the ECtHR's change of approach towards constitutional complaint in Hungary, albeit not immediately after the entry into force of the new regulations. For some years after the 2011 constitutional reform, the ECtHR has still shown 'distrust' towards the reformed constitutional complaint, while exempting the applicants from

53 The admissibility criteria set forth allowing an individual to bring a constitutional complaint are threefold. First, standing requirements under Articles 26(1), 26(2) and 27 ACC require a violation of the complainant's rights under the Fundamental Law (individual injury). Second, all other domestic remedies must be exhausted before the submission of a constitutional complaint. Third, Article 29 ACC lays down additional admissibility criteria, by allowing the Constitutional Court to admit complaints only if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance.

54 Pursuant to Article 41(1) ACC.

55 Pursuant to Article 43(1) ACC.

56 Paczolay, 2020, p. 160.

57 Gárdos-Orosz, 2012, p. 307. As Tóth demonstrates, between 2012 and 2018, over 90% of the cases before the Hungarian Constitutional Court were constitutional complaints, Tóth J., 2018, pp. 105–106.

approaching the Hungarian Constitutional Court to be able to successfully lodge a claim to the Strasbourg Court.[58]

The ECtHR started to consider the Hungarian constitutional complaints as effective remedy for the purpose of Article 13 and Article 35(1) ECHR in 2018 and 2019, as marked in its landmark decisions in cases *Mendrei v. Hungary*[59] and *Szalontay v. Hungary*[60] one year later. In *Mendrei v. Hungary,* the ECtHR scrutinised the constitutional complaint under Article 26(2) ACC upon the Government's objection of non-exhaustion of domestic remedies. The ECtHR examined whether the 'exceptional' ('direct') constitutional complaint designed to challenge allegedly unconstitutional legislation whose application or effect has led to a violation of fundamental rights can be considered as an accessible and effective remedy, capable of offering sufficient redress. The facts of the case related to the entry into force of the National Public Education Act in 2013, which provided for the *ipso iure* membership of Hungarian teachers in the National Teachers' Chamber. The applicant, a teacher at a public education institution, complained that such compulsory membership to a professional association infringed his rights under Articles 10 and 14 of the ECHR; nonetheless, he had not tried to challenge the questioned regulation before the Constitutional Court with a constitutional complaint, which he had not considered an effective remedy. According to the ECtHR, a successful complaint would have been capable of putting an end to the grievance (i.e. the mandatory membership in the professional association), because the removal of the impugned provisions would have terminated his membership, itself an *ipso iure* consequence of the law.[61] Against this background, the ECtHR considered the 'exceptional' constitutional complaint procedure under Article 26(2) ACC as an effective remedy, and rejected the application for the non-exhaustion of domestic remedies.

In *Szalontay v. Hungary,* the ECtHR commented on the 'real' constitutional complaint, allowing to challenge individual judicial decisions under Article 27 ACC, taken alone or applied in combination with the procedure under Article 26(1) ACC to challenge unconstitutional legal provisions underlying a judicial decision. The applicant was the managing director of a company which leased and sub-leased the

58 The ECtHR Judge Kūris argued, in connection with the reformed Hungarian constitutional complaint, that the ECtHR's refusal to recognise the most important national constitutional instrument was an attempt to effectively invalidate and disqualify the Hungarian Constitutional Court as being irrelevant to the protection of human rights, see: ECtHR, *Király and Dömötör v. Hungary,* judgment of 17 January 2017, Application No. 10851/13, dissenting opinion of Judge Kūris. para. 41; ECtHR, *Könyv-Tár Kft and Others v. Hungary*, judgment of 16 October 2018, Application No. 21623/13, concurring opinion of Judge Kūris, para. 5.

59 ECtHR, *Mendrei v. Hungary*, judgment of 19 June 2018, Application no. 54927/15.

60 ECtHR, *Szalontay v. Hungary*, judgment of 12 March 2019, Application no. 71327/13. According to Dudás, the ECtHR's change of approach can be explained by the fact that in 2017 the former president of the Hungarian Constitutional Court was appointed as ECtHR judge, and as a result the ECtHR gained a much better insight into the functioning of the Constitutional Court in Hungary, see: Dudás, 2020, p. 49.

61 *Mendrei v. Hungary*, para. 35.

premises of a shopping mall in Budapest to hold music events. In 2011, during one of the events a panic broke out in the crowded stairway of the mall, and in the resultant stampede three people were crushed to death. Both the court of first instance and the court of second instance found the applicant guilty of the crime of danger caused by negligent professional misconduct leading to fatal mass casualties. In his claim to the ECtHR, the applicant challenged the decision of the Hungarian criminal courts, on account that his right to a fair trial under Article 6 ECHR had been violated, in that the principle of equality of arms had not been observed during the criminal proceedings, and that the domestic courts had not been impartial.

The Hungarian Government submitted a plea on non-exhaustion of domestic remedies on account that the applicant had not submitted a constitutional complaint, either under Article 26(1) ACC or Article 27 ACC. The ECtHR found that the applicant's grievances concerned (I) the application of a provision of the Hungarian Code of Criminal Procedure barring him from submitting a challenge for bias in an effective manner; and (II) his conviction and sentence resulting from the first- and second-instance judgments that demonstrated a lack of impartiality on the part of the courts.[62] The first of these issues, related to the constitutionality of the relevant provision, could have been challenged under Article 26(1) ACC; whereas the second issue related to the constitutionality of the application of the law by the courts, could have been challenged under Article 27 ACC. According to the ECtHR, a successful constitutional complaint, relying either on a combination of Article 26(1) and Article 27 ACC or Article 27 ACC alone, would have been capable of putting an end to the grievance by prohibiting the application of the impugned rule and ordering new proceedings regarding the applicant's case.[63] Consequently, the ECtHR found that the applicant had not exhausted domestic remedies as required by Article 35(1) ECHR, and therefore, it declared the application inadmissible.

In *Mendrei v. Hungary* and *Szalontay v. Hungary*, the ECtHR found the Hungarian constitutional complaint, more specifically the procedure under Article 26(2) ('direct' constitutional complaint), Article 27 ACC ('real' constitutional complaint), as well as Article 26(1) in combination with Article 27 can be considered as an effective remedy for the purpose of Articles 13 and 35(1) ECHR. The ECtHR made a disclaimer that it was ready to change its approach as to the potential effectiveness of these procedures, if the practice of the Hungarian courts indicates the contrary.[64] In a more recent decision concerning Hungary (*Sándor Varga v. Hungary*), confronted with different factual and legal circumstances of the case, the ECtHR provided a different assessment of the remedy under Article 27 ACC and under Article 26(1)

62 *Szalontay v. Hungary*, para. 33.

63 *Szalontay v. Hungary*, para. 35. The eventual striking down of the impugned legal provision pursuant to Article 26(1) ACC, coupled with the quashing of the court judgments pursuant to Article 27 ACC, would have resulted in new proceedings before the competent criminal courts in accordance with Article 41 ACC. Moreover, a constitutional complaint lodged solely under Article 27 ACC could also have resulted in the quashing of the judgments and in new proceedings in the applicant's case.

64 *Szalontay v. Hungary*, para. 39.

ACC. It pointed out that these provisions do not guarantee effective remedy for the applicant if the applicant cannot claim the *unconstitutionality* of the judicial decision or the underlying legal provisions.[65] When the alleged violation of human rights, such as the institution of life imprisonment without the possibility of release on parole, examined in *Sándor Varga v. Hungary*, is explicitly provided for by the Fundamental Law, it is impossible to challenge the compatibility with the Fundamental Law of either the court judgments or the underlying provisions of law through constitutional complaint under Article 27 ACC or under Article 26(1) ACC, consequently, such remedy is not an accessible and effective legal approach within the meaning of Articles 13 and 35(1) ECHR.

4. Constitutional Complaint Procedure in Poland

The constitutional complaint procedure was introduced to the Polish legal system in 1997 with the adoption of the Constitution of the Republic of Poland (hereinafter: 'the Constitution').[66] It is regulated in Article 79(1) of the Constitution, which guarantees anyone whose constitutional freedoms or rights have been infringed the right to initiate before the Constitutional Tribunal an examination concerning the conformity with the Constitution of a statute, or another normative act based on which a court or an administrative body has made a final decision on their freedoms or rights or on their obligations set forth in the Constitution. Detailed rules on the

65 ECtHR, *Sándor Varga and Others v. Hungary*, judgment of 17 June 2021, Applications nos. 39734/15, 35530/16, and 26804/18. The applicants complained that, under the new mandatory pardon procedure (*kötelező kegyelmi eljárás*) in force as of 2015, their whole life sentences remained *de facto* irreducible, in breach of Article 3 of the ECHR. The ECtHR noted that life imprisonment without the possibility of release on parole is explicitly provided for by the Hungarian Fundamental Law, and that the possibility of exclusion of eligibility for parole is part of the constitutional legal order. Consequently, it cannot be said that any issues of 'constitutionality' or compatibility with the Fundamental Law of the court judgments or the provisions of the Criminal Code arise, therefore the ECtHR considered that the constitutional complaint did not constitute an effective remedy for the applicants' grievances, see: *Sándor Varga and Others v. Hungary*, para. 34.

66 The Constitution of the Republic of Poland adopted on 2 April 1997 (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*), Journal of Laws [Dz. U.] of 1997, No. 78, item 483, as amended.

constitutional complaint procedure are laid down in the Act of 30 November 2016 on Organisation and Procedure before the Constitutional Tribunal.[67]

Out of the two classical models of a constitutional complaint, i.e. a complaint against the unconstitutionality of a court decision and a complaint against the unconstitutionality of a provision of law, the drafters of the Polish Constitution have chosen the latter. The Polish constitutional complaint procedure allows to challenge unconstitutional legislation, and not its application; in other words, the Polish Constitutional Tribunal is not competent to receive and consider complaints lodged directly against judicial decisions, as opposed to constitutional courts in countries where the 'full' constitutional complaint exists.[68] Although there is no direct fundamental rights adjudication in Poland, the primary function of the Polish constitutional complaint is nevertheless to protect the constitutional freedoms and rights of individuals, as the Constitutional Tribunal itself has explicitly stressed.[69] Aside from being an instrument of human rights protection, the Polish constitutional complaint is an instrument of ex-post norm control designed to ensure the compliance of lower-level legal acts with the Constitution and the general coherence of the domestic legal system.[70]

The model of constitutional complaint envisaged by the Polish Constitution bears implications for the effects of successfully initiated constitutional review, which are regulated in Article 190(4) of the Constitution. According to the latter, the Constitutional Tribunal's judgment on non-conformity with the Constitution of legal provisions underlying a final court decision or a decision of an administrative body constitutes the basis for reopening a case or for quashing a decision in separate proceedings.[71] The Constitutional Tribunal does not decide whether the impugned provisions infringed the applicant's constitutional rights, but only whether the

67 Act of 30 November 2016 on Organisation and Procedure before the Constitutional Tribunal (*Ustawa z dnia 30 listopada 2016 r. o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym*), Journal of Laws [Dz. U.] of 2016, item 2072, as amended. The substantive as well as procedural requirements to lodge a constitutional complaint are laid down in the Constitution and in the Act of 30 November 2016 on Organisation and Procedure before the Constitutional Tribunal. One of the basic prerequisites is the existence of a final court ruling or a decision of non-judicial State authority that affects the applicant's rights and freedoms or obligations set forth in the Constitution. Therefore, personal interest needs to be demonstrated while submitting the complaint. The constitutional complaint is a subsidiary and extraordinary remedy, which presumes that it can be lodged after other domestic remedies have been exhausted, and it is admissible only if the alleged violation of constitutional rights cannot be otherwise removed. For more information on the admissibility requirements see: Jamróz, 2015, pp. 150–154.

68 Unlike the constitutional courts in Hungary and in the vast majority of Central European countries, see: Tóth J., 2022, p. 381; Jamróz, 2015, p. 146.

69 Constitutional Tribunal of the Republic of Poland, judgment of 16 November 2011, SK 45/09.

70 Łabno, 2012, p. 51. For more information on the characteristics of the Polish constitutional complaint, see: Syryt, 2021; Jarosz-Żukowska, 2014, pp. 827–848.

71 Additionally, a judgment of the Polish Constitutional Tribunal finding the unconstitutionality of legal provisions have also the result referred to in Article 77(2) of the Constitution, namely it opens the possibility for all persons concerned to claim compensation for any damage caused by the unconstitutional legislation.

impugned provisions are compatible with constitutional provisions. Consequently, the annulment of a decision that had been based on a legal provision successfully challenged by a constitutional complaint does not take place automatically, but requires the applicant to take further legal steps and to initiate further proceedings.[72] Several authors argue that such complex, fragmented procedure undermines the effectiveness of the Polish constitutional complaint as a remedy for human rights violations: it is time-consuming, requires additional efforts and costs from the applicant and does not fully serve legal coherence, especially if the cessation of legal effects of impugned legislation is deferred in accordance with Article 190(3) of the Constitution.[73]

The ECtHR has also been confronted with these issues while examining the admissibility of cases where the Polish Government raised a plea on the ground of non-exhaustion of domestic remedies under Article 35(1) ECHR. In *Szott-Medyńska v. Poland*[74], the first of the series of cases dealing with the effectiveness of the constitutional complaint in Poland, the ECtHR expressed its reservations regarding the scope of the Polish model of constitutional complaint, and the form of redress it provides. It has led to the conclusion that the procedure of the constitutional complaint can be considered as an effective remedy for the purpose of Articles 13 and 35(1) ECHR only in limited circumstances.

In *Szott-Medyńska v. Poland*, the applicants were engaged in a family business, in the course of which they were found guilty of a fiscal offence and were imposed a fine by the Polish authorities for non-payment of income-tax advance on wages. In their appeal, the applicants contested the legal classification of the act, which affected the jurisdiction of the competent authorities and the access to court. The second instance administrative authority dismissed the appeal and upheld the contested decision, against which the applicants had no further appeal. In their complaint to the ECtHR, the applicants claimed that Poland had violated the right to access a court, guaranteed by Article 6(1) ECHR, in that the administrative decision could not be challenged in court. The Polish Government pleaded the non-exhaustion of domestic remedies on the ground that the applicants had not brought a constitutional complaint before the Constitutional Tribunal. The ECtHR noted that the Polish constitutional review procedure does not provide for any immediate redress, as the successful applicant needs to take another step to request the reopening of his or her individual case or the quashing of the decision. However, since in the renewed examination of the case, the authorities will have to disregard the law

72 A judgment of the Constitutional Court on the unconstitutionality of legal provisions does not cause the automatic 'collapse' of the decision that gave rise to the complaint, but only provides a basis for resuming the proceedings or initiating other procedures aimed at repealing such a decision in accordance with Article 190(4) of the Constitution, see e.g. Constitutional Tribunal of the Republic of Poland, judgment of 21 May 2001, SK 15/00, para. 5 of the Reasoning.

73 See e.g. Wojtyczek, 2017, p. 87; Łabno, 2012, pp. 41, 53–58; Jarosz-Żukowska, 2014, pp. 852–853.

74 ECtHR, *Szott-Medyńska v. Poland*, decision of 9 October 2003 on admissibility, Application no. 47414/99.

declared unconstitutional in the proceedings before the Constitutional Tribunal and will have to apply the law as interpreted in its judgment to the particular facts of the individual case, the two-step remedy envisaged under Polish law is able to provide effective redress. Consequently, the ECtHR took the stand that the exhaustion of the constitutional complaint in Poland should be required under Article 35(1) ECHR only where (I) the individual decision, which allegedly violated the ECHR, had been adopted as a result of directly applying an unconstitutional provision of national legislation; and (II) procedural regulations applicable to the revision of such type of individual decisions provided for the reopening of the case or the quashing of the final decision in consequence of the judgment of the Constitutional Tribunal in which unconstitutionality had been found.[75]

The considerations concerning the Polish model of constitutional complaint formulated by the ECtHR in *Szott-Medyńska v. Poland* were upheld in several subsequent cases (e.g. *Pachla v. Poland*[76], *Wiącek v. Poland*[77], *Tereba v. Poland*[78]). They have not lost their relevance, and two decades later were reaffirmed by the ECtHR in *Xero Flor w Polsce sp. z o.o. v. Poland*.[79] In the latter case, however, the effectiveness of the Polish constitutional complaint *per se* was not the centre issue, since it was examined by the ECtHR not in relation to admissibility requirements under Article 35(1) ECHR (the applicant had exhausted the domestic remedial measures, including the constitutional complaint procedure), but in the context of Article 6(1) ECHR, regarding the right to a tribunal established by law, to determine whether it applied to the proceedings before the Polish Constitutional Tribunal.[80] In *Xero Flor w Polsce sp. z o.o. v. Poland*, the ECtHR concluded that in the factual and legal circumstances of the case, the constitutional complaint proceedings were directly decisive for the applicant's civil rights, which, in the ECtHR's opinion enabled the application of Article 6(1)

75 Consequently, the Polish constitutional complaint cannot serve as an effective remedy if the provision in question does not constitute the legal basis for the final judicial or administrative decision, but is merely applied, at some stage of the main procedure, to take an interim or incidental measure, see e.g.: ECtHR, *Brudnicka v. Poland*, decision of 16 January 2003 on admissibility, Application no. 54723/00.

76 ECtHR, *Pachla v. Poland*, decision of 8 November 2005 on admissibility, Application no. 8812/02.

77 ECtHR, *Wiącek v. Poland*, decision of 17 January 2006 on admissibility, Application no. 19795/02.

78 ECtHR, *Tereba v. Poland*, decision of 21 November 2006 on admissibility, Application no. 30263/04.

79 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, Application no. 4907/18.

80 The applicant company submitted that its right to a trial established by law, guaranteed under Article 6(1) ECHR had been violated because the Constitutional Tribunal had examined its constitutional complaint in a panel which, according to the applicant company, was composed in violation of the Polish Constitution. The Government disputed the applicability of Article 6(1) ECHR under its civic head to the proceedings before the Constitutional Tribunal. According to the ECtHR, the relevant test in determining whether proceedings come within the scope of Article 6(1) ECHR, even if they are conducted before a constitutional court, is whether their outcome is decisive for the determination of the applicant's civil rights and obligations, see *Xero Flor w Polsce sp. z o.o. v. Poland*, para. 191.

ECHR.[81] While examining the Polish model of constitutional complaint, the ECtHR reaffirmed that it can be an effective remedy, but has two important limitations, namely its scope and the form of redress it provides.[82]

The latest cases concerning Poland (*Advance Pharma sp. z o.o. v. Poland*[83], *Juszczyszyn v. Poland*[84]*, Tuleya v. Poland*[85]) reflect a major change in the ECtHR's approach towards the effectiveness of the Polish constitutional complaint. The shift can be seen in the ECtHR's departure from the examination based on purely objective legal criteria towards an examination involving a more subjective assessment of the judicial reforms in Poland. In all three cases, the applicants challenged the composition of the highest domestic judicial bodies where their respective cases were heard (the Constitutional Tribunal or the Supreme Court of the Republic of Poland), alleging a violation of Article(1) ECHR. In *Advance Pharma Sp. z o.o.*, the applicant company submitted that it had its cassation appeal examined by the Civil Chamber of the Supreme Court in a panel which, according to the applicant company, was composed in a manner contrary to domestic law and the ECHR. The Government raised a preliminary objection of non-exhaustion of domestic remedies and submitted that the applicant company had failed to lodge a constitutional complaint which would have provided the national authorities with an opportunity to examine its complaint under Article 6(1) ECHR. The ECtHR rejected the Polish Government's preliminary objection, arguing that in the circumstances of the case it "did not see sufficiently realistic prospects of success for a constitutional complaint".[86]

The ECtHR reached a similar conclusion in *Juszczyszyn v. Poland* and *Tuleya v. Poland*, both of which concerned the applicants' suspension from their judicial duties by the Disciplinary Chamber of the Polish Supreme Court, which, in the applicants' submission, did not satisfy the requirements of an independent and impartial tribunal established by law. In both cases, the Polish Government submitted the non-exhaustion of domestic remedies on account that the applicants had failed to lodge a constitutional complaint to challenge the compatibility of the law on the Supreme Court and on the National Council of the Judiciary with Article 45(1) of the Constitution, which enshrines the right to a fair hearing before a competent, impartial and independent court. In both cases, the conditions formulated by the ECtHR in *Szott-Medyńska v. Poland* to consider the constitutional complaint as an effective remedy for the purpose of Article 35(1) ECHR were fulfilled. Nevertheless,

81 However, as Judge Wojtyczek pointed out, declaring Article 6 ECHR applicable to the judicial review of legislation, was not unproblematic and triggered serious objections and concerns, see: *Xero Flor w Polsce sp. z o.o. v. Poland,* Judge Wojtyczek's party concurring and partly dissenting opinion, paras. 12–17.

82 *Xero Flor w Polsce sp. z o.o. v. Poland,* paras. 197–200.

83 ECtHR, *Advance Pharma sp. z o.o. v. Poland*, judgment of 3 February 2022, Application no. 1469/20.

84 ECtHR, *Juszczyszyn v. Poland*, judgment of 6 October 2022, Application no. 35599/20.

85 ECtHR, *Tuleya v. Poland*, judgment of 6 July 2023, Applications nos. 21181/19 and 51751/20.

86 *Advance Pharma sp. z o.o. v. Poland,* paras. 319–320.

the ECtHR held that it was not enough to examine the legal framework of the constitutional complaint, and that its effectiveness of had to be analysed in conjunction with the general context in which the Constitutional Tribunal operated.[87] In the ECtHR's assessment, there were no sufficiently realistic prospects of success for a constitutional complaint to consider it as an effective remedy.[88]

5. Conclusions

The effective implementation of the European system of human rights protection largely depends on the existence of effective domestic remedies, which enables the enforcement of ECHR rights and freedoms at national level according to the principle of subsidiarity. A constitutional complaint that meets the standards of effective remedy under Article 13 ECHR may successfully enhance the overall level of human rights protection in the given jurisdiction. The ECtHR holds that to be considered as an effective remedy, a constitutional complaint should satisfy all the general requirements expected from domestic remedies, i.e. it must provide an accessible remedy, must be capable of providing redress in respect of the alleged grievances and offering reasonable prospects of success. It also sets out the specific prerequisites of effectiveness, which apply specifically to this constitutional instrument, namely that (I) the rights protected by the national Constitution must correspond in substance to the ECHR rights; (II) the applicant must be able to resort to the constitutional court directly; (III) the constitutional complaint must guarantee effective decision-making; and finally that (III) a constitutional complaint procedure must provide effective redress for any violation, which implies the power of a constitutional court to quash the impugned decision or measure, or to remit the case for reopening, or to take other meaningful steps to remedy the unlawful situation.

These criteria have been used by the ECtHR to assess whether the constitutional complaint in Poland and in Hungary complies with Article 13 ECHR. In both jurisdictions, constitutional complaint was introduced after the democratic transition, together with other instruments inherent to a democratic State governed by the rule of law and providing human rights protection.

In Hungary, the earliest form of constitutional complaint, in force until 31 December 2011, was limited in scope and allowed for a constitutional review of legal provisions applied by the courts in individual cases. It did not constitute an effective remedy for the purpose of Articles 13 and 35(1) ECHR. According to the ECmHR and the ECtHR, the mere control of the constitutionality of laws initiated with a constitutional complaint, without the Constitutional Court's power to quash or amend

87 *Juszczyszyn v. Poland*, paras. 149-151; *Tuleya v. Poland*, paras. 308–310.
88 *Juszczyszyn v. Poland*, para. 150; *Tuleya v. Poland*, para. 309.

individual decisions did not provide sufficient relief. The current Hungarian constitutional framework offers three types of constitutional complaints, two of a norm control type, and a 'full' constitutional complaint to challenge both the legislation and its application in individual cases. As a result, the Hungarian Constitutional Court has equally the power to annul any impugned legal provision and to set aside any impugned decision, in the latter case, without the applicant having to initiate separate proceedings. The constitutional reform put in place in 2012 and the introduction of new types of constitutional complaints have changed the ECtHR's evaluation of the Hungarian general remedy. In *Mendrei v. Hungary*, the 'exceptional' constitutional complaint, while in *Szalontay v. Hungary* the 'real' constitutional complaint alone or in combination with a normative type of constitutional complaint was considered as an effective remedy that needs to be exhausted before bringing a case to Strasbourg. The effectiveness of the constitutional complaint resided in the fact that in the given circumstances of the examined cases, it could have put an end to the grievance, either by removing impugned legal provisions, or by quashing the individual judgments and ordering new proceedings.

In Poland, the legal framework governing constitutional complaint has remained unchanged since its adoption in 1997, and it represents a normative model of constitutional complaint applied to challenge unconstitutional legislation. The Polish Constitutional Tribunal, unlike its Hungarian counterpart, is not competent to annul individual judicial decisions. The redress offered by the Polish constitutional complaint is available under a two-step procedure: a judgment of the Polish Constitutional Tribunal on the unconstitutionality of legal provisions underlying a final court decision allows for the applicant to request the reopening of a case or the annulment of a decision in separate proceedings. The constitutional complaint envisaged by the Polish Constitution, requiring a two-step procedure to achieve the annulment of an individual decision can be considered as an effective remedy for the purpose of Articles 13 and 35(1) ECHR, as it was concluded in *Szott-Medyńska v. Poland*. Nonetheless, the ECtHR has found that, in certain circumstances, the effectiveness of the constitutional complaint in Poland might be limited by the complex legal framework it operates in, affecting the scope of applicability and form of redress it provides; one of the main concerns being that the judgment of the Constitutional Tribunal does not automatically quash an individual decision in relation to which the constitutional complaint was lodged.

Recent cases concerning constitutional complaint in Hungary (*Sándor Varga v. Hungary*) and in Poland (*Advance Pharma Sp. z o.o. v. Poland, Juszczyczyn v. Poland, Tuleya v. Poland*) prove that the ECtHR's assessment of a given remedy can change fundamentally over time and depending on the circumstances. The same remedy, once considered as an effective redress, in a different case and in different circumstances may as well be declared ineffective. The change of assessment concerning the effectiveness of constitutional complaint in Hungary was clearly related to the difference in legal premises, the different legal circumstances that led to a different conclusion. The Polish cases demonstrate that even the comparable legal premises

can lead to a different assessment of effectiveness of a constitutional complaint. The ECtHR has embarked on a new approach which, alongside the examination of the legal framework of the constitutional complaint in Poland, includes an assessment of the 'general context' in which the Constitutional Court has operated since 2015. Such assessment, in the ECtHR's case-law, involves the scrutiny of the Polish reform of the judiciary, and undoubtedly, forms part of the test to establish whether the remedy is effective both in legal and practical terms, in line with the ECtHR's general practice. Nonetheless, there is always a risk that departing from making an assessment solely on the basis of objective legal premises towards a more vague assessment of the 'general context', especially if it lacks objective and thorough reasoning, can make the ECtHR's conclusion that it "does not see sufficiently realistic prospects of success"[89] sound like a fortune-teller's reading from a crystal ball.

89 *Advance Pharma sp. z o.o. v. Poland,* para. 319.

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Chapter 17

Less is More? The ECtHR's Judgment on the Voting Rights of National Minority Voters in Hungary

Attila Horváth

Abstract

In 2011, Hungarian Parliament passed a new electoral law that – unlike the previous legislation – contained elements of positive discrimination in favour of the national minorities to promote their representation in Parliament and to enhance their political participation. After the 2014 parliamentary elections, the system of national minority voting was challenged before the European Court of Human Rights by two minority voters, claiming that the voting system constituted discriminatory interference with their voting rights (Bakirdzi and E.C. v. Hungary). The applicants relied on Article 3 of Protocol No. 1 (right to free elections) to the European Convention on Human Rights taken alone and in conjunction with Article 14 of the Convention (prohibition of discrimination). The Court found that the combination of the restrictions on the applicants' voting rights, considering their total effect, constituted a violation of both of the articles of the Convention.

The current study outlines the background of the case, paying special attention to the challenged legal framework and the outcome of the last three parliamentary elections, and then analyses the procedure before the Court. As the relevant statutory scheme has not yet been amended, the summary outlines some possible ways in which the Government could bring the domestic legal framework into line with the principles set out in the judgement.

The judgement may be of interest for at least two reasons. On the one hand, the decision sheds light on the problems that lawmakers must face when elaborating the voting system of national minority voters. On the other hand, the judgement analysed here helps us to explore the meaning of 'equal suffrage', 'free elections' or

Attila Horváth (2025) 'Less is More? The ECtHR's Judgment on the Voting Rights of National Minority Voters in Hungary'. In: Nóra Béres – Renáta Hrecska-Kovács (eds.) *The ECHR at 70: The Central European Narrative*, pp. 389–418. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2025.nbrhkechr_17

'secrecy of vote'. According to some views, the Court has not yet carried out such an abstract examination of the legislation of the Member States ensuring the effective participation of national minorities in public life. Therefore, the judgment may also have an international impact.

Keywords: national minorities, right to vote, equal suffrage, free expression of opinion of people, discrimination, Hungary

1. Background of the Judgement

As the ECtHR's judgement would be difficult to interpret without knowledge of the legal context, the first section of this study aims to outline the background of the case of Bakirdzi and E.C. v. Hungary.[1] In doing so, firstly some overall features of the national minorities in Hungary are sketched out. Then the long and bumpy road that led to the parliamentary representation of ethnic minorities is outlined. This is followed by the analysis of the current legal framework that was thoroughly reviewed by the ECtHR as well. Finally, the results of the 2014–2022 parliamentary elections are briefly presented from the perspective of minority lists.

1.1. National Minorities in Hungary

Although for many centuries Hungary was a rather mixed country in terms of the ethnic composition of its population, after the 1920 Treaty of Trianon following World War I (by which Hungarian territory was reduced to less than one-third of its former extent, and the country lost almost 60% of its population), and the deportations and forced population exchanges after World War II, the country became nearly ethnically homogeneous. As Kukorelli notes, the minority policy in the decades of communism was part of the communist party's alliance policy, and was ideological and with little regard for fundamental rights.[2]

Three years after the democratic transition, Parliament[3] passed the Act on the Right of National and Ethnic Minorities[4] by an overwhelming majority vote. It is noteworthy, that the Council of Europe formed a positive opinion about it, highlighting

1 Bakirdzi and E.C. v. Hungary, Judgement of 10 November 2022 (Applications nos. 49636/14 and 65678/14)

2 Kukorelli, 2018, p. 5.

3 We use the terms 'Parliament' and 'National Assembly' (*Országgyűlés*, the official name of the Hungarian legislative body) interchangeably.

4 Act LXXVII of 1993 on the Rights of National and Ethnic Minorities (hereby 1993 Minority Act)

its merits and highly progressive achievements.[5] The phrase "keeping up with the most noble traditions and values of Hungarian history" in the explanatory notes of the law refers primarily to the Nationalities Act of 1849, which was the first official act of the legislature in Hungary (and one of the first even in Europe) that regulated the rights of minorities and languages,[6] and to the Nationalities Act of 1868, the earliest modern, liberal language law on the continent.[7]

Based on the 1993 Minority Act, the following ethnic groups qualified as ethnic groups native to Hungary: Bulgarian, Gypsy, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian.[8] The law underwent a number of amendments over the next two decades and was subsequently replaced by a new act.[9] The 2011 Minority Act recognised the same 13 minorities as its predecessor (however, the term 'Gypsy' was changed to 'Roma'). It is worth mentioning that both of the minority laws left open the possibility for other ethnic groups to qualify for a recognised minority status. On this basis, in the past decades, several ethnic groups (e.g. Italians, Russians, Huns, Székelys [Szeklers], and, most recently, Scythians) have tried to get themselves recognised as national minorities.[10] However, they were either unable to collect 1,000 signatures from Hungarian citizens (which is a prerequisite for the initiative), or their initiatives were rejected by the Parliament.

5 Réti, 1995, p. 273.
6 Katus, 2003.
7 Berecz, 2022.
8 1993 Minority Act, Section 61 (1).
9 Act CLXXIX of 2011 on the Rights of National Minorities (hereby 2011 Minority Act).
10 For attempts before 2007, see Pap, 2007, pp. 81–95.

As regards the number of minorities, the results of the censuses are summarised in Table 1.

		2001		2011		2022	
		Persons	%	Persons	%	Persons	%
1.	Armenian	1,164	0.01%	3,571	0.04%	4,198	0.04%
2.	Bulgarian	2,316	0.02%	6,272	0.06%	6,109	0.06%
3.	Croatian	25,728	0.25%	26,774	0.27%	21,823	0.23%
4.	German	120,339	1.18%	185,696	1.87%	142,550	1.48%
5.	Greek	6,618	0.06%	4,642	0.05%	6,178	0.06%
6.	Polish	5,144	0.05%	7,001	0.07%	7,398	0.08%
7.	Gypsy/Roma	205,715	2.02%	315,583	3.18%	209,909	2.19%
8.	Romanian	14,780	0.14%	35,641	0.36%	27,554	0.29%
9.	Ruthenian	2,075	0.02%	3,882	0.04%	7,109	0.07%
10.	Serbian	7,344	0.07%	10,038	0.10%	11,621	0.12%
11.	Slovak	39,266	0.39%	35,208	0.35%	29,880	0.31%
12.	Slovene	4,831	0.05%	2,820	0.03%	3,965	0.04%
13.	Ukrainian	7,393	0.07%	7,396	0.07%	24,609	0.26%
14.	Total Minority Population	414,165	4.06%	555,507	5.59%	313,810	3.27%
15.	Total Population	10,198,079	100.00%	9,937,515	100.00%	9,603,518	100.00%

Table 1. Number of minorities and their share of the total population in Hungary based on the question: "Which ethnic group do you belong to?"[11]

Notes:
1) As the respondents were allowed to declare two identities (in 2011 and 2022), the sum of rows 1–13 is higher than the 'Total Minority Population'.
2) The 'Total Minority Population' does not include the number of other minorities that are not recognised by law (e.g. Arabs, Chinese, Russians).

As can be seen, only the German and Roma minorities exceed 1%, meanwhile, six minorities do not even make up 0.1% of the population. As the numbers in Table 1 rely on the self-declaration of the citizens, the changes in the data are mainly due

11 Source: the author, based on the census data; Available at: http://tinyurl.com/muzhm26s .

to the willingness of the respondents to assume their minority identity during the censuses.[12]

Two further characteristics of domestic minorities deserve closer attention. Firstly, minorities are geographically relatively scattered throughout the country, and there are no ethnically homogenous blocks such as the Hungarian-inhabited Székely Land in Romania.[13] Secondly, the nationalities in Hungary are widely considered to be highly assimilated minorities.[14] According to the 2022 census, only 79,256 respondents (0.83% of the total population) declared that they did not belong to the Hungarian nationality.[15] However, among Hungarian citizens (i.e. excluding respondents with foreign citizenship), only 8,980 made this response. In summary, a vast majority of the 13 minorities also declared their belonging to the Hungarian nationality during the census. As Dobos notes, "With the exception of the Roma, ethnic minorities in Hungary are well integrated into Hungarian society in socio-economic terms, and ethnicity in general does not play such a role that it becomes a political mobilizing force for many, and a fundamental influence on voter behaviour."[16]

1.2. Parliamentary Representation of the Minorities – Struggles and Dead Ends

As Nagy puts it, "Ensuring the representation of minorities living in Hungary has been subject to heated public debate since the democratic transition in 1989/90."[17] Indeed, it was a long and bumpy road that led to the parliamentary representation of ethnic minorities. A detailed overview of this process would go far beyond the scope of this study, so only a few stages are touched upon.[18]

In March 1990, the following provision was added to the Constitution: "The representation of national and linguistic minorities living in the Republic of Hungary in Parliament and in the Councils shall be ensured. The Parliament shall elect Members of Parliament to represent minorities, irrespective of the election pursuant to paragraph (1) of Article 71, in the manner and in the number determined by a separate Act."[19] At the same time, the Parliament adopted this above-mentioned act.[20]

12 Tóth and Vékás, 2013. As Morauszki and Papp claim, the 'minority revival' from 2001 to 2011 (meaning that the rate of people who identify themselves as a minority has increased by almost one and a half times) was due to the fact that the 2011 census used a different methodology to ask about minority affiliation (Morauszki and Papp, 2014). For the limited comparability of the two censuses, see also Tátrai, 2014; Kapitány, 2015.

13 See the minority map of Hungary based on the data of the 2011 census: https://atlo.team/magyarorszagnemzetisegiterkepe/ . For further analyses, see Tóth and Vékás, 2014, pp. 53–56.

14 Kállai, 2012; Tátrai, 2014; Kapitány, 2015; Dobos, 2022.

15 However, 1,086,223 respondents refused to answer the question regarding their nationality.

16 Dobos, 2021, p. 56.

17 Nagy, 2021, p. 52.

18 For a detailed overview, see e. g. Várfalvi, 1995; Szajbély, 2003; Kukorelli, 2018; Móré, 2018.

19 Act XVI of 1990 on the Amendment of the Constitution of the Republic of Hungary, Section 6.

20 Act XVII of 1990 on the Parliamentary Representation of National and Linguistic Minorities Living in the Republic of Hungary.

The new law laid down that, "In the Republic of Hungary, the part of the Gypsy, Croatian, German, Romanian, Serbian, Slovak, Slovenian and Jewish communities […] shall have one representative each in the Parliament".[21] The representatives of minorities would not have been elected directly, but by the MPs themselves, based on the proposition of the nomination committee (the 'co-optation procedure'). However, this regulation was rather short-lived, as the newly elected parliament decided in June 1990 to repeal the entire law. Meanwhile, the newly enacted provision of the Constitution was replaced by the following provision: "The laws of the Republic of Hungary ensure the representation of national and ethnic minorities living in the territory of the country."[22] As can be seen, the new wording spoke about representation in general, without clear reference to *parliamentary* representation.

The next development was the above-mentioned 1993 Minority Act, which stipulated that, "Minorities have the right – as determined in a separate Act – to be represented in the National Assembly."[23] Although several ideas had been put forward by the legislators[24] and scholars to solve the problem of parliamentary representation,[25] the aforementioned 'separate Act' was never adopted. The Constitutional Court already established an unconstitutional omission of legislative duty in 1992, as the Parliament had failed to adopt the act on the rights of minorities.[26] The Court ruled that, "the general representation of minorities has not been ensured to the extent and in the manner required by the provisions of the Constitution".[27] Two years later the Court found in its rather ambiguous decision that the unconstitutional omission of legislative duty persisted.[28] By this time, the Minority Act of 1993 had already been passed, but parliamentary representation was still a long way off. However, in the academic literature, it was far from clear whether the Parliament indeed committed a constitutional omission for failing to ensure parliamentary representation of minorities.[29] It should be recalled here that the Constitution referred to representation *in general*, and it did not clearly imply the need for parliamentary representation. In December 1994, the first minority self-government elections were held, giving minorities representation at the municipal level. Meanwhile, a year later, minority self-governments were also established at national level.

In 2008, the ombudsman for minorities' rights, alongside the chairs of the national minority self-governments, drafted a concept on the parliamentary representation

21 *Ibid* Section 1.
22 Act XL of 1990 on the Amendment of the Constitution of the Republic of Hungary, Section 45.
23 1993 Minority Act, Section 20 (1).
24 For an overview of the first years, see Várfalvi, 1995, pp. 61–64.; Kékkúti, 1998.
25 E. g. Somogyvári, 1998; Ágh, 2001. Both authors envisaged the representation of minorities in a newly created second chamber (upper house). For the most detailed review of possible solutions, see Szajbély, 2003, pp. 190–203.
26 Decision No. 35/1992 (VI.10).
27 *Ibid* Section III.
28 Decision No. 24/1994. (V.6).
29 E.g. Szajbély, 2003, pp. 183–186.; Kállai, 2012, pp. 47–49.

of minorities[30] and submitted it to the Government. Two years later, the outgoing Parliament passed a resolution in February 2010 setting a 2012 deadline for the Government to present a draft bill on the parliamentary representation of minorities.[31] Some three months later, following the 2010 parliamentary elections, the Parliament added the following provision to the Constitution: "The number of Members of Parliament shall not exceed two hundred. A maximum of thirteen additional Members of Parliament may be elected to represent national and ethnic minorities."[32] However, this provision has never entered into force since Fidesz, which won a two-thirds majority in the 2010 elections, decided to adopt a new constitution.

1.3. The Current Legal Framework

After a landslide victory in the 2010 parliamentary election, the Fidesz-led government embarked on a transformation of Hungary's constitutional and political framework. As a part of this transformation process, Parliament soon passed a new constitution named the Fundamental Law (April 2011), a new minority law (2011 Minority Act) and a new electoral law[33] (December 2011). The Fundamental Law lays down that, "The participation of national minorities living in Hungary in the work of the National Assembly shall be regulated by a cardinal Act."[34] The 2011 Minority Act in its original wording did not refer to the parliamentary representation of the national minorities.[35] Although the 2011 Electoral Act retained the mixed electoral system established in 1989, it has shifted the system towards the majoritarian principle, and several adjustments have been made to give the largest party (practically, Fidesz) a better position in the later elections.[36] One of the most significant (albeit politically less crucial) changes was the introduction of a new scheme for minority voting, i.e. for the first time in democratic Hungary, special provisions aimed at favouring the participation of national minorities in Parliament.

As is widely known, a number of methods, from reserved seats to exemption from the parliamentary threshold, exist to ensure, or at least foster, the parliamentary

30 Available at: http://www.kisebbsegiombudsman.hu/hir-161-kisebbsegek-parlamenti-kepviseletenek.html

31 National Assembly Resolution No. 20/2010 (II.26) on the Legislative Process on the Representation of National and Ethnic minorities in the National Assembly.

32 The 25 May 2010 Amendment of the Constitution of the Republic of Hungary, Section 1.

33 Act CCIII of 2011 on the Election of the Members of the National Assembly (hereby 2011 Electoral Act).

34 Fundamental Law of Hungary, Art. 2 (2).

35 However, the following provision was added to the 2011 Minority Act in 2017: "Every national minority community and every individual belonging to a national minority shall have the right to take part, through its representative in the National Assembly's legislative work affecting the interests and rights of national minorities." [Section 4 (1) c)].

36 Tóth, 2015.

representation of national minorities.[37] The Hungarian legislator decided to introduce a preferential threshold for the national minorities' electoral lists. According to the 2011 Electoral Act, the national list may be drawn up as a party list or national minority list,[38] which means the minority lists compete with the political parties' lists. The relevant provisions affecting minority voting are:

Section 9 (1) National self-governments of national minorities may draw up national minority lists.

(2) Drawing up a national minority list shall be subject to recommendations by at least one percent of the voters recorded in the electoral register as national minority voters or to 1,500 recommendations, whichever is fewer.

(3) Candidates on a national minority list may be only voters recorded in the electoral register as voters of that particular national minority.

(4) A national minority list shall include at least three candidates.

(5) The national self-governments of two or more national minorities may not draw up a joint national minority list.

As noted above, the 2011 Electoral Act retained the mixed electoral system,[39] consequently voters with domicile in Hungary may cast two votes. As a crucial provision, the law lays down that the 'ordinary' voters (i. e. not recorded in the electoral register as national minority voters) may cast a vote for one single-member constituency candidate and one party list.[40] In contrast, a voter recorded in the electoral register as a national minority voter may cast a vote for one single-member constituency candidate and the list of their national minority (or in the absence thereof, one party list).[41] (It should be stressed – and this fact was also of great importance in the trial – that the national minority voters do not vote for the party list.)

At this point, one may pose the question: what is the 'preferential' aspect/element of this minority voting system? First of all, the 5% electoral threshold for party lists is waived for the national minority lists. In addition, the law introduced a so-called preferential quota for the national minority lists, that is the number of votes required for winning a preferential national minority mandate.[42] When allocating mandates from the national list, the total number of national list votes is divided by 93 (virtually, this is the 'price' of a single mandate), and the result is then divided by four; the integer of the resulting quotient constitutes the preferential

37 For a global overview, see Protsyk, 2010; for a brief summary of the European models, see Móré, 2016, 319–320. and Cservák and Farkas, 2017, pp. 29–32.

38 2011 Electoral Act, Section 7.

39 Currently 106 members of the Parliament are elected from single-member constituencies and 93 from the national list [2011 Electoral Act, Section 3 (2)].

40 2011 Electoral Act, Section 12 (1).

41 2011 Electoral Act, Section 12 (2).

42 2011 Electoral Act, Section 14 (3).

quota.[43] To sum up, a national minority list needs to acquire a quarter of as many votes to win the first mandate as the parties. However, it should be noted that this preferential provision applies only to the *first* mandate of a given national minority list, that is if the number of votes cast for a minority list exceeds twice the preferential quota, that minority will not be entitled to two seats (i.e. a national minority list may not be assigned more than one preferential mandate).[44]

The legislator also had in mind those minorities which, despite the preferential quota, were unable to gain any seat. According to the law, "a national minority which drew up a national minority list from which, however, it has not won a mandate shall be represented by a national minority spokesperson[45] in the National Assembly."[46]

An important point of the legal framework is the process of becoming a national minority voter. According to the Act on Election Procedure, voters with an address in Hungary may request that their belonging to a national minority be entered into the central electoral register, or such an entry be deleted.[47] This means that a citizen belonging to a national minority is free to decide whether they wish to participate in the parliamentary elections as a national minority voter. If so, then they may request to be registered as a national minority voter. A request for registration as a national minority voter must contain the reference to the national minority (i.e. the voter must indicate to which national minority they belong) and a statement by the voter in which the voter professes to belong to the national minority in question.[48] The Election Procedure Act also stipulates that, "Voters who are listed in the register as national minority voters also with regard to the election of Members of Parliament shall be issued a single-member constituency ballot paper and the list ballot paper of *their* national minority."[49] (emphasis added). To give an example, a voter recorded as a Greek minority voter receives the Greek minority's list, and so they may cast the vote only to this list. Consequently, the Greek minority's list may receive votes only from the voters who are recorded as Greek minority voters. The law also stipulates that the national self-governments of two or more national minorities may not draw up a joint national minority list.[50]

The structure of the minority lists should also be briefly mentioned. As noted above, a national minority list must contain at least three candidates. However, the

43 2011 Electoral Act, Section 16 d). To put it in another way, a given minority list is entitled to one seat only if it secures at least one quarter of the electoral Hare quota (cf. Venice Commission – OSCE/ODIHR, 2012, Section 47).

44 2011 Electoral Act, Section 16 e). However, in the very unlikely event that a given national minority list's share of the vote reaches 5%, the list could win additional seats. [Section 16 fb)].

45 Elsewhere also translated as 'national minority advocate'.

46 2011 Electoral Act, Section 18 (1). The nationality spokesperson may speak at the sitting of the Parliament if the House Committee considers that the item on the orders of the day affects the interests or rights of nationalities. However, he or she has no right to vote at the sittings of the Parliament.

47 Act XXXVI of 2013 on Election procedure (hereby Election Procedure Act), Section 85 (1) a).

48 Election Procedure Act, Section 86 a)–b).

49 Election Procedure Act, Section 257 (1a).

50 2011 Electoral Act, Section 17 (1).

voter cannot vote for a specific candidate, but only for the list itself. In other words, the minority lists are closed, and so the voters have no influence on the order in which candidates are elected. (As an illustration, see the German minority's list in the 2022 election [Picture 1].) If a minority list gains a seat, the mandate is allocated to the candidate ranked first.[51]


P.H.

SZAVAZÓLAP | STIMMZETTEL

Országgyűlési képviselők választása
Wahl der Parlamentsabgeordneten
2022. április 3. | 3. April 2022

NÉMET NEMZETISÉGI LISTA
LISTE DER DEUTSCHEN NATIONALITÄT

Érvényesen szavazni csak egy listára lehet!
Eine gültige Stimmabgabe ist nur für eine Liste möglich!

MINTA

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MAGYARORSZÁGI NÉMETEK ORSZÁGOS ÖNKORMÁNYZATA
Landesselbstverwaltung der Ungarndeutschen

RITTER IMRE
ENGLENDERNÉ HOCK IBOLYA – Ibolya Hock-Englender
KOCH EMIL – Emil Koch
SCHUBERT OLÍVIA – Olivia Schubert
MANZ JÓZSEF GYÖRGY – Josef Manz

Érvényesen szavazni a lista neve feletti körbe tollal írt két, egymást metsző vonallal lehet, például: ⊗ vagy ⊕
Eine gültige Stimmabgabe erfolgt durch Eintragung eines Kreuzes in den Kreis über den Listennamen mit einer Füllfeder oder einem Kugelschreiber, z. B. ⊗ oder ⊕

Picture 1. German minority's list in the 2022 election[52]

Therefore, it can be concluded that the Hungarian model of the parliamentary representation of minorities does not resemble any of the existing Eastern and Central European models.[53]

1.4. Minority Voting in Practice – Lessons from the Elections of 2014–2022

Three parliamentary elections (2014, 2018, 2022) have taken place in Hungary since the 2011 Electoral Law came into force. Although the applications were lodged

51 2011 Electoral Act, Section 9 (5).
52 Source: https://nemzetisegek.hu/wp-content/uploads/v%C3%A1laszt%C3%A1s-460x325.jpg.
53 Halász, 2022, p. 82.

to the ECtHR after the 2014 election, the outcome of the latest two elections is worth a deeper look to get a more thorough picture of minority voting.

Diagram 1 illustrates the outcome of the 2014 parliamentary elections when minority voting debuted.

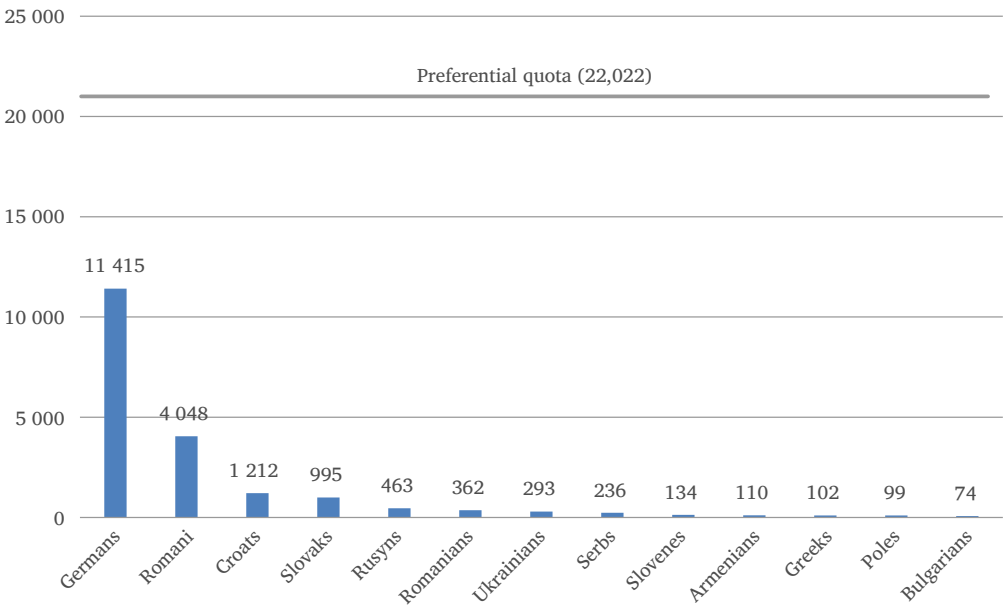

Diagram 1. Votes cast for the national minority lists in the 2014 parliamentary elections[54]

As the bar chart reveals, even the minority list with the highest support (the list of Germans) was far from gaining a seat. To win a parliamentary seat, 22,022 votes would have been needed, but the 13 minority lists together only received 19,543 votes. The fact that the minorities would be left without a parliamentary seat was practically certain even before the elections, as the two largest minorities (Roma and German) had only 14,271 and 15,209 voters in the electoral register, respectively, while the preferential quota was expected to be around 20,000. As no minority list votes reached the preferential quota, each of the 13 minorities was represented by a national minority spokesperson in the Parliament.

Although it was widely believed, based on the 2014 results, that under these circumstances no minority had a chance of winning a seat,[55] the 2018 election brought significant change (Diagram 2). In contrast to 2014, this time the German minority had a real chance to win a mandate as they had more than 33,000 voters in their

54 Source: the author, based on the election data.
55 E. g. Móré, 2015, pp. 591–592.

electoral register,[56] thanks to the intensive mobilisation of the self-government of the German minority.[57] In addition, the Roma minority (18,490 registered voters) still had a very slim chance of winning a seat, but they would have needed a low turnout along with committed and willing voters. While the German minority was able to reach the preferential quota, the vast majority of the Romani minority voters nevertheless decided not to vote for their minority list. (As the preferential quota was much higher than the number of registered Roma voters, they would in any case have had no chance of winning a seat.) The other eleven minorities had absolutely no chance of crossing the threshold.

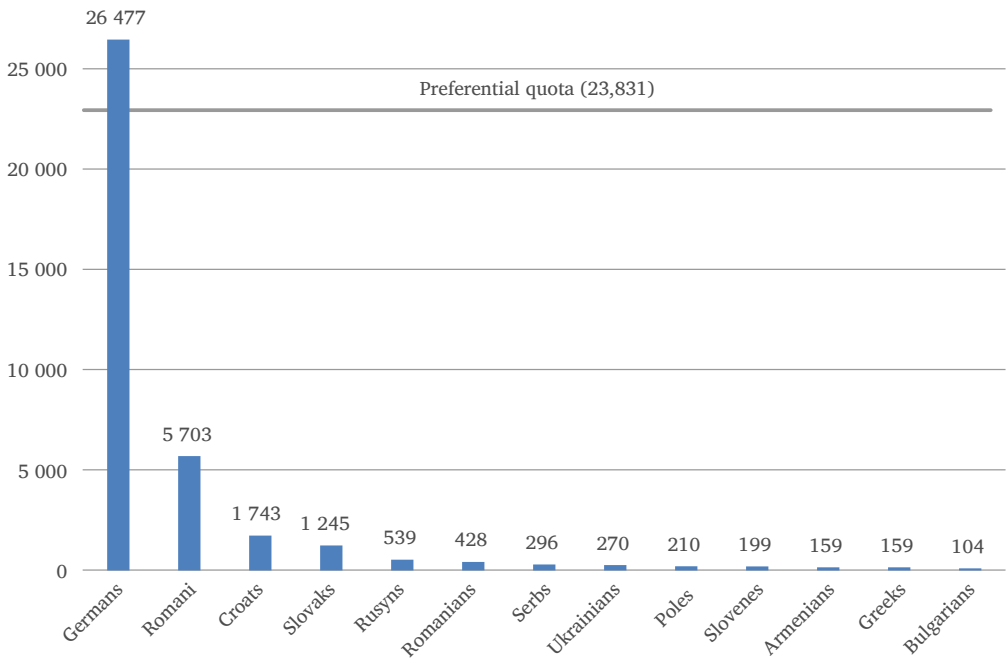

Diagram 2. Votes cast for the national minority lists in the 2018 parliamentary elections[58]

The outcomes of the 2022 elections (Diagram 3) are not significantly different from those of 2018. The German minority has once again won a parliamentary seat, albeit a narrow one, while the other minorities had absolutely no chance of winning

56 For the data of the electoral register, see: https://www.valasztas.hu/valasztopolgarok-szama .
57 Kállai, 2020, p. 15.
58 Source: the author, based on the election data.

seats. (Due to internal conflicts, the Romani minority self-government failed even to draw up a list.)

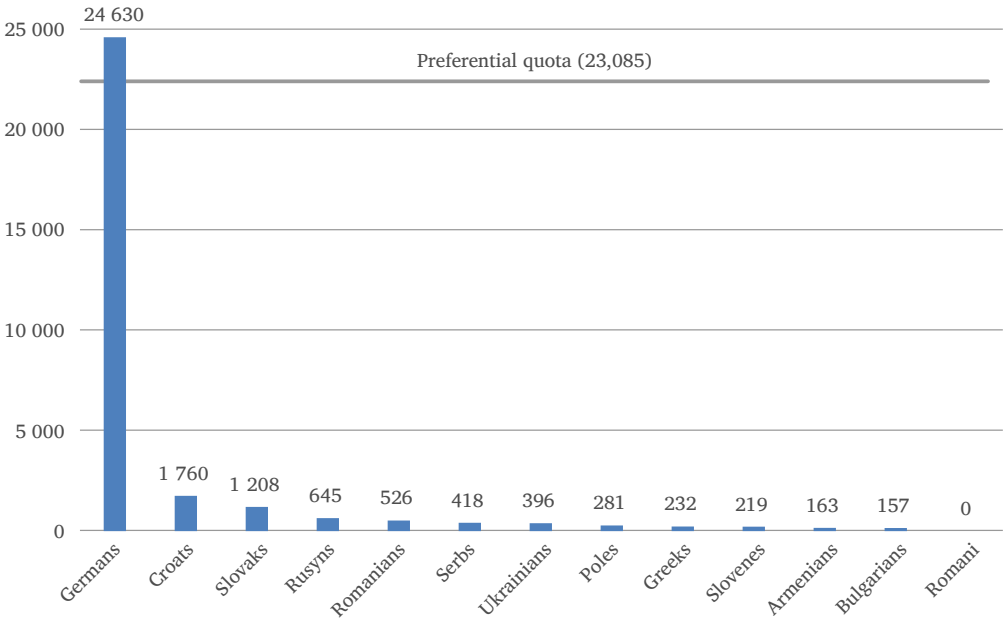

Diagram 3. Votes cast for the national minority lists in the 2022 parliamentary elections[59]

The results of the three elections suggest that minorities, with a certain simplification, can be divided into three categories based on their chances of winning a seat:[60]

I) Based on their population numbers, the Germans and the Romani have a real chance to gain a parliamentary seat. As seen, while the German minority exceeded the preferential quota twice, the Roma minority was unable to mobilise their members to a sufficient extent.

II) The Croatian, Romanian, Slovak, and Ukrainian minorities have a very marginal, rather theoretical chance of winning a mandate. Each of these minorities exceeds 20,000, but these figures also include minors, so the number of persons with a right to vote is even lower. Crossing the preferential quota would require, on the one hand, a low turnout in the parliamentary elections (which would result in a lower quota), and, on the other hand, virtually all members of the given minority would have to register and then to vote for

59 Source: the author, based on the election data.

60 Cf. Kurunczi, 2020, pp. 126–127.

their own minority list.[61] All in all, they only have a theoretical chance of winning a mandate.

III) The remaining seven minorities do not even have a theoretical chance of entering parliament, as their population numbers are far below the preferential quota of the last elections.

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2. Procedure Before the Court

After outlining the background of the case of Bakirdzi and E.C. v. Hungary, we now turn to the Court's judgement. Firstly, the applicants' objections are summarised, then the Government's point of view is outlined, followed by the Court's assessment, the final decision, and the joint concurring and a partly dissenting opinion.[62]

2.1. The Applications

The applications were lodged after the 2014 parliamentary elections by two Hungarian citizens, Ms Kalliopé Bakirdzi and E.C., belonging to the Greek and Armenian national minorities, respectively.[63] (Concerning the similar subject matter of the applications, the Court examined them jointly in a single judgement.[64])

The applicants complained that the system of national minority voting constituted a discriminatory interference with their voting rights. They relied on Article 3 of Protocol No. 1 to the European Convention on Human Rights[65] (hereby Convention) taken alone and in conjunction with Article 14 of the Convention.[66] The applicants had three objections to the Hungarian legal regulation. Firstly, they claimed that although the intention of the Hungarian authorities had been to promote the participation of national minorities in the legislature by introducing national minority voting, the effects of the measure were to the contrary, leading to the disenfranchisement of that group, since they had no prospect of attaining the preferential quota prescribed by the relevant legislation. The applicants referred to the actual

61 In contrast, the 2014–2022 experience shows that only a fraction of minority citizens register as minority voters (Dobos, 2023).

62 However, we do not touch upon the admissibility of the applications.

63 Judgement, paras. 2 and 4.

64 Judgement, para. 26.

65 "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

66 Judgement, para. 27: "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

population statistics, arguing that it was impossible for national minorities to gain a seat in Parliament.[67] (Reminder: during the 2011 census 3,571 and 4,642 respondents identified themselves as belonging to the Armenian and Greek minorities, respectively.)

Secondly, the applicants further submitted that the fundamental element of free elections is a real choice between the competitors of the political racecourse. They, however, did not have a genuine choice. National minority voters, on the one hand, were excluded from voting for party lists. On the other hand, they could not cast a ballot for anyone other than the candidates of their (closed) minority list. They argued in this respect that having an identical ethnic origin did not lead to having identical political views.[68]

Thirdly, the applicants alleged that the secrecy of the vote had also been violated since once they were identified as national minority voters, it was immediately known to everyone how they had voted.[69] (As noted above, a request for registration as a national minority voter contains a reference to the national minority the voters belong to. When the polling station commission hands over the ballot paper to the minority voter, the members of the commission are aware of who the voter will cast their vote for.)

To sum up, in the applicants' view, the legal regulation was discriminatory since – because of their status of belonging to a national minority – they had been treated differently from other voters.[70]

2.2. The Government's Stance

The Hungarian Government maintained that the regulation of the national minority seats constituted positive discrimination since a national minority list needs to acquire a quarter of as many votes to win the first mandate as that of the parties. This preferential rule had the legitimate aim of enhancing the political participation of minorities.[71]

When it comes to the fact that minority voters cannot vote for the party list, the Government referred to the principle of equal suffrage. If the minority voters could also vote for the party list (in addition to the minority list), this principle would be violated as they would have three votes (single-member constituency candidate, party list, and minority list), whereas other voters had only two (single-member constituency candidate and party list).[72]

67 Judgement, para. 35.
68 Judgement, para. 36. It is worthwhile to mention that this problem was also indicated in the OSCE/ODIHR Election Observation Mission Reports published after the parliamentary elections of 2014, 2018, and 2022.
69 Judgement, para. 37.
70 Judgement, para. 38.
71 Judgement, para. 39.
72 Judgement, para. 40.

Finally, the Government emphasised that it was the voters' free choice to register as minority voters, which in any event could always be subsequently changed.[73] If doing so, they would regain the possibility to vote for the party list.

2.3. The Court's Assessment

The Court first interpreted Article 3 of Protocol No. 1 and Article 14 of the Convention, summarizing its case law to date.

As for the first (right to free elections), the Court reiterated that this provision enshrines a characteristic principle of democracy and is accordingly of prime importance in the Convention system.[74] According to the case law of the Court, the words "free expression of the opinion of the people" means that elections cannot be conducted under any form of pressure in the choice of one or more candidates, and that in this choice the elector must not be unduly induced to vote for one party or another. The word 'choice' means that the different political parties must be ensured a reasonable opportunity to present their candidates at elections.[75] The Court reminded that Article 3 of Protocol No. 1 does not create any obligation to introduce a specific system such as proportional representation or majority voting with one or two ballots. The Contracting States have a wide margin of appreciation in that sphere. However, the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election does not entail that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus, no electoral system can eliminate 'wasted votes'.[76]

With regard to electoral systems, the Court ruled that its task is to determine whether the effect of the rules governing parliamentary elections is to exclude some persons or groups of persons from participating in the political life of the country and whether the discrepancies created by a particular electoral system can be considered arbitrary or abusive or whether the system tends to favour one political party or candidate by giving them an electoral advantage at the expense of others.[77] In this context, the court explained that under certain conditions both electoral thresholds and closed party lists could be justified.[78]

Concerning Article 14 (prohibition of discrimination), the Court claimed that a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to

73 Judgement, para. 41.
74 Judgement, para. 42.
75 Judgement, para. 43.
76 Judgement, para. 44.
77 Judgement, para. 45.
78 Judgement, paras. 46–47.

be realised".[79] However, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible. Nevertheless, Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct "factual inequalities" between them.[80]

After assessing the general principles, the Court applied them to the current case. In the reasoning of the judgement, the Court reviewed the three objections of the applicants' one by one.

2.3.1. Objection #1 – "No prospect of attaining the preferential quota"

The Court laid down that the Hungarian statutory scheme with a preferential threshold for minority representatives significantly differs from the 'general' electoral threshold (the latter has been addressed by the Court in several judgements).[81] Subsequently, the Court recalled that, according to a decision of the former European Commission of Human Rights, the Convention "does not compel the Contracting Parties to provide for positive discrimination in favour of minorities".[82] It has also been reiterated that "even interpreted in the light of the Framework Convention [for the Protection of National Minorities], the Convention did not call for different treatment in favour of minority parties".[83]

As the Court noted, the specificity of the Hungarian regulatory system was that national minority candidates could attain the requisite number of votes only from the ballot of national minority voters belonging to the same minority group as themselves (i.e. the Greek minority's list may receive votes only from the voters who are recorded as Greek minority voters). In the Court's view, this in fact placed them in a significantly different situation compared to other candidates – whether representing political parties or independents – who could obtain votes from the total eligible electorate. As indicated in the overview of the legal framework, national self-governments are prohibited from drawing up a joint national minority list. The Court found that this prohibition impinged upon the right of the applicants as national minority voters to associate for political purposes through the vote, in that their candidate could only be endorsed by members of the same national minority. In comparison, other members of the electorate were free to associate with any other like-minded electors for the advancement of political beliefs.[84]

The Court accepted the applicants' argument that the number of minority voters belonging to the same national minority in Hungary was not high enough to reach the preferential electoral threshold even if all voters belonging to that national minority

79 Judgement, para. 49.
80 Judgement, para. 50.
81 Judgement, para. 53.
82 Magnago and Südtiroler Volkspartei v. Italy, no. 25035/94, Commission Decision of 15 April 1996, DR 85-A, p. 112.
83 Partei Die Friesen v. Germany, no. 65480/10, par. 43, 28 January 2016. Judgment, par. 54.
84 Judgement, para. 55.

were to cast their vote for the respective minority list. As noted in the judgement, in 2014, 140 and 184 voters were registered as Greek and Armenian minority voters, respectively, whereas the requisite number of votes to gain a seat in Parliament for a national minority candidate was 22,022.[85]

Subsequently, the court again emphasised that the Convention does not require States to adopt preferential thresholds in respect of national minorities. However, when setting up a quorum for national minority groups, consideration needs to be given as to whether that threshold requirement makes it *more burdensome* (emphasis added) for a national minority candidate to gather the requisite votes for a national minority seat than it is to win a seat in Parliament from the regular party lists and whether – in turn – that electoral threshold has a negative impact on the opportunity of national minority voters to participate in the electoral process on an equal footing with other members of the electorate.[86] The reasoning of the judgement again reiterated that not all votes must necessarily have equal weight as regards the outcome of the election; the national legislator needs to assess whether the statutory scheme creates a disparity in the voting power of members of national minorities, as the applicants, in order to avoid that the potential value of votes that might be cast for national minority lists becomes diluted.[87]

2.3.2. Objection #2 – "No genuine choice"

In its assessment of the 2011 Electoral Act, the Court stressed, that in practice, as a consequence of being registered as national minority voters, the applicants could only vote for their respective national minority lists as a whole, or abstain from voting for the national minority list altogether. Therefore, they had neither the choice between different party lists nor any influence on the order in which candidates were elected from the national minority lists.[88] Whereas closed lists are not in themselves incompatible with the free choice of voters (they still may distribute their vote between the different party lists corresponding to their political preferences),[89] in the present case the national minority voters could only cast their votes for candidates fixed on the national minority list, irrespective of their political viewpoint.[90] As the judgement puts it, the applicants, as national minority voters, could not express their political views or choice at the ballot box, but only the fact that they sought representation in political decision-making as members of a national minority group.[91]

Overall, the Court expressed doubt as to whether a system in which a vote may be cast *only for a specific closed list of candidates, and which requires voters to*

85 Judgement, para. 57.
86 Judgement, para. 58.
87 Judgement, para. 59.
88 Judgement, para. 61.
89 Judgement, para. 62.
90 Judgement, para. 64.
91 Judgement, para. 65.

abandon their party affiliations in order to have representation as a member of a minority ensures "the free expression of the opinion of the people in the choice of the legislature".[92]

2.3.3. Objection #3 – "Secrecy of their vote had been violated"

Interpreting the principle of secret ballot, the Court pointed out that a voting system must ensure that voting is conducted by secret ballot allowing the electorate to exercise their vote for a preferred candidate freely and effectively, in accordance with their conscience and without undue influence, intimidation or disapproval by others. The voting system must assure voters that they would not be compelled directly or indirectly to disclose for whom they have voted.[93]

The applicants did not allege that the secrecy of the vote was violated in the act of voting itself but rather that since they had only one choice as voters, their electoral choice was indirectly revealed to everyone.[94] As has been explained above, a request for registration as a national minority voter must contain a reference to the national minority (i.e. the voter must indicate to which national minority they belong). Consequently, as soon as a minority voter registers, it becomes apparent which list they intend to vote for. Furthermore, when entering the polling station, the voter is given the ballot paper corresponding to their minority. Hence, all present at the polling station at the relevant time, especially members of the relevant election commissions, would come to know that the elector had cast a vote for the candidates on the national minority list. Similarly, national minority voters could be linked to their votes during the counting procedure, especially at polling stations where the number of registered national minority voters was limited.[95] Based on the above, the Court found that the national minority list voting system was not available to the applicants without compromising the right to secrecy.[96]

2.4. The Court's Decision

Considering the above, the Court ruled that domestic legislation resulted in the applicants' being substantially limited in their electoral choice, with the obvious likelihood that their electoral preferences would be revealed and that the system fell with unequal weight on them because of their status as national minority voters.[97]

The Court once more reiterated that there is no requirement under the Convention for different treatment in favour of minority parties. It nonetheless considers that once the legislature decides to set up a system intended to eliminate or reduce

92 Judgement, para. 66.
93 Judgement, para. 68.
94 Judgement, para. 69.
95 Judgement, para. 70.
96 Judgement, para. 71.
97 Judgement, para. 72.

actual instances of inequality in political representation, it is only natural that the measure should contribute to the participation of national minorities on an equal footing with others in the choice of the legislature, rather than perpetuating the exclusion of minority representatives from political decision-making at a national level. As regards the Hungarian statutory scheme as a whole, the Court found that the minority voting system limited the opportunity of national minority voters to enhance their political effectiveness as a group and threatened to reduce, rather than enhance, diversity and the participation of minorities in political decision-making.[98] The Court ruled that the combination of the above restrictions on the applicants' voting rights, considering their total effect, constituted a violation of Article 3 of Protocol No. 1 taken in conjunction with Article 14 of the Convention.[99]

Although the applicants claimed 10,000 euros each in respect of non-pecuniary damage, the Court considered that its finding of a violation constituted sufficient just satisfaction and accordingly made no award under this head.[100]

2.5. Separate Opinions

A joint concurring and a partly dissenting opinion were annexed to the judgement. In the joint concurring opinion, Judges Bošnjak and Derenčinović agreed only with the second and third arguments, but had some concerns regarding the reasoning with respect to the threshold requirement for a national minority in the context of Article 3 of Protocol No. 1 and the almost complete lack of reasoning when it came to the violation of Article 14 of the Convention.[101] The two judges saw a contradiction between the statements "the Convention does not require States to adopt preferential thresholds in respect of national minorities" and "when setting up a quorum for national minority groups, consideration needs to be given whether that threshold requirement makes it more burdensome for a national minority candidate to gather the requisite votes for a national minority seat than it is to win a seat in Parliament from the regular party lists". In their views, when the judgement laid down that "the national legislator needs to assess whether the statutory scheme creates a disparity in the voting power of members of national minorities, as the applicants, in order to avoid that the potential value of votes that might be cast for national minority lists becomes diluted", the Court went well beyond the guarantees established by the Protocol. Judges Bošnjak and Derenčinović acknowledged that the Hungarian statutory scheme may be subjected to scrutiny and criticism by the relevant international actors but to hold that such a policy amounts to a violation of the Protocol seemed to them to be quite far-fetched.[102] As the joint concurring opinion notes, by

98 Judgement, par. 73.
99 Judgement, par. 74.
100 Judgement, pars. 76 and 78.
101 Joint Concurring Opinion of Judges Bošnjak and Derenčinović, para. 1.
102 Joint Concurring Opinion of Judges Bošnjak and Derenčinović, paras. 2–3.

establishing this more favourable threshold for minorities, the Hungarian authorities went beyond the current requirements under the relevant international legal standards.[103] Therefore, the Hungarian legislator did not fall short of its obligations under the relevant international law, which provides a very broad margin of appreciation in election-related matters. The judges recalled that should the national minority fail to win a seat, the first candidate on the national minority list is appointed as a non-voting national minority spokesperson.[104] In their view, the effective political participation of minorities is ensured also by the spokespersons.

In the partly dissenting opinion, Judge Ktistakis contested the statement that "the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage that may have been sustained by the applicants", as concluded by the majority. As the applicants were not politicians or members of a political party but simply voters, he cannot accept that the Court's finding of a violation alone can constitute sufficient just satisfaction.[105]

2.6 Comments on the Judgment

Since the judgement was handed down, most of the domestic academic analyses on the subject have agreed with the Court's ruling.

Regarding equal suffrage, Sándor-Szalay and Kiss reiterated[106] that neither the European Commission of Human Rights, nor the Venice Commission explicitly excluded plural suffrage (derogation from the equality of suffrage to be acceptable to protect national minorities), whereas the Hungarian Constitutional Court pinned down that the equality of suffrage excludes plural suffrage; the 'one person – one vote' principle stemming from the Constitution cannot be restricted for any reason whatsoever in this respect.[107]

When it comes to the violation of the secrecy of the voting, the authors pointed out a further circumstance that seriously undermines the principle. Given the diaspora nature of their geographical location, the number of voters registered in the national minority register in individual polling districts may be very low, and in a number of cases only one voter may cast their vote for a national minority list. In the latter case, if a single national minority voter attends the polling district and places the two ballot papers in the envelope handed over to them, even their single-member constituency candidate vote may be reconstructed (as the two ballot papers are in the same envelope).[108]

103 Joint Concurring Opinion of Judges Bošnjak and Derenčinović, para. 6.
104 Joint Concurring Opinion of Judges Bošnjak and Derenčinović, para. 7. It should be noted that the Joint Concurring Opinion refers here to Section 18 of the *Election Procedure Act*. However, this provision can be found in the *2011 Electoral Act*, Section 18 (1).
105 Partly Dissenting Opinion of Judge Ktistakis.
106 Sándor-Szalay and Kiss, 2022, pp. 67–69.
107 Decision No. 22/2005. (VII.17), Section II 2.
108 Sándor-Szalay and Kiss, 2022, p. 71.

Sándor-Szalay and Kiss reviewed also the joint concurring opinion of Judges Bošnjak and Derenčinović, and they agreed with the judges that the judgement does not contain an application and analysis of the general principles of Article 14 ECHR to the facts of the case, which makes it difficult to understand how the fundamental safeguards against discrimination were applied in the case in the context of the elections. In the author's view, the Court failed to further develop the Court's case law, as the Court did not undertake to provide a more detailed explanation of the reasoning behind Article 14.[109] In addition, Sándor-Szalay and Kiss claim that the judgement in Bakirdzi and E.C. v. Hungary even has international impact as the Court "has not yet carried out such an abstract examination of the legislation of the Member States ensuring the effective participation of national minorities in public life, and thus – in its own assessment as well – has deviated significantly from its previous case law".[110]

Kállai claims that some points of the reasoning should have been more elaborate and clearer in order to highlight the discriminative nature of the system. He argues that the whole electoral system is exclusionary towards minorities. Then he recalls that while the rights of the applicants were infringed in 2014, the same infringement happened systematically to thousands of minority voters also in 2018 and in 2022.[111]

In another recent analysis, Kurunczi challenged the Court's argument that the statutory scheme violated the secrecy of the voting. In his view, once a voter registers themself as a minority voter, their decision does not relate to their political affiliation and political identity in the political sense, but to the minority to which the voter identifies themself. Furthermore, if the state bodies (in this case, the electoral commission) could not be aware of the minority affiliation of the voter, the voter would not be able to take part in the election as a minority voter.[112]

Majtényi took a more critical view of the judgement. Although he does not think that the Court was mistaken about the conclusion that the Hungarian rules on the representation of minorities in Parliament are in breach of the Convention, he claims that "the quality of the court's argumentation is doctrinally weak and demonstrates an inadequate knowledge of Hungarian law". As he puts it, "The judgement does not address at all what has happened in the last eight years, e.g. that the German minority list gained enough votes to send an MP to the Parliament in both 2018 and 2022." This statement is confusing because the applications were lodged after the 2014 parliamentary elections, and, in the author's opinion, the Court could not be expected to extend its review to the 2018 and 2022 elections. He recalls the reasoning that, "As is apparent, the arrangement put in place for minority voters allowed for the details of how a national minority voter had cast their ballot to be known to everybody, and for information to be gathered about the electoral intention of minority voters

109 Sándor-Szalay and Kiss, 2022, p. 72.
110 Sándor-Szalay and Kiss, 2022, p. 77.
111 Kállai, 2022.
112 Kurunczi, 2023, p. 67.

as soon as they registered as such."[113] Majtényi considers this statement to be false since data on minority affiliation is subject to special protection, so even minority self-governments do not have access to minority voters' data after the elections, and election documents, including ballots, are destroyed after the elections.[114]

3. Conclusions – the Future of Minority Voting in Hungary

As can be seen, it took the legislators more than 20 years to pass a law aimed at favouring the participation of national minorities in Parliament. However, a paradoxical situation has arisen that if no regulations in favour of minorities had been adopted, the Court's condemnation would not have been issued. In this sense, it is no exaggeration to say that less would have been more… It should be recalled here that, as the judgment also confirmed, neither the Convention, nor the First Additional Protocol to the Convention, nor the relevant international legal norms require different treatment and positive discrimination in the establishment of parliamentary representation of national minorities.[115] A key sentence in the reasoning of the judgement reads as follows: "However, when setting up a quorum for national minority groups, consideration needs to be given whether that threshold requirement makes it *more burdensome* for a national minority candidate to gather the requisite votes for a national minority seat than it is to win a seat in Parliament from the regular party lists […]" (emphasis added).[116] As discussed above, the statutory scheme enacted in 2011 made it completely impossible for seven out of the thirteen minorities to gain a parliamentary seat, while four other minorities have only a very slim, theoretical chance. (Based on their population numbers, only the Germans and the Romani have a real chance to gain a parliamentary seat.)

It must be stressed that the Court's previously established case law (e.g. Partei Die Friesen v. Germany) was not applicable in the Bakirdzi and E.C. v. Hungary case since the Hungarian legal framework has a unique feature, i.e. each minority list can only receive votes from voters of that minority. While, even a small niche party or a minority party has at least some theoretical chance to cross the electoral threshold (as it can attract voters from the whole of society, *at least theoretically*), the Hungarian statutory scheme *works in a different vein.* To put it bluntly, it was absolutely certain even *before* the elections that the Greek or the Armenian list would not win a mandate, as they had 140 and 184 voters recorded, respectively, in the electoral register in 2014. Consequently, the Greek list could under no circumstances have

113 Judgement, par. 70.
114 Majtényi, 2023.
115 For the details, see Sándor-Szalay and Kiss, 2022, pp. 73–76.
116 Judgement, para. 58.

received more than 140 votes. By all means, it could be argued that if more members of the Greek minority had registered as minority voters, there would have been a better chance of winning a seat. However, this statement overlooks the fact that even the population number of the Greeks (and also six other minorities) is far from the preferential quota. In light of this, the judgement was not excessive when it referred to "perpetuating the exclusion of minority representatives from political decision-making at a national level".[117]

While the Hungarian Government requested that the case be referred to the Grand Chamber of the Court, the referral request was rejected, and consequently the judgement became final. This means that the Hungarian Government must take action to put an end to the infringements identified by the Court, since the implementation of the judgement is an obligation for Hungary under both international law and domestic law. As is clear from the judgement, the Court refrained from determining how Hungary should eliminate the infringement. Therefore, a number of solutions are possible, depending on the choice of the legislators. Some of the possible options are outlined below.[118]

I) An obvious, but 'cheap' solution would be to abolish the minority voting system, i.e. to restore the pre-2012 situation. As noted above, there is no legally binding requirement at the international level to promote parliamentary representation of minorities through preferential provisions. Several countries, even in the European Union, do nothing to make it easier for minorities or minority parties to win parliamentary seats.[119] However, abolishing the current statutory scheme could also be seen as a step backwards, which may provoke criticism from domestic minorities, the neighbouring countries, and international organisations.

II) Another option would be to maintain the current legal framework, with the amendment that minority voters would also have the right to vote for the party list, so they would not have to choose between expressing their minority identity or their party affiliation in the parliamentary elections. This scenario would be an obvious break with the principle of equal suffrage, as the minority voters would have three votes, whereas the others only two. According to the Venice Commission, "Certain measures taken to ensure minimum representation for minorities either by reserving seats for them or by providing for exceptions to the normal rules on seat distribution, e.g. by

117 Judgement, para. 73.

118 Based on the experience of 2014 and 2018, Kurunczi has formulated several other proposals (e.g. establishing an upper house in the Parliament) for the reform of the minority electoral system (well before the Court's decision) (Kurunczi, 2020, pp. 135–143.).

119 Slovakia serves as an example here. Hungarians are the largest ethnic minority (7.75%), even though the Hungarian (and other ethnic) parties do not receive any preferential treatment in the parliamentary elections.

waiving the quorum for the national minorities' parties do not infringe the principle of equality."[120]

The introduction of plural suffrage may be preceded by the amendment of the Fundamental Law,[121] as both the Fundamental Law and the case law of the Constitutional Court are committed to equality of suffrage. However, there is a notable exception from the latter as the Fundamental Law lays down that, "A cardinal Act may provide that only persons with domicile in Hungary may be granted the right or the *full right* to vote and to be voted for, and may specify further requirements for the eligibility to be voted for" (emphasis added). Based on this provision, the 2011 Electoral Act stipulates that, "A voter with no domicile in Hungary *(author's note: mainly Hungarians living in the neighbouring countries)* may cast a vote for the party list."[122] Consequently, they cannot vote for the single-member constituency candidates,[123] i.e. they have only one vote.[124] (It is noteworthy that the Court did not refer to this element of the Hungarian constitutional framework.)

Even if an amendment of the Fundamental Law would pave the way for plural suffrage, some problems still remain, while new challenges occur. As Kurunczi warns, plural suffrage may motivate citizens to take part in the elections as minority voters, without any real affiliation to the given minority, in order to gain an 'extra' vote. The minority lists may therefore become a 'playground' for political parties.[125] Additionally, it must be borne in mind that "the Court did not base the infringement of the right to free choice primarily on the absence of party list voting, but on the fact that the regulation chosen by the legislature, which entrusts national-level minority self-governments with the exclusive competence and responsibility for drawing up national minority lists, does not allow for the expression of political and ideological diversity within the national minority community […]".[126] To put it another way, plural suffrage alone would not tackle the problems identified by the Court.

III) Within the framework of plural suffrage, the Government may decide to provide reserved seats for minorities. Croatia and Slovenia should serve as reference points, as the minorities in these countries have the right to

120 Code of Good Practice in Electoral Matter. Guidelines and Explanatory Report. Guidelines on Elections. I.2.4.b). [CDL-AD (2002) 23 – Opinion no. 190/2002].

121 Cf. Sándor-Szalay and Kiss, 2022, 69.; Kurunczi, 2023, p. 67.

122 2011 Electoral Act, Section 12 (3).

123 The reasons for that are quite obvious since a voter without residency in Hungary cannot be assigned to either one of the 106 single-member constituencies. However, Majtényi claims that "The half vote of non-resident citizens violates the 'one person, one vote' principle and that of the equal weight of all votes" (Majtényi, 2023).

124 For the details, see Bodnár, 2016.

125 Kurunczi, 2023, p. 67.

126 Sándor-Szalay and Kiss, 2022, p. 68.

guaranteed parliamentary seats.[127] First of all, the number of minority seats should be determined, which – if we look at the total proportion of minorities in the population – should be around eight. Subsequently, the lawmakers have to elaborate a scheme on how to distribute the reserved seats between the 13 minorities, taking into account the population numbers of the minorities. What seems certain, however, is that even in this case, not all 13 minorities would be guaranteed a seat, as it would result in a high degree of disproportionality if the minorities, numbering a few thousand, were to be able to elect a 'full' MP.

IV) Theoretically, the calculation method of the preferential quota may be changed, entailing a lower threshold for the minority lists. However, even if the quota were halved, it would not improve the chances of minorities other than Germans winning a seat. In addition, Hungarian scholars are divided on the question of which is the highest preference that would not be unconstitutional.[128]

V) Finally, it could be considered amending the current statutory scheme to allow minorities to elect only spokespersons in the future, but not full-fledged MPs, while certainly, they could also vote for the party list. At the same time, the minority lists should be transformed into open lists, enabling the voters to choose between the candidates. Although this option would eliminate the minority MPs with voting rights, it would offer at least three benefits. Firstly, the minority voters would not have to choose between expressing their minority identity or their party affiliation, i. e. they would not be excluded from voting for party lists. Secondly, they would have a genuine choice while voting for the minority list as they could vote directly for the preferred candidate. Thirdly, this arrangement would not undermine the principle of equal suffrage as overtly as option ii. would, since the spokespersons would be 'only' non-voting members of the Parliament.[129]

The scenarios sketched above serve as a point of departure for the forthcoming legislation. In the author's view, it seems to be a somewhat difficult task to draft a law that takes into account each of the Court's objections, while fitting into the Hungarian constitutional framework. However, one of the key statements of the judgement should be recalled: "The Court thus finds that the *combination* of the above restrictions on the applicants' voting rights, considering their *total* effect, constituted a violation of […] (emphasis added)".[130] This wording clearly implies that the

127 Roter, 2017; M. Balázs, 2022, pp. 181–189.

128 Móré, 2018, pp. 138–139.

129 Kállai suggests a similar reform and claims that the principle of equal suffrage would be infringed even if the minority voters would vote for the spokespersons (in addition to the single-member constituency candidates and party list) (Kállai, 2022). For a recent argument, see László, 2023, pp. 63–64.

130 Judgement, para. 74.

shortcomings of the minority voting system were 'cumulative', which suggests that even if only some of the problematic elements of the current statutory scheme were resolved, then the system may be in line with the ECHR.

At the time of closing this manuscript, Hungary had not yet taken a step to amend the legal framework. However, as the next parliamentary election is scheduled only for 2026, the Government has plenty of time to find the proper solution.

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Chapter 18

Unequal Czech Old Age Pensions for Men and Women in the ECtHR's Case Law with Special Regard to *Andrle v. the Czech Republic**

Martin Stefko

Abstract

The purpose of this article is to provide an overview of the Czech pension policy in the light of Mr Andrle's case and to present the underlying argumentation. How is it possible that Mr Andrle did not win the case, although he had suffered discrimination to the extent that he was obliged to collect additional 4 years and 20 months of insured periods? As a woman, no such additional period would have been required. Despite the obvious gender-based discrimination, neither the Constitutional Court of the Czech Republic nor the ECtHR dared to declare this to be a discrimination. The former supported the explanation with the reasoning that there was nothing to do as the advantageous pension insurance status of women could only be abolished but not replicated to the status of men and that everything was covered by the people's power. The ECtHR argued that this practice was to be stopped, was going to be stopped by the policymakers, but Czechs simply needed more time. Czechs have had more time, but the will of the people remained more or less the same.

Keywords: pension insurance, old age, caretakers

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1. Introduction

Retirement ages[1] have come to be important milestones in people's working lives. People not only hope or dream about a long and happy retirement, but also they have to adjust their lives to be prepared to support themselves during this period of life. Mr Andrle took care of his two children.[2] He claimed the advantageous lowered retirement age reserved to women but was refused by the Czech Social Security Administration on the basis of his gender. The lowered retirement age was available only to women. Czech courts upheld the negative decision issued by the Czech Social Security Administration and so did the European Court of Human Rights (hereinafter 'ECtHR'). As a result, Mr Andrle did not retire at 57 but had to work almost until the age of 62.

The relevant Czech regulations and case law were found to be in line with the Convention on Human Rights and Fundamental Freedoms, in particular with Article 14 thereof. In this particular case (hereinafter referred to as the '*Andrle* case'), the ECtHR pointed out that: "*In the light of the specific circumstances of the case, this approach continues to be reasonably and objectively justified on this ground until social and economic changes remove the need for special treatment for women.*"

The ECtHR reaffirmed that gender equality allows for taking special measures that compensate for factual inequalities between men and women. It motivated such discrimination along three main considerations:

- 'specific historical circumstances',
- difficulties to pinpoint any particular moment when the unfairness to men begins to outweigh the need to correct the disadvantaged position of women using affirmative action and
- move towards equalisation of the retirement age.

What was formerly the twilight phase of a worker's life is now, some 126 years later, equal to the length of a person's youth. People are getting older and older, which means they can work for longer periods but are unwilling to do so. In this article, we will analyse the relevant case law of the ECtHR to place the *Andrle* case into a broader international context (section 2). The subsequent section will consider the historical circumstances that led to the establishment of a lowered age for women in the 50s of the previous century in the totalitarian satellite State of the Soviet Union. The fourth section will compare the legal opinion expressed by the ECtHR to subsequent Czech legislative developments (section 4) because, in the aftermath, the Czech legislature did several things. It abolished the lowered age for women.

1 The retirement age is legal shorthand for an age that has to be reached in order to be eligible for the benefit provided by national laws, in case of living beyond a prescribed age.

2 Mr Andrle is a citizen of the Czech Republic. He was married from 1971 until 1998 when his marriage was dissolved. Based on an application, his two minor children were entrusted to his care by decision of 16 July 1998 of the District Court in Ústí nad Orlicí. Case of *Andrle v. the Czech Republic*, Application no. 6268/08.

However, it also continued in the old ways and developed an additional increase in pensions for women only once again.[3]

2. International and European Union Standards

The 1948 Universal Declaration of Human Rights, the founding human rights instrument of contemporary international human rights law, included the first reference to retirement age. This reference can be found in Article 25 I, which states that everyone has the right to security in their old age. Beyond dispute, the International Labour Organisation ("ILO") has the most important role in setting development standards that affect retirement ages. The ILO has developed standards for the statutory age, expressed in Convention No. 102: the retirement age shall be not more than 65 years, unless a higher age is fixed by a competent authority, with due regard to the working ability of elderly persons in the country concerned.[4] ILO Convention No. 142 indicates that career guidance and vocational training should be provided without discrimination based on age.[5] Similarly, Recommendation No. 162 of 1980, on older workers, states that, wherever possible, retirement should be voluntary and take place in a framework allowing for a gradual transition from working life to free activity.[6] According to Section 21 (b) of the Recommendation, the entitlement age for an old-age pension should be flexible.[7]

The only right of the International Covenant on Economic, Social, and Cultural Rights that gives rise to any explicit protection for elderly persons in this regard is the right to social security under Article 9. The Committee on Economic, Social and Cultural Rights has emphasised that States should establish flexible retirement ages, depending on the occupation performed and the working ability of elderly persons. This flexibility should also reflect demographic, economic, and social factors.[8]

Within the unique control system developed based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR had to challenge the issue of discrimination on grounds of age, with the applicants arguing that earlier generations of pensioners received considerably higher pensions than the

3 The author is the father of two children and acknowledges that it was his wife who had always taken care of them. Nothing in this article is to be interpreted to the detriment of mothers. However, there are also men who do not have any female support and take care of their common children alone.

4 C102 - Social Security (Minimum Standards) Convention, 1952 (No. 102)

5 Cf. also Articles 1 and 5 of ILO Convention on Discrimination (Employment and Occupation), 1958 (No. 111).

6 Adopted in Geneva at the 66th ILC session, on 23 June 1980.

7 Servais, 2014, p. 77

8 International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171, paragraph 28. Cf. Rodríguez-Pinzón and Martin, 2003, p. 958.

applicants would receive on reaching retirement age. However, the Court ruled in this Ackermann case that the applicants had not established that their situation was comparable to that of earlier pensioners and found that their scheme was reflective of socioeconomic circumstances.[9]

The European Union has never successfully established a common pension insurance scheme or even come close to this aim. The CJEU has confirmed several times that EU law permits the existence of different national social security schemes.[10] *Substantive and procedural differences between the pension insurance systems of individual Member States remain possible*[11] *unless there are different retirement ages and the criterion applied is sex.*[12] *Even so,* Directive 2006/54/EC does not preclude an employer from granting a pension supplement to persons who have already reached the occupational pension retirement age, but who have not yet reached retirement age for the statutory retirement pension, until the persons benefiting from the supplement reach the statutory retirement age.[13] *If Member States had efficiently overcome national differences, as t*he Convention concluded between Germany and Denmark on 14 August 1953, even regarding various retirement ages, *EU law precludes the loss of social security advantages for the workers concerned that would result from the inapplicability of such an international treaty, following the entry into force of EU coordination regulations.*[14]

2.1. The ECtHR

Pension insurance is not excluded from Article 14 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter the 'Convention') as the

9 See *Ackermann v. Germany*, Application no. 71477/01, Judgment of 8 September 2005. The provision of different levels of support based on age has been also upheld by the UK House of Lords in a case brought under the European Convention on Human Rights, and by the Supreme Court of Canada under the Canadian Charter of Rights. *R. v. Secretary of State for Work and Pensions Ex Parte Reynolds* [2005], *UKHL 37. Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC); *Gosselin v. Attorney General of Québec*, 2002 SCC 84. See Kim and Piper, 2003.

10 See CJEU *judgment of 5 July 1988 in Case 21/87 Borowitz v Bundesversicherungsanstalt fuer Angestellte [1988] ECR 3715, paragraph 23.*

11 See Article 9 I (f) of the Directive 2006/54/EC. Cf. CJEU *judgment of 15 January 1986 in Case 41/84 Pinna v Caisse d' allocations familiales [1986] ECR 1, paragraph 20.*

12 CJEU judgment of 22 December 1993, Case C-262/88 Barber - Case C-152/91 and to measures intended to provide equal treatment for men and women in the past as well as for the future. Case C-408/92: Smith and Others v. Advel Systems and the Second Defrenne judgment, File No. 43/75. Cf. also Article 2 ofCouncil Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

13 The aim of this measure is to equalise, or make more equivalent, the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex who are in the same situation and who have already reached the statutory retirement age.

14 See CJEU Case 227/89, [1991] ECR I-323, paragraph 27. To the contrary, in the *Walder* judgment of 7 June 1973 (Case 32/72, [1973] ECR 599, paragraphs 6 and 7) the CJEU ruled that it was clear from those Articles that the replacement by the regulation of the provisions of social security conventions between Member States was mandatory in nature and did not allow exceptions, save for the cases expressly set out in the regulation.

ECtHR concluded in several cases before the *Andrle* case. Because pension insurance requires stability and reliability, to allow for lifelong family and career planning, any adjustments to the pension schemes must be carried out in a gradual, cautious and measured manner. Any other approach could endanger social peace, foreseeability of the pension system and legal certainty, as pointed out in *Willis v. the United Kingdom*.[15] More or less along the same line, the ECtHR stated that calculation methods in disability insurance must consider gender equality in *di Trizio v. Switzerland*.[16]

The ECtHR stated that the *Andrle* case must be distinguished from the issue of discrimination in the field of parental leave,[17] because

- the amendments of the parental leave system referred to in the case of *Konstantin Markin* do not involve changes to the subtle balance of the pension system,[18]
- do not have serious financial ramifications and
- do not alter long-term planning, as might be the case with the pension system, which forms a part of national economic and social strategies.

To the contrary, less persuasive seems the conclusion of the *Andrle* case to be compared with the conclusion of the *Van Raalte* case,[19] in which the ECtHR stated that treating unmarried childless men differently than unmarried childless women is a violation of the Convention unless there are "*very weighty reasons*" for such a policy tax regiment on behalf State family support. The State cannot base the differential treatment on the assumption of men's respective biological possibilities to procreate. Even less understandable is the *Andrle* case compared to the *Willis* case, in which the ECtHR argued that the Applicant had paid full social security contributions, gave up work to take care of his sick wife and children, and that it was uneconomical for him to return to work on a part-time basis following his wife's death.[20]

3. The Czech context

Since 1948[21], the Czech system of protection against ageing, the death of a 'breadwinner', and employment disability was not constructed based on the premium principle. Although employees paid taxes that were used to finance social security, the

15 Case of *Willis v. the United Kingdom*, Application no. 36042/97.
16 Complaint no. 7186/09, Judgment of 2 February 2016.
17 Case of *Konstantin Markin v. Russia* (Application no. 30078/06)
18 Case of *Konstantin Markin v. Russia* (Application no. 30078/06).
19 *Van Raalte v. the Netherlands*, (Application no. 20060/92).
20 *Willis v. the United Kingdom* (Application no. 36042/97).
21 Cf., Section 5 of the Social Security Act No. 101/1964 Sb., Sec. 12 of the Social Security Act No. 121/1975 Sb., and Sec. 14 of the Social Security Act No. 100/1988 Coll.

benefits systems had no pure connection between inputs (premiums) and outputs (payments). The classical 'proportion principle' (the proportion between several earnings and an amount of pension) was used, but it was affected by the obligatory categorisation of jobs. This compulsory classification is the most representative and important example of certain advantageous provisions that were laid down during the era of communism.[22]

Shortly after the fall of communism, the leading political parties decided to abolish the system of compulsory employment categorizstion; however, the process of removal was slow and it is still unfinished. The categorisation of employment therefore even has some influence today, 34 years after the revolution. In the first stage of abolition, the Parliament approved the Act on the Abolition of Employment Categories (No. 235/1992 Sb., hereinafter the 'Abolition Act'). The Abolition Act sets forth that the lists of first and second employment categories were abolished on 1 June 1992, and that the classification of employment laid down in the Social Security Act of 1988 (No. 100/1988 Sb.) was to be in force until 31 December 1992. For the classification of the first and second employment categories, the lists outlined in tertiary legislation were to be used until 30 May 1992. Consequently, all jobs performed since 1 January 1993 are deemed to be classified in the same third employment category.

3.1. Employment Categories

According to the Social Security Act[23], each type of employment had to be classified into the first, second or third category[24]. Consequently, the category influenced both the retirement age and the final amount of the pension.[25] For example, under Section 22 (1) of the Social Security Act of 1988, the amount of an old-age pension is comprised of 60% of an individual's average monthly earnings if he or she reached 20 years in the first employment category, 55% of an individual's average monthly earnings if he or she reached 20 years in the second employment category or 50% of an individual's average monthly earnings in other cases. According to Section 22 (2) of the Social Security Act of 1988, the basic amount of old-age pension was increased by exactly 2% of an individual's average monthly earnings for each year of employment, if he or she continued to work beyond the 26th year of employment (if an individual worked 20 years in the first or second employment category, then the limit was decreased from the 21st year) and was employed in the first employment category; the basic amount was increased about 1.5%, in the second employment

22 Cf. Section 5 of Social Security Act No. 101/1964 Coll.

23 Cf. Social Security Act No. 99/1948 Sb., Social Security Act No. 55/1956 Sb., Social Security Act No. 101/1964 Sb., Social Security Act No. 121/1975 Sb. and Social Security Act No. 100/1988 Coll.

24 The principle was simple: the higher the employment category, the lower the retirement age and the higher the pension.

25 See Social Security, 1964, pp. 23–24.

category and 1% in all other cases. The particular effect of the employment category on the retirement age was regulated in Section 21 of the Social Security Act of 1988.

Though the type of employment category was extremely important, the list of first and second category employment was only partially outlined in the Act. The central State agencies were entitled to develop the core of the employment categories in tertiary legislation.[26] For example, miners, plane or ship cabin crew, and some officials in the military, police forces, or Communist Party were classified in the first employment category.[27]

3.2. The Abolition of Employment Categories

The old regulation (from the Communist era) contained in Section 21 of the Social Security Act of 1988, laid down the retirement age, depending on the number of years worked in the first or second employment category. If the standard method of computing retirement age was not advantageous to a woman, then her retirement age was determined depending on the number of children she raised. For example, the retirement age for a man employed as a miner for 15 years was at the age of 55. The retirement age for a man who did not work in the first or second employment category was 60. A woman who satisfied the same conditions as such a man, and who did not raise any children, had a retirement age of 57.

The legislation since 1989 has aimed to increase the retirement age. The first step was taken in 1995. The Pension Insurance Act stipulated an increased retirement age for insured persons, but only for those who reached the retirement age after 31 December 2012. The retirement age for a man is 63, and for a woman, it is dependent on the number of children she has raised.[28]

The Pension Insurance Act, which replaced the old regulation contained in the Social Security Act of 1988 (No. 100/1988 Sb.), sets forth additional transitional measures governing the importance of employment categories for determining benefits accrued since 1 January 1995. Under Section 71 of the Pension Insurance Act, acquired rights are protected. The amount of old-age pension, full invalidity pension or partial invalidity pension obtained under the Pension Insurance Act shall not be

26 The term 'tertiary legislation' means legislative measures of the State that have less power than primary or secondary legislation. Primary legislation means laws, and secondary legislation means Government Decrees or ministerial notes. In the end, the list of employment categories was defined in agreements between State agencies. See the Decision of 29 June 1961 of the Regional Court in Prague.

27 Cf. CSSZ, 1995, p. 46.

28 The retirement age is 59 years, if she raised at least five children, 60 if she raised three or four children, 61 if she raised two children, 62 if she raised one child, or 63 in all other cases.

lower than the number of benefits granted by provisions valid until 31 December 1995.[29]

All remaining insured persons, who either had already reached the retirement age before the Pension Insurance Act came into force (31 December 1995) or who reached the retirement age before 1 January 2013, are divided into two groups. Under Section 32 of the Pension Insurance Act, provided that an insured person reached the age before 31 December 1995 (the day before the Act came into force), the retirement age is 60 years for a man and 53 for a woman, if she raised at least five children, 54 if she raised three or four children, 55 if she raised two children, 56 if she raised one child or 57 in all other cases. If the insured person reaches the aforementioned age limits laid down in Section 32, between 1 January 1996 and 31 December 2012, the actual retirement age is determined by adding to the calendar month in which the person reaches the set age limit, 2 calendar months for a man and 4 calendar months for a woman, per each year commenced between 31 December 1995 and the date when the person reaches the set age limits.[30]

From 2010 onwards, within the so-called parametrical changes, the 'required insurance period' is being gradually extended, namely from a base of twenty-five years to a final thirty-five years. In determining the 'required period of insurance' for an individual, only the calendar year when he/she reaches retirement age is decisive. As regards the 'retirement age', this is also being increased gradually. Moreover, it is still differentiated according to the year of birth, gender, and number of children raised (by women). Until 31 December 1995, the required retirement age was 60 years for men and 53 to 57 years for women (57, if they did not raise any children, 56 in the case of one, 55 in the case of two, 54 in the case of three or four, and 53 in the case of five or more children raised). These age limits are still valid for people born before 1936. The precise retirement age of individuals born between 1936 and 1977 is outlined in an Appendix to the Pension Insurance Act. For persons born after 1977 (later changed to 1971), the number of calendar months that equals twice the difference between the year of birth and 1971 is added to the age of 67 years (later diminished to 65).

29 Pursuant to Section 71 (2) of the Pension Insurance Act, the principle of acquired rights is valid for an individual, provided he or she acquired at least one year of employment in the first or second employment category and the entitlement to benefits has arisen or will arise in the period from 1 January 1996 to 31 December 2018. If the entitlement arose after 31 December 2005, the insurance carrier is obliged to respect the principle of acquired rights only upon request from the entitled person. However, there is a rule set forth in Section 71 (4) of the Pension Insurance Act that excludes the application of certain provisions contained in the Social Security Act of 1988. The list in Section 71 (4) of the Social Security Act of 1988 refers to the possibility of increasing a benefit that is the only source of income, or to the provision that enables the application of acts valid before 1 October 1988.

30 In 2003, the legislator decided (Act No. 425/2003 Coll.) to continue this increase at the same rate up to 63 years of age (born in 1948-1953) for men and the target age of 59 to 63 for women.

3.3. Constitutional Protection

The social and cultural values acknowledged by Czech society have been reconsidered since the end of the Communist regime in 1989 and are outlined in the Charter of Fundamental Rights and Freedoms (hereinafter 'the Charter').[31] Article 30 of the Charter provides for social welfare rights; however, under this Article, an individual is not entitled to derive his or her rights to a specific retirement age directly from the Charter. This Article of the Charter represents rather the constitutional basis of the Czech pension insurance system and constitutes therefore the limits for ordinary statutes. According to Articles 4 and 41 (1) of the Charter, three conditions must be fulfilled in the statutory social regulations. First, in order to comply with the Charter and therefore to be valid, social regulations must be explicitly outlined in primary law, not in secondary legal measures, such as measures issued by the Government, Ministries, or other competent State or public agencies. Additionally, social regulations must secure the core and sense of social rights,[32] shall not be misused, and must be applied equally to all cases fulfilling the same conditions.[33]

The Czech Constitutional Court decided that no natural person may enter into a contract with the State which would guarantee a definite amount of benefits within the mandatory Czech social security system. Furthermore, the Constitutional Court declared that even in cases of a relationship between individuals and private insurance carriers, which are based on a contract governed primarily by private contract law, there is no right to obtain a definite amount of benefits from the carrier, because an individual is not entitled to assert vested rights. [34]

In the subsequent decision, the Constitutional Court reiterated that equality is a relative category that requires the elimination of unjustified differences. Legal distinctions in access to certain rights must not be arbitrary, but the principle of equality does not imply that everyone must be granted any right. Differential treatment is

31 The Charter of Fundamental Rights and Freedoms was adopted as an Appendix to Act No. 23/1991 Coll. Regarding the extraordinary situation in 1992, when the predecessor of the Charter in the Czech and Slovak Federal Republic was abolished, the Charter was declared again on 16 December 1992 as a component of the Czech constitutional order (Constitutional Act No. 2/1993 Sb.). The Charter was amended by Act No. 162/1998 Sb.

32 The State is obliged to act; omissions could be contrary the core of certain social rights. See the Constitutional Court's Decision File No. II. ÚS 2623/09)

33 Cf. the Constitutional Court's Decision of 6 June 2006, File No. Pl. ÚS 42/04 or the Constitutional Court's Decision of 5 May 1999, File No. Pl. ÚS 23/98.

34 See the Constitutional Court's Decision of 12 April 1995, File No. Pl. ÚS 12/94. Similarly, the Polish Constitution does not contain any specific provision about an exact retirement age. Although the Constitution guarantees the right to social security connected with retirement, Polish legislators reserve the right to increase the retirement age, should the condition of the retirement system so require. It was also confirmed by the Polish Constitutional Court, which left the legislature broad room for manoeuvre to take the necessary corrective actions. In the Court's opinion, increasing and equalising retirement age does not infringe the constitutional principles of acquired rights, or the citizens' trust in the State and its laws. On the other hand, the Constitutional Court ruled that the 'partial old-age pension' infringed the Constitution by ensuring different rights to women and men.

therefore permissible in principle if there are objective and reasonable grounds for the difference. In the field of economic, social, cultural and minority rights, the legislator has much more scope to apply its idea of the permissible limits of de facto inequality within it. "According to the Constitutional Court, if the contested provision were to be repealed, it would merely deprive women, mothers of a certain advantage, without giving men, fathers the same advantage as women, mothers in the context of 'equalisation". The Constitutional Court found the preferential treatment of women who had raised children to be based on objective and reasonable grounds, referring to the arguments in the parties' submissions and the requested opinions. Nor did the Constitutional Court find that the legislator had acted arbitrarily in adopting the contested provision, since a solution to the unequal position of men and women in the pension insurance system could not be found without a comprehensive and wisely timed adjustment of the entire pension insurance system, finding socially acceptable and economically acceptable aspects, which should rather be determined within the framework of the overall reform of the pension system."[35]

It follows that the Constitutional Court was ultimately persuaded by the tradition and study of the Ministry of Labour and Social Affairs. However, it is necessary to mention the relevant assessment of Judge Wagnerová who adds: "The actual, unusually contentious reasoning of the award, contained only in paragraphs 33 to part of paragraph 36, when the remainder of this paragraph contains a remarkable obiter dictum, builds on tradition, although it does not explicitly mention it, and on the contrary takes refuge in what I believe to be a problematically interpreted comparative study provided by the Ministry of Labour and Social Affairs."[36]

3.4. The Gradually Increasing Standard Retirement Age

As part of its austerity measures, the Government decided to change the current regulation of the statutory retirement age. The Act on Pension Insurance set forth an unlimited increase in the retirement age, which constituted a real nightmare for young generations. In addition to increasing the statutory retirement age, there was also a gradual unification of the statutory retirement age for men and women (since the 1950s, there have been separate retirement ages for the sexes). The Government aimed to slow down the pace of increase gradually. It might come into balance in the future, with the expected trends in average life expectancy.

Some experts stated that it can be expected that future developments will not entirely match current demographic forecasts. Even though current demographic forecasts did not support the Government's intention to change the pace of raising the statutory retirement age, the Ministry of Labour and Social Affairs, in cooperation with the Ministry of Finance, prepared a discussion document based on a proposal to create and enact a regular mechanism/process to review the pace of increase of

35 See the Constitutional Court's Decision of 16 October 2007, File No. Pl. ÚS 53/04.
36 Dissent votum by judge Wagnerová was published with the judgment.

the statutory retirement age, so that there are no significant changes in the average time spent in retirement for each generation. The period of entitlement to old age pension should stabilise at an average of about 20 years. It was apparent that the debate must continue.[37]

4. Not the second time

The Czech pensionable age under the Pension Insurance Act has increased since 1996, subject to various modifications. A major revision approved in 2017 (in force since 2018) concerned the envisaged unlimited growth in retirement age, setting the maximum at 65 years to be reached in the 2030s. This retirement age applies to persons born after 1971 and is the same for both men and women. Thus, the number of children raised is not taken into account by anybody.

As far as persons born before 1971 are concerned, the law is different. Retirement age is still differentiated depending on the year of birth, and the number of children raised is also taken into account for women.

Subsequently, the legislator enacted another change in favour of women and that happened while the indexation of pensions ought to be cut because of the financial instability of the whole pension insurance scheme.[38] From 1 January 2023, insured persons can once again apply for an increase in old-age pension for bringing up a child or children. This is a fixed amount, which will be CZK 500 in 2023. In the case of raising more children, this amount is multiplied by the number of children, i.e. for 3 children, CZK 1,500 will be due, by which the percentage of the old-age pension, regular or early, will be permanently increased. The amount due to pensions granted in 2024 and later will be gradually indexed in the same way as the pension percentages. The upbringing of the same child cannot be credited to more than one person simultaneously for the increase received for the child raised; if more than one person raised the child, the upbringing of the child shall be taken into account only for the person who personally cared for the child to the greatest extent.

The conditions for recognizing a child as having been brought up are the same as those that apply to reducing the retirement age of women. Thus, it is required that

37 Cf. the similar approach of the Slovak legislature, which has already started the phase of unifying the retirement age (a specific time is added to the lower retirement age of women, which is proportional to the number of raised children; 1–5 is taken into consideration). From 2017, a 'floating' retirement age limit, based on an increase in the average middle lifespan (of men and women) in a monitored reference period will be applied. Lacko, 2014, p. 42.

38 Act 323/2021 Coll. amending Act No 155/1995 Coll., on pension insurance, as amended, and Act No 582/1991 Coll., on the organisation and implementation of social security, as amended (in Czech "kterým se mění zákon č. 155/1995 Sb., o důchodovém pojištění, ve znění pozdějších předpisů, a zákon č. 582/1991 Sb., o organizaci a provádění sociálního zabezpečení, ve znění pozdějších").

the person has personally cared for the child up to the age of majority for at least ten years before the date of entitlement to the old-age pension, provided that if he/she has taken up the care of the child after the child has reached the age of eight, it will be sufficient if he/she has cared for the child for at least five years and has not ceased to care for the child before the child reaches the age of majority.

The increase for a child brought-up is not payable if the insured person committed against the child, as perpetrator, accomplice or participant, a deliberate offence against life and health, against freedom and personality protection rights, against human dignity in sexual context, or against the family and children under the Criminal Code or similar deliberate offences under previously applicable legislation.

Although the Government's interpretations of the new regulation appear to be gender-neutral at first sight, this is not true in practice. Only the woman's upbringing is automatically taken into account as this new law applies to each insured and pensioner. The practice of the Czech Social Security Administration for women already granted old age pensions is that the woman who gave birth to the child is eligible for the new upbringing allowance. The claim is deemed to be proved by the children's birth certificates as lodged to the authority by the matter of the children in question. The authority presupposes that the person who gave birth to a child was the main or sole upbringing parent regardless of other circumstances of the case. Therefore, the pension insurance authority does not conduct any procedure to examine whether the woman has cared for the child or not.

Only those parents who are to apply for an old age pension must agree upon the beneficiary for the upbringing allowance. If such an agreement cannot be concluded it is upon the authority to start a formal administrative proceeding todetermine the beneficiary.

As in the *Andrle* case, there are a few pending cases, when children were brought up by their father or a foster parent and those persons do not receive any upbringing allowance as they did not give birth to those children. None of those has been adjudicated and the respective decision published so far. But it is sure that the given upbringing allowances are adjudicated and paid to the respective mothers of those children.

However, this is not the second time. Because this time the primary reason is not outlined in the relevant legislation but is embedded in the relevant practice of a State authority. The relevant Czech regulations outlined in Section 34a of the Act on Pension Insurance are neutral.[39] It is the Czech Social Security Administration that simplifies procedures by having recourse to the stereotype that mothers bring up their offspring and their father, as men are to work and women to stay behind.

Those still rare cases when the stereotype was not true and fathers were the main upbringing persons are to be solved by competent Czech judges who, as we think, will quash the relevant decisions issued by the Czech Social Security Administration

39 Act No. 155/1995 Coll.on Pension insurance as amended.

and order proper evidence hearing to take place. If nothing of this will take place, which seems rather improbable, higher courts will be involved by the Constitutional Court as well.

5. Conclusions

As this article has shown, the Czech legislator tends to set forth advantageous provisions in codified universal public insurance for women as those are to raise their children almost exclusively. It is an important social role and must be supported. However, speaking about premium rates for the pension insurance scheme, it is the same percentage for all insured persons, including all men who had to take care of their children alone. Of course, those are small numbers compared to women, because Czech society still lives according to the old model of women caring for their children.

The ECtHR acknowledged in *Andrle* that, given the complex political negotiations, changes to the pension system in the Czech Republic are limited because of the fact that the measure in question was applied in the legal order for 45 years, and given demographic changes and changes in the perception of gender roles, the timing of the adjustment of the pension system needed to be right. Accordingly, in the Court's view, the State cannot be blamed for changing the pension system gradually and for failing to bring about full equality more quickly. The reform of the pension scheme must be set in the wider context of demographic changes, such as population ageing or migration, while at the same time maintaining the predictability of the scheme for those affected by it and obliged to contribute to it.

All of that might have been true upon the emergence of the *Andrle* case, as the proverb says: every cloud has a silver lining. We must hear the whole story that came after this. After social reforms, the Czech mandatory pension insurance remained to be flawed in terms of retirement age, and this will continue for decades. Women's lowered retirement ages do not apply to men, even when men have raised their children alone.[40] The retirement age will be equal for men and women from 2036 onwards when insured persons born in 1971 are to reach the age of 65, but always allowing for the possibility that the pension reform of 2022 prolonged advantageous provisions for women only. For the first few years by the letter of law, for the rest because of the actual practice of public authorities, which prefer women.

Hence, we can conclude that the Czech practice, partially approved by the Constitutional Court, has not been changed, despite enormous efforts and contrary

40 Cf. Koldinska, 2011, pp. 14–20.

decisions, both by the ECHR in Andrle[41] and the CJEU in *Soukupová*. [42] Should the case be brought one day in front of the ECtHR, the Czech Government will not be able to defend its position by having recourse to a specific history as the upbringing allowance came into force this year? The upbringing allowance was proclaimed to be one of the reform attempts launched by the Government to improve intergenerational justice within the pension insurance scheme. Its goal is to reward parents for the hardship of upbringing children. Albeit the rewarded insured might be a woman, the goal or desire of the legislature to prefer one sex over another can be seen in connection with actual retirement ages and the practice of the respective authorities. Therefore, we must understand that the presented measures still aim to compensate women only. Now we do not speak about measures rooted in these specific historical circumstances. The gradual reform is in place and shall be applied during the whole century as much as we can anticipate as of today. This scheme is to be applied not to the elderly, but to everyone even to those who were not even born.

Would the ECtHR find this practice reasonably and objectively justified when its main goal remains unchanged? The Czech people's power wants to compensate women for their role in family life and household duties even in the future.

The new reasoning is based on bad demographic expectations, together with the underlying trends of greater life expectancy and low birth rates. Seen specifically from the Czech perspective, despite corrective actions in recent years, pension insurance payments have been exceeding the dedicated social premium revenues on a regular basis. The Czech Republic, like other European countries (despite local variations), has both an ageing population and a shrinking working-age population. As a result of this projected deficit, pension insurance has become a "lightning rod" for far-reaching reform proposals. Therefore, the Czech Republic needs to act to ensure that the pension system retains an adequate and sustainable basis. The action is the incentive for women not to be afraid to have children and to raise them. However, it is a generally acknowledged fact that the ECtHR quite clearly refuses to recognise the legitimacy of the family law regulation at issue by pointing to tradition and, on the contrary, shows the dynamism in the concept of rights and relations related to the family.[43]

41 *Andrle v. the Czech Republic*, 2011, Application No. 6268/08.

42 Case C-401/11 *Blanka Soukupová v. Ministerstvo zemědělství.*

43 See the decision of 22 February 1994 in *Burghartz v. Switzerland* or the decision of 16 November 2004 in *Ünal Tekeli v. Turkey*)

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Chapter 19

How Does the ECHR Provide Protection in wartime?

Katarína Šmigová

Abstract

The article aims to provide an overview of selected case-law of the European Court of Human Rights, covering the interplay between international humanitarian law and international human rights law from several points of view, especially in relation to the protection of the right to life and the right to liberty and security.

Keywords: European Convention for the Protection of Human Rights and Fundamental Freedoms, armed conflicts, international humanitarian law, international human rights law

1. Introduction

Several years ago, it would have been rather easy to answer the question how the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also referred to as the "Convention") provides protection in wartime, i.e. during armed conflicts. However, the situation has changed dramatically since then primarily because of the cases brought before the European Court of Human Rights after the Russian Federation engaged in armed conflicts with Georgia and later on with Ukraine because of the Crimea.

This article is not about the still ongoing armed conflict between Ukraine and Russia because of the aggression of the Russian Federation and its invasion into the

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territory of Ukraine that started in February 2022. It is not even about any alleged perpetration of war crimes and crimes against humanity.[1] This article aims at covering some of the key issues that have been decided by the European Court of Human Rights (hereinafter also referred to as the "Court") in the *Georgia v. Russia* (II) case, the *Ukraine and the Netherlands v. Russia* case within the admissibility phase and some other cases such as *Varnava and others* and *Hassan*. Since these decisions included the application of several concepts of international human rights law and international humanitarian law at the same time, because of space constraint, focus has been chosen to be given to only three Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely its Article 1 (principle of extraterritoriality and the relevant issue of jurisdiction of a State party), Article 2 (right to life) and Article 5 (right to liberty and security). Such a strict framework is intended to help in understanding the interplay between international human rights law and international humanitarian law.

The first part of the article will focus on the interplay between international human rights law and international humanitarian law itself, i.e. from a general point of view. The second part will analyse the European Convention on Human Rights as an international treaty. It will also look into the means of interpretation applicable in case of an international treaty. The next part will aim at providing an overview of selected decisions of the European Court of Human Rights to point out particularities of the simultaneous application of international human rights law and international humanitarian law. The fourth part will focus on a decision adopted by the European Court of Human Rights, which became final only as regards the admissibility aspect. The aim of this article is to examine the legal framework that is applicable during armed conflicts and to emphasise that both the factual and the legal context must be taken into account in every single case decided by an international judicial body, including the European Court of Human Rights.

2. International Human Rights Law and International Humanitarian Law in General

Both these areas of international law have the same final *raison d´être*, namely the protection of the inherent dignity of individuals and ensuring their safety and well-being. However, each of these areas use different methods to achieve their goal.

International humanitarian law and international human rights law are two distinct but interconnected sets of legal norms. International humanitarian law

1 For more information see e.g. an investigation carried out by the International Criminal Court, information available at: https://www.icc-cpi.int/situations/ukraine.

primarily focuses on regulating the actions of parties involved in armed conflicts, aiming to mitigate human suffering and to protect non-combatants, prisoners of war and civilians.[2] It thus governs the conduct of parties during armed conflicts, namely methods and means of warfare.[3] International human rights law, on the other hand, is applicable both in peacetime and in times of armed conflicts, setting universal standards for the respect and protection of human rights under all circumstances, although sometimes derogation from these standards is possible.[4] The interplay between international humanitarian law and international human rights law occurs during armed conflicts, where both bodies of law complement and reinforce each other to ensure a comprehensive human rights protection framework. The interplay between international humanitarian law and international human rights law underscores the need for a comprehensive approach to addressing human rights violations during armed conflicts, emphasizing accountability, justice and the principle of humanity.

The International Court of Justice (hereinafter also referred to as "ICJ") and other international tribunals have already considered the relationship between international humanitarian law and international human rights law in their decisions, aiming to uphold the overall framework of human rights during armed conflicts. By the time of the CEA conference in June 2023, the International Court of Justice has specifically approached the relationship between international humanitarian law and international human rights law in two of its advisory opinions, namely in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, adopted in 1996[5] and in its advisory opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, adopted in 2004,[6] and in one judgment, namely in its decision on Armed Activities on the Territory of the Congo.[7]

In the course of those proceedings, some States argued that international human rights treaties were adopted to protect human rights in peacetime and that unlawful loss of life in hostilities was to be governed by the law applicable in times of armed conflicts, i.e. international humanitarian law.[8] The Court rejected this argument and stated that the protection provided by international human rights treaties does not cease in wartime, except upon the application of a derogation clause. But even in that case some rights are not derogable anyway. Even in times of national emergency

2 See e.g. Henckaerts and Doswald-Beck, 2005, p. 3. For more information about the principle of distinction see also Article 48 of Additional Protocol I.

3 Crowe and Weston-Scheurber, 2013, pp. 24–44.

4 See e.g. Article 15 of the Convention.

5 International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996.

6 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004.

7 International Court of Justice, *Democratic Republic of the Congo v. Uganda*, Judgment, I.C.J. Reports 2005, p. 168, para. 216.

8 International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (I), p. 239, para. 24.

and in times of belligerent hostilities, the right to life is protected by the international human rights protection system. It is true that people are deprived of their lives during armed conflicts, however, such a deprivation must undergo determination whether it has been arbitrary or not according to the law applicable in armed conflict which is designed to regulate the conduct of hostilities.

According to the ICJ, the protection provided for by international human rights law does not cease in case of an armed conflict.[9] As for the relationship between international humanitarian law and international human rights law, there are three possible situations presented by the ICJ. First, some rights may be exclusively addressed by international humanitarian law. Second, some rights may be exclusively addressed by international human rights law. Third, there are rights that are of a concern of both these areas of international law. For the third situation, the ICJ originally stated that international humanitarian law is *lex specialis* vis-à-vis international human rights law.[10] Nevertheless, it does not mean that international human rights law is not applicable in such a situation, both these branches of law coexist and are applied within the same framework.

As for the European regional system of human rights protection, there are several possibilities to limit the scope of human rights protection system that was foreseen when the ECHR was drafted and adopted. Not only can a State Party withdraw from the Convention,[11] it can also apply reservations when ratifying it.[12] Finally, a State Party may apply the derogation clause of the Convention. Article 15 of the Convention, the so-called derogation clause, regulates the application of the concept of derogation in exceptional situations in three paragraphs, both materially in a positive and negative way and procedurally without setting a specific time frame. It is not only in wartime but also upon the occurrence of any other public emergency threating the life of the nation when a State Party to the Convention may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. The State Party is obliged to keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons thereof and of the time when such measures have ceased to operate and the provisions of the Convention are again being fully executed.[13] It is very important to point out that there are limits to the derogation clause, namely in relation to some rights that are considered to be non-derogable: no derogation from Article 2 (right to life), or from Articles 3 (prohibition of torture), 4 (paragraph 1, prohibition of torture and forced labour) and 7

9 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, para. 106.

10 Compare ibid. The Court maintained the same approach in Armed Activities on the Territory of the Congo, para. 216.

11 Article 58 of the Convention.

12 Article 57 of the Convention.

13 See Article 15, paras. 1 and 3 of the Convention.

(*nullum poena sine lege*) is possible in case of war or emergency situation.[14] However, directly within the derogation clause, an exception is a part of a list of non-derogable rights, namely deaths resulting from lawful acts of war.[15]

Especially at the time when the Convention was adopted in 1950, these two areas of international law were as separated and distinct as possible. International human rights law started to emerge, international humanitarian law had been one of the oldest branches of international law.[16] International humanitarian law was the law applicable during wars, i.e. armed conflicts, international human rights law was the other side of the classical division of law in wartime and in peacetime.[17] Nevertheless, as it will be demonstrated, although differences between international human rights law and international humanitarian law keep their reasoning, the interplay between them is more obvious in the current framework of international law. The appropriate example is analysed in the following subchapter, namely an international human rights law treaty, the European Convention on Human Rights, and its interpretation and application in armed conflicts, i.e. when international humanitarian law is applied as well.

3. The European Convention on Human Rights as an International Treaty and its Interpretation in case of Armed Conflicts

According to the general rule of interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties,[18] a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Moreover, the Vienna Convention specifies that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty and any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[19] Furthermore, together with

14 See Article 15, para. 2 of the Convention.
15 Ibid.
16 Cryer *et al.*, p. 267
17 See also the analysis of the development of the relationship between international humanitarian law and international human rights law in Robert Kolb, Human Rights and Humanitarian Law. Max Planck Encyclopedia of Public International Law available at www.mpepil.com. *Johnston and others v. Ireland*, European Court of Human Rights, 18 December 1986, decision No. 9697/82.
18 For more details see e.g. Aust, 2007, p. 234.
19 Article 31 of the Vienna Convention on the Law of Treaties.

the context, there shall be considered any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and any relevant rules of international law applicable in the relations between the parties.[20] Finally, the Vienna Convention determines also supplementary means of interpretation, including the preparatory work of the treaty[21] and the circumstances of its conclusion, to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[22]

It is especially Article 31, para. 3, letter (c) of the Vienna Convention that is of relevance in relation to the topic of this contribution. Any relevant rule of international law applicable in the relations between the parties should be taken into account when deciding a case according to the European Convention on Human Rights. Having searched the case-law of the European Court of Human Rights in terms of the possible application of international humanitarian law when deciding the case in front of the Court, there are several approaches of the Court within its jurisprudence and decision competence.

As for the first approach, one might detect cases where no norm of international humanitarian law was mentioned, such as a very well-known case where acts of occupation were analysed. In *Loizidou v. Turkey* the Court declared full existence of the effective overall control by the Turkish armed forces over the disputed territory.[23] However, although occupation as such is an institute of international humanitarian law with its specified rules in e.g. Geneva Conventions from 1949, the Court has not even mentioned it at all. Its reasoning was based solely on the European Convention on Human Rights, the Court declared that the right to enjoy ownership of a Greek Cypriot woman was violated by preventing her from going to her property located in Northern Cyprus. However, in *Loizidou*, the Court pointed out that the Convention must not be interpreted and applied in a vacuum, but rather in light of the rules set out in the Vienna Convention on the Law of Treaties.[24]

Within the second approach, there are situations and cases where, on the contrary, the applicability of the Geneva Conventions from 1949 is expressly mentioned by the Court. The best example is a decision in *Varnava* case in which the applicants were relatives of Cypriot nationals who disappeared during Turkish military operations in Northern Cyprus in July and August 1974. In relation to the selected Articles

20 Ibid.

21 Article 32 of the Vienna Convention on the Law of Treaties. *Travaux préparatoires* were important in *Johnston and others v. Ireland*, European Court of Human Rights, 18 December 1986, decision No. 9697/82, § 52.

22 Article 32 of the Vienna Convention on the Law of Treaties.

23 *Loizidou v. Turkey*, application no. 15318/89, judgment, Grand Chamber, 18 December 1996, para. 56.

24 Ibid., para. 43.

considered in this contribution, namely Articles 1, 2 and 5 of the Convention, it was claimed that the Cypriot nationals had disappeared after being detained by Turkish military forces and that the Turkish authorities had not accounted for them since.[25] Considering its temporal jurisdiction, the Court decided that any complaints by the applicants asserting the responsibility of the Contracting State for factual events in 1974 were outside its temporal jurisdiction. However, since the applicants specified that their claims related only to the situation pertaining after January 1987 (acceptance of the right of individual petition by Turkey), namely the continuing failure to account for the fate and whereabouts of the missing men by providing an effective investigation was at stake.[26] And it was finally this continuing violation of Article 2 (right to life) of the Convention on account of the failure of the authorities to conduct an effective investigation into the fate of the nine men who disappeared in life-threatening circumstances that the Court held upon. Moreover, it was also decided upon a continuous violation of Article 5 (right to liberty and security) of the Convention by virtue of the failure of the authorities to conduct an effective investigation into the fate of the missing men. As for Article 1, the Court only referred to its previous case-law concerning Cyprus, namely to the decision of Grand Chamber in *Cyprus v. Turkey*.[27]

As for the interplay between international human rights law and international humanitarian law, the Grand Chamber concurred with the reasoning of the Chamber in holding that in a zone of international conflict, State Parties are under the obligation to protect the lives of those not, or no longer, engaged in hostilities.[28] This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate the proper disposal of remains and would require from the authorities to collect and provide information about the identity and fate of those concerned, or to permit bodies such as the International Committee of the Red Cross to do so.[29] The Court pointed out that Article 2 of the Convention must be interpreted, as far as possible, in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflicts.[30] Moreover, the

25 *Varnava and others v. Turkey*, applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), judgment, Grand Chamber, 18 September 2009, para. 3.

26 Compare *Varnava* case, para. 134.

27 *Cyprus v. Turkey* case, application no. 25781/94, judgment, Grand Chamber, 10 May 2001, paras. 80 to 81.

28 *Varnava* case, para. 185

29 Ibid.

30 Ibid.

Court included all the Geneva Conventions into the footnote to specify the applicable rules.[31]

Finally, the third approach within the case law of the European Court of Human rights in relation to the interplay between international human rights law and international humanitarian law includes not only the applicability of both these branches, but their coexistence as such. The best example of the beginning of this approach is the *Hassan* case.[32] This case concerned the capture of the applicant's brother by British armed forces and his detention at Camp Bucca in Iraq. The applicant alleged in particular that his brother had been arrested and detained by British forces in Iraq and that his dead body, bearing marks of torture and execution, had subsequently been found in unexplained circumstances. He also complained that the British authorities had failed to carry out an investigation into the circumstances of his brother's detention, ill-treatment and death. The case therefore concerned extra-territorial jurisdiction and the application of the Convention in the context of an international armed conflict.[33]

As for more facts, after the British assessment that Tarek Hassan was a civilian who did not pose a security risk, he was determined to be released and placed in the civilian section of the base until the security situation allowed his release. The British Government submitted documents recording his release in the first days of May 2003. During a physical check of detainees carried out in mid-May 2003, Tarek Hassan was demonstrably no longer at the base.[34]

However, Tarek Hassan was never reunited with his family, and they had no information about his fate until 1 September 2003, when they were contacted after Tarek Hassan's body was accidentally found in Northern Iraq. According to the complainant, when Tarek Hassan was found, he had multiple gunshot wounds to the chest caused by a machine gun, his hands were bound with a plastic tape, and in his pocket, there was an identification tag issued by US authorities at Camp Bucca. The death certificate issued by the Iraqi authorities gave the date of death as 1 September 2003, leaving the cause of death undetermined.

As for legal issues, of the first one concerns the exercise of jurisdiction under Article 1 of the Convention outside the territory of a Member State. The Court recalled the principles formulated in the *Al-Skeini* case by application of which, Tarek Hasan fell under the jurisdiction of the United Kingdom because he was in the physical

31 See the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (first adopted in 1864, last revised in 1949); Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (first adopted in 1949); Third Geneva Convention relative to the Treatment of Prisoners of War (first adopted in 1929, last revised in 1949); and Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (first adopted in 1949), together with three additional amendment protocols, Protocol I (1977), Protocol II (1977) and Protocol III (2005).

32 *Hassan v. the United Kingdom*, application no. 29750/09, Grand Chamber, judgment, 16 September 2014.

33 See e. g. ibid., para. 86.

34 *Hassan* case, paras. 14 to 28.

power and control of British soldiers, even though this happened during the active fighting phase of an international armed conflict.[35] The Court also supported its conclusion by referring to the jurisprudence of the International Court of Justice and underlined that even in armed conflicts, international humanitarian law and human rights law could be applied at the same time.[36] Moreover, the Court rejected claims that the United States exercised jurisdiction over Tarek Hassan.[37]

The Court noted that detention under the Third and Fourth Geneva Conventions did not fall under any of the permitted exceptions to the prohibition of restrictions on personal freedom under Article 5, paragraph 1 of the Convention. In the absence of another agreement between the States on the interpretation of Article 5 of the Convention in international armed conflicts, the Court proceeded from the rules of interpretation codified in Article 31, paragraph 3, letter (b) of the Vienna Convention on the Law of Treaties, according to which the consistent practice of States following the ratification of the Convention can be understood not only as an expression of their agreement on the interpretation, but also of a change in the text of the Convention.[38] According to the Court, such a relevant practice of States is absent in cases of derogation from their obligations under Article 5 of the Convention if persons are detained under the Third and Fourth Geneva Conventions. Furthermore, it also seemed that the practice of not withdrawing from obligations under Article 15 of the Convention replicated the practice of States in relation to Article 4 of the International Covenant on Civil and Political Rights, which continues to apply even after the International Court of Justice proceeded in the case of the *Democratic Republic of the Congo v. Uganda* and specified its position in its advisory opinions on the Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory and on the Legality of the Threat or Use of Nuclear Weapons, in which it confirmed that international human rights law was also applicable in international armed conflicts.

With reference to Article 31, paragraph 3, letter (c) of the Vienna Convention on the Law of Treaties, the Court further emphasised that the Convention must be interpreted in accordance with other rules of international law of which it is a part, i.e. also with international humanitarian law. The Geneva Conventions were negotiated concurrently with the Convention and are universally applicable, with the provisions of the Third and Fourth Geneva Conventions formulated to protect captured combatants and civilians posing a security risk. The Court recalled its earlier conclusion that Article 2 of the Convention must, to the maximum extent possible, be interpreted in the light of the general principles of international law, including international humanitarian law, the rules of which play an indispensable role in mitigating the inhumanity of armed conflict.[39] According to the Court, this conclusion

35 Cf. *Al-Skeini v. the United Kingdom*, no. 55721/07, Grand Chamber, judgment, 7 July 2011, paras. 130 to 142.

36 *Hassan* case, para. 24.

37 *Ibid*., para. 78.

38 *Soering v. the United Kingdom*, no. 14038 /88, judgment, 7 July 1989, paras. 102–103.

39 *Varnava* case, para. 185.

also applies in relation to Article 5 of the Convention. Due to the concurrent validity of the guarantees of international human rights law and international humanitarian law in armed conflicts, the Court found it necessary to try to interpret the Convention in a manner consistent with the framework established by the International Court of Justice.

The Court thus accepted the government's argument that the lack of a formal derogation under Article 15 of the Convention, the derogation clause, does not prevent it from taking into account the context and provisions of the norms of international humanitarian law when interpreting Article 5 of the Convention. Although the guarantees arising from the Convention remain in force even during an international armed conflict, there are legal reasons for the restriction of freedom formulated in Article 5 paragraph 1, letters a) to f) of the Convention to adapt the authority to take prisoners of war and to detain civilians posing a security risk under the Third and Fourth Geneva Conventions. However, only in an international armed conflict, where legal norms permit prisoners of war, Article 5 of the Convention can be so broadly interpreted even without derogation under Article 15 of the Convention.[40] In order for a restriction of liberty to be lawful within the meaning of Article 5, paragraph 1 of the Convention, the detention must comply with the rules of international humanitarian law and in particular with the basic purpose of Article 5, paragraph 1 of the Convention, i.e. the protection of individuals against arbitrary decisions. According to the Court, the procedural guarantees contained in Article 5, paragraphs 2 and 4 of the Convention must also be interpreted in a way that considers the context and the relevant rules of international humanitarian law. Furthermore, the Court added that, given that Tarek Hassan was not detained pursuant to Article 5, paragraph 1, letter c), Article 5, paragraph 3 of the Convention was not applicable to the case under discussion.[41]

However, the lack of a formal derogation under Article 15 of the Convention had to be looked into as well, since in case there is no such derogation, it cannot lead the Court automatically to the assumption that a State Party intends to change its obligations under the Convention. In the absence of derogation, the Court has to interpret and apply the provisions of Article 5 of the Convention in the light of the relevant provisions of international humanitarian law only if such an objection is raised.[42]

Considering the above-mentioned principles and the facts of the case (Tarek Hassan was armed at the time of his arrest, other weapons and documents of intelligence importance were found in his house), the Court concluded that the Geneva Conventions were applicable during the relevant period, while the arrest of Tarek Hassan took place in accordance with these Conventions and was not arbitrary.

40 In non-international armed conflicts, the Geneva Convention on Prisoners of War with its detailed legal framework is not applicable (only its Article 3 that is, however, not detailed enough if interpretation of the Convention is done according to Article 31 of the Vienna Convention on the Law of Treaties).

41 *Hassan* case, para. 106.

42 Ibid., para. 107.

Moreover, it only took a few days and the reason for the detention was obvious to the detainee from the questions that were put to him during the interrogations. The Court thus found no violation of Article 5 of the Convention.[43]

As for the alleged violation of Article 2 of the Convention, the Court recalled that the obligation under this Article in conjunction with Article 1 of the Convention imposes on States the duty of effective investigation where an individual has been killed as a result of the use of force by State officials.[44]

However, in the present case, according to the Court, there was no indication that the United Kingdom was responsible for the alleged ill-treatment of Tarek Hassan or for his death, nor that the death occurred in a United Kingdom-controlled territory or while he was in the hands of the British authorities, which could establish an obligation to conduct an effective investigation. The Court declared this part of the complaint inadmissible since it found it manifestly ill-founded.[45]

Although the decision was adopted by a clear majority, a partially dissenting opinion was provided by Co-Judges Nicolaou and Bianku and Judge Kalaydjieva, together with Judge Spano. They emphasised that the majority, in the Court's conclusion of no violation of Article 5 of the Convention, attempted to merge rules of international law that are incompatible.[46] These judges emphasised that the Convention is applied equally in times of peace and war, otherwise the possibility of derogation from obligations under Article 15 of the Convention would be meaningless. Therefore, according to the dissenting judges, if the United Kingdom considered it likely that it would be necessary to detain prisoners of war or civilians posing a security risk within the meaning of the Third and Fourth Geneva Conventions during the Iraq campaign, the only legal recourse was to derogate from its obligations under Article 15 of the Convention, which the United Kingdom failed to do. The position of these dissenting judges points out that the authority to restrict personal liberty under the Third and Fourth Geneva Conventions relied upon by the respondent Government in the *Hassan* case is in direct conflict with Article 5, paragraph 1 of the Convention. According to the dissenting opinion, the Court has no legal instrument to resolve this conflict. It must therefore, in the purpose of the obligations imposed on it by Article 19 of the Convention, give priority to the Convention. In attempting to reconcile the irreconcilables, the majority failed to respect the significance of the scope and content of the fundamental right to liberty under the Convention, as reflected in its purpose and historical origins in the horrors of the Second World War.[47]

43 Ibid., para. 108 to 111.
44 *Al-Skeini and Others* case, para. 163.
45 See Article 35 of the Convention.
46 See the dissenting opinion, para. 17.
47 Ibid., para. 19.

4. Latest Case Law of the European Court of Human Rights Regarding Armed Conflicts

Before considering the last two selected cases, from a jurisdictional point of view it is very important to mention at least basic facts about NATO operation in former Yugoslavia, and the related *Banković* case.[48] A complaint was submitted by six people living in Belgrade, Serbia against 17 NATO Member States which are also State Parties to the Convention. The applicants complained about the bombing by NATO, as part of its campaign of air strikes during the Kosovo conflict, of the Serbian Radio-Television headquarters in Belgrade, which caused damage to the building and several deaths. The Court declared the application inadmissible. It made a distinction between the attributability of the acts of State to that State and its jurisdiction by refusing the argument that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, could be brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.[49] It found that, while international law did not exclude a State's exercise of jurisdiction extra-territorially, jurisdiction was, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. Other bases of jurisdiction were exceptional and required special justification in the particular circumstances of each case, the Court did not find special justification for airstrikes. It was therefore not persuaded that there was any jurisdictional link between the victims of the airstrike and the respondent States.[50]

A different approach to the so-called effective control to base the jurisdiction under Article 1 of the Convention was taken in the inter-State case concerning the Georgia-Russia conflict.[51] This case concerned allegations by Georgia of administrative practices on the part of Russia that allegedly included various breaches of the Convention, in connection with the armed conflict between Georgia and Russia in August 2008. The *Georgia v. Russia (II)* case was a landmark judgment by the European Court of Human Rights in cases concerning armed conflicts. The alleged violations concerned, *inter alia*, the right to life and the freedom of movement. The Court pointed out that Russia exercised effective control over parts of Georgia's territory during and after the conflict. The Court found that a distinction had to be made between the military operations carried out during the active phase of hostilities and the other events occurring after the cessation of the active phase of hostilities – that is, following the ceasefire agreement of 12 August 2008.

48 *Banković and Others v. Belgium and 16 Other Contracting States*, 19 December 2001, Grand Chamber – decision on admissibility.

49 *Banković* case, para. 75.

50 European Court of Human Rights, Fact Sheet – Armed Conflicts,

51 *Georgia v. Russia (II)*, application no. 38263/08, judgment, Grand Chamber, 21 January 2021.

The Court decided that the events that took place during the active phase of hostilities, i.e. during 5 days from 8 to 12 August 2008, did not fall within the jurisdiction of Russia for the purposes of Article 1 of the Convention to respect human rights and therefore declared this part of the application inadmissible. To consider the approach of the Court in relation to Article 1 of the Convention, let us have a closer look at this Article: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Having said that, it was found that armed fighting created chaos with no effective control over that area of an international armed conflict and that no form of "State agent authority and control" over individuals could be realised.[52] However, on the other hand, the Court held that the Russia had exercised "effective control" over South Ossetia, Abkhazia and the "buffer zone" during the period from 12 August to 10 October 2008 when the Russian troops officially withdrew from this territory. Even after that period it was found that there had been continued "effective control" realised over South Ossetia and Abkhazia by Russia.[53] Therefore, the Court concluded that the events occurring after the cessation of hostilities, that is after 12 August 2008, fell within the jurisdiction of the Russian Federation for the purposes of application of Article 1 of the Convention.[54]

As far as other selected Articles are concerned, namely Article 2 and Article 5 of the Convention, it is very interesting that the Court held that the Russia had had a procedural obligation under Article 2 of the Convention to carry out an adequate and effective investigation not only into the events which had occurred after the cessation of hostilities, following the ceasefire agreement of 12 August 2008, but also into the events which had occurred during the active phase of hostilities, i.e. during those 5 days from 8 to 12 August 2008 for with the Court found no jurisdiction of Russia related to Article 1 of the Convention. Based on such a conclusion, the Court decided that there had been a violation of Article 2 of the Convention in its procedural aspect. As far as Article 5 of the Convention is concerned, the Court held that there was an administrative practice contrary to the Convention as regards the arbitrary detention of Georgian civilians in August 2008.[55]

This decision is a very important case regarding the relevance of the European Convention on Human Rights in armed conflict situations, and it highlighted the duty of States to uphold human rights even in times of armed conflicts. Such an approach to extraterritoriality emphasized the importance of protecting human rights in various international contexts. The decision has developed the application of the principle of accountability and responsibility of States regarding their actions and their effects on individuals outside their territory.

52 Ibid., paras. 122 to 144.
53 Ibid., para. 174.
54 Ibid., para. 175.
55 Ibid., para. 254.

The case that is currently in the spotlight of the academia and practitioners is a case submitted by *Ukraine and the Netherlands against the Russian Federation*.[56] This article was written in 2023, after the Russian aggression against Ukraine had started in February 2022. However, the applications received within this contribution and still pending before the Grand Chamber include events in Eastern Ukraine that took place in 2014, including the downing of flight MH17, not the 2022 aggression. Nevertheless, there are several issues related to the interplay between international humanitarian law and international human rights law already in this case, however, the focus is only on issues concerning Article 1, Article 2 and Article 5 of the Convention in the thread of this contribution.

The application in the case of *Ukraine v. Russia (II)*, submitted on 13 June 2014 concerns the alleged abduction of three groups of children in eastern Ukraine between June and August 2014 and their temporary transfer to Russia.[57] The application in the case of *The Netherlands v. Russia*, submitted on 10 July 2020 concerns the shooting down on 17 July 2014 of Malaysia Airlines flight MH17 over Eastern Ukraine, killing 298 persons, including 196 Dutch nationals.[58] The Government of the Netherlands allege that Russia was responsible for these deaths, however, it failed to investigate them. From the procedural point of view, the jurisdiction was relinquished in favour of the Grand Chamber and since 27 November 2020 both inter-State applications have been joined. As of mid-October 2023, only the admissibility decision has already been adopted in which the Court confirmed that States must respect the principles of proportionality and necessity also during armed conflicts.

This admissibility decision was a long-awaited decision: although Russia was not a member of the Council of Europe at its adoption anymore, it concerned a situation from an era when it was. Moreover, there is another application lodged by Ukraine that considers the 2022 invasion and the situation afterwards when Russia still was a Party to the Convention.[59]

The *Ukraine and the Netherlands v. Russia* admissibility decision has received much attention from commentators, especially in relation to the interrelation between *ius ad bellum* and *ius in bello* and to the interplay between international humanitarian law and international human rights law. It is true that Ukraine argued that since it was Russia that used force in violation of international law, i.e. it violated the provisions of *ius ad bellum*, also this fact should be considered when applying *ius in bello*, and especially the norms of international human rights protection.[60] However, *ius ad*

56 *Ukraine and the Netherlands v. Russia*, application no. 8019/16, the case is still pending before the Court.

57 *Ukraine v. Russia (II)*, application no. 43800/14, complaints relating to events in Eastern Ukraine were placed under application no. 8019/16 still pending before the Court.

58 *The Netherlands v. Russia*, application no. 28525/20), complaints relating to events in Eastern Ukraine were placed under application no. 8019/16 still pending before the Court.

59 *Ukraine v. Russia (X)*, application no. 11055/22 still pending before the Court.

60 Ukraine, Application file, paras. 91(b), 92, 101, 110, 121.

bellum and *ius in bello* are separated to treat all the belligerents equally.[61] Moreover, international humanitarian law and international human rights law are always applicable even if one of the parties to the conflict does not respect them: in such a case the other side is still obliged to follow its own legal commitments, especially norms of law of armed conflicts.[62]

As for Article 1 of the Convention, this admissibility decision analysed it in relation to attributability and jurisdiction as such. Since this contribution is aimed at the jurisdictional aspect of Article 1 of the Convention, it is important to point out that the Court confirmed that it is well-established that acts of the States Parties performed outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention.[63] Moreover, the Court developed criteria for establishing extraterritorial jurisdiction, either so-called spatial, i.e. when effective control over an area is established or personal, i.e. when an individual is under State agent authority and control. Finally, the jurisdictional link might be established also in relation to the procedural obligation of a State under Article 2 of the Convention.[64]

There have been differentiations provided by the Court in relation to active hostilities. According to the Court, in case there are complaints regarding military operations carried out during an active phase of hostilities to establish control over an area in a context of chaos, there is a presumption that extraterritorial jurisdiction is excluded under its both spatial and personal type, on the other hand, jurisdiction in relation to an obligation to investigate deaths that have occurred is established anyway.[65] Therefore, in a particular case of kinetic use of force in a context of hostilities and related chaos, a case-by-case determination is necessary to determine jurisdiction. This case-by-case decision-taking approach is important especially in relation to distinguishing the horizontal and vertical application of the Convention also in the context of chaos and related proximity. Nevertheless, as it was stressed by the Court, Article 1 of the Convention "cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State which it could not perpetrate on its own territory".[66] However, even if jurisdiction within the meaning of Article 1 of the Convention is established, it does not mean that all the aspects of the international legal framework of human rights protection and humanitarian law are applicable entirely, they are applied respectively.

61 Compare e. g. ICRC, 2020 Commentary to Geneva Convention on Prisoners of War, Article 2, online available at https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-2?activeTab=undefined

62 See Article 1 of Geneva Conventions from 1949, see also *ICTY, Prosecutor v. Kupreškić et al.*, IT-95-16-T, Senate judgment, 14 January 2000, paras. 511, 517 and following.

63 *Ukraine and the Netherlands v. Russia*, para. 555.

64 Ibid., paras. 560 to 575.

65 Ibid., para. 576.

66 Ibid., para. 570.

As it has been indicated, there are two Articles that toned to be considered in more detail if the interplay between international humanitarian law and international human rights law are at stake, namely Article 2 and Article 5 of the Convention.

During active hostilities, especially in the context of chaos of armed conflicts, killing combatants is a "natural" part of hostilities. According to Article 2 of the Convention, however, everyone's right to life shall equally, irrespective of the position of a combatant, be protected by law. No one shall be deprived of his life intentionally, save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law or in case of defence or to quell a riot or insurrection.[67] Even in these cases the use of force has to be no more than absolutely necessary.[68] Nevertheless, especially this procedural aspect is required to be understood in the context of international humanitarian law, i.e. in the context of armed conflicts. Even if Article 15 of the Convention, the derogation clause, is not applied, use of force during an armed conflict, i.e. war has to be analysed in light of interpretation based on Article 31, paragraph 3, letter (c) of the Vienna Convention on the Law of Treaties. According to the Convention, use of force has to be absolutely necessary. And in case of death, there is a positive obligation of a State Party to investigate it.[69] The principles of distinction, proportionality and precaution are applied according to international humanitarian law. It means, if a decision is taken on a case-by-case approach while interpreting the Convention in accordance with the Vienna Convention on the Law of Treaties, there might be a synthesis possible as it was possible in the *Hassan* case.

Such an approach is possible also in relation to Article 5 of the Convention. As for this Article and its aim at the interplay with international humanitarian law, it is true that no one shall be deprived of his liberty, save in accordance with a procedure prescribed by law in cases enlisted strictly in the Convention.[70] However, internment of prisoners of war is not realised as a punishment or to protect the society but because prisoners of war are considered to be a security threat. Moreover, their internment is not arbitrary in substance neither in time, there is a detailed framework in the Third Geneva Convention on Prisoners of War. There might be even security grounds under which civilians in enemy hands can be exceptionally subjected to the measures of internment and assigned residence.[71] This group of individuals protected by international humanitarian law has a specific legal treatment provided for by the Fourth Geneva Convention. That means that if the Convention is interpreted according to Article 31, paragraph 3, letter (c) of the Vienna Convention of the Law of Treaties, these two international treaties have to be taken into account

67 See Article 2 of the Convention.
68 Ibid.
69 *McCann and Others v. the United Kingdom*, application no.18984/91, judgment, Grand Chamber, para. 161.
70 See Article 5 of the Convention.
71 See e.g. Geneva Convention on Civilians, Article 78.

as well. The result then might be not a contradiction but a possible synthesis of the application of norms of different areas of international law.

5. Conclusions

Originally, both legal areas, international humanitarian law and international human rights law, were separated. First, from the historical point of view, international humanitarian law was the first to get developed since basic rules and principles of so-called law of armed conflicts were created already in ancient times.[72] Origins of international human rights law are dated to the era after WWII that was a milestone concerning legal obligations vis-à-vis individuals as human beings in general not only vis-à-vis foreign nationals. That was a fundamental change in relation to own inhabitants because previously there had been no norm limiting treatment of own nationals since it would have been considered until that time as a possible clash with a principle of no intervention into domestic affairs.[73] Furthermore, from the point of view of the scope of application and institutional background of both considered areas what is especially relevant in case law. International humanitarian law, also well-known as Geneva and Hague law, has become universally legally binding as treaty and customary law in a much bigger range than international human rights law that is universally applicable but in various details in a different legally binding framework when talking about regional human rights law systems. The interpretation of regional legally binding texts by regional judicial bodies (European, Inter-American and African Court) has differentiated several aspects of understanding and application of particular legal concepts. On the other hand, decisions of universal quasi-judicial bodies are not considered legally binding. Unlike international humanitarian law, where there is no special protection provided for by institutional background established and functioning on the international level, there is a well-established institutional background on both universal and regional international level in case of human rights protection. However, after all, it is still a State that is a primary subject of duties within both these areas.

Nowadays, the interrelation between the different areas of international law has been materialised also within the interplay between international humanitarian law and international human rights law. As one could detect it in the decisions of the International Court of Justice where international human rights law was originally considered to be *lex generalis* and later on held to be equally applicable during armed conflicts if not derogated, even the decisions of the European Court of Human Rights have moved from the position of no reference to international humanitarian law

72 Cryer *et al.*, p. 267.
73 Cf. Article 2, paragraph 7 of the UN Charter.

even in cases of armed conflicts to the position of implied preference of application of human rights law and of consideration relevant norms of international humanitarian law at the same time.

There have been some proposals on ignoring the specificities of international humanitarian law when applying the European Convention on Human Rights. However, not only could that lead to unwanted fragmentation of international law and international commitments of individual States, but also the result could not cause any greater humanisation of both areas, quite the contrary, respect for both, international human rights law and international humanitarian law could get reduced. To avoid the fragmentation and to support synthesis of various international legal norms, it is important when deciding upon applications in front of the European Court of Human Rights to take the context into account and to apply Article 31, paragraph 3, letter (c) of the Vienna Convention on the Law of Treaties as foreseen in this international treaty. Obviously, the European Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty itself. It has established an international judicial body that has to decide individual cases on the basis of a case-by-case approach, not to adopt generally legally binding decisions.

In conclusion, how does the Convention provide protection in wartime? While waiting for a decision in merit in the case of *Ukraine and the Netherlands v. Russia*, it is possible to state that factually speaking, the Convention provides protection of basic rights and fundamental freedoms in war as much as it is possible in a context of chaos of war and legally speaking, to the extent it is possible if taking all other international commitments of State Parties into account.

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Part VII

PROPERTY RIGHTS AND MIGRATION

Chapter 20

The Protection of Property under the ECHR with Special Regard to Central Europe and Former Yugoslav Republics[1]

Vladan Petrov – Nataša Plavšić

Abstract

Although the right to the protection of property was not initially part of the original text of the European Convention on Human Rights, after the adoption of Protocol 1, this right experienced growth in the case law of the European Court of Human Rights. Special influence on the development of the right to possession in the case law of the Strasbourg Court goes to the cases decided against Central European countries and ex-Yugoslav Republics.

The paper covers basic concepts of importance for a better understanding of the right to possession/property under Article 1 of Protocol 1 to the European Convention on Human Rights, as well as the case law of the European Court of Human Rights. The paper analyzes the autonomous meaning of possession/property, interference with property rights and a fair balance test. Finally, the paper presents some important cases decided against Central European countries and ex-Yugoslav Republics. These cases, in the authors' opinion, contributed considerably to the progress of the case law of the European Court of Human Rights.

Keywords: European Convention on Human Rights, European Court of Human Rights, Central European countries, ex-Yugoslav Republics, property, possessions,

1 This paper analyses case law in respect of nine countries: Bosnia and Hercegovina, Croatia, the Czech Republic, Hungary, Montenegro, Poland, Romania, Serbia and Slovakia.

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legitimate expectation, interference, deprivation or confiscation of property, control of property, a fair balance test, proportionality

1. Introduction

Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) protects the right to property within the Council of Europe system.[2] This Article of Protocol 1 to the Convention reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The above provisions shall not in any way affect the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[3]

The Central European countries were not members of the Council of Europe at the time of the adoption of Protocol 1 and the majority of them became part of the Convention system in the early '90s.[4] The dominant case law of the European Court of Human Rights '(hereinafter: the 'Court') on the protection of the right to property in these countries stems from their transition from communist and socialist systems to democratic systems, as well as from communist and socialist economies to free market economies. They are also the result of the repair of previous mistakes made by those States regarding wrongful convictions, deprivation of property, expropriation and nationalisation. Finally, the case law of those States in respect of Article 1 of Protocol 1 is the result of the collapse or dissolution of the States, mostly Yugoslavia.[5] When looking at the statistics and the number of cases in which the Court

2 Due to different and conflicting conceptions of the right to property among the Council of Europe Member States, this right was not included in the Convention"s initial text, see Lopez-Escarcena, 2012, p. 514 and Collected Edition of the *Travaux Préparatoires* of the European Convention on Human Rights, 1985, Vol. I, pp. 198-230.

3 This paper has borrrowed the above citation from a previously published Article of one of the authors, Plavšić, 2023. This study cites key elements from the previous Article, in particular broad property protection concepts, to support new materials and arguments.

4 The Czech Republic ratified the Convention in 1992, Hungary in 1992, Poland in 1993, Romania in 1994 and Slovakia in 1993. Former Yugoslav Republics became members depending on the outcome in respect of the dissolution of the relevant Yugoslav State. Bosnia and Herzegovina ratified the Convention in 2002, Croatia in 1997, Montenegro in 2004, Serbia in 2004 and Slovenia in 1994, https://www.echr.coe.int/country-profiles.

5 See, among others, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, no. 60642/08.

ruled, it may be asserted that this right is quite important because it is constantly sought before the Strasbourg Court.[6]

This paper analyses the key elements for the interpretation of property and protection of property before the Court, with special regard to some important cases in which rulings were issued against Central European countries and former Yugoslav Republics. These cases, in the authors' opinion, contributed significantly to the development of general property concepts in the case law of the Court, but also influenced the legislation of the States and the jurisprudence of domestic courts.[7] Finally, the authors mention some country-specific issues related to the dissolution of former Yugoslavia.

2. What is Property under the Convention?

Article 1 of Protocol 1 does not define property or possession, implying that the Court's extensive case law has created an autonomous definition of property.[8] The Court itself often emphasises in its judgments and decisions that "the concept of 'possession' within the meaning of Article 1 of Protocol 1 has an autonomous meaning that is not limited to ownership of material goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision".[9]

Case law in respect of Central European countries had a significant impact on the Court's extensive case law in identifying what property is in the Convention system and which property is protected before the Court, particularly in restitution cases and the scope of the concept of a 'legitimate expectation'. According to the case law, the Convention protects existing property rights over movable and immovable assets, other existing rights and economic interests, existing claims, and

6 HUDOC sources retrieved on 30 September 2023, search criterion: Article 1 of Protocol 1: Bosnia and Herzegovina – 155 cases, Croatia – 299 cases, the Czech Republic – 143 cases, Hungary – 245 cases, Montenegro – 17 cases, Poland – 644 cases, Romania – 770 cases, Serbia – 541 cases, Slovakia – 204 cases and Slovenia 99 – cases, https://hudoc.echr.coe.int.

7 Only some specific cases are presented in the paper, with some in the text and others in the footnotes. The study does not address neither the questions of positive and negative obligations of States, nor the issues of victim status and incompatibility *ratione personae*. Regarding the obligations of States see Plavšić, 2023, pp. 3–6. Regarding the issue of victim status and incompatibility *ratione personae*, see *Albert and Others v. Hungary* [GC], no. 5294/14, §§148–169, Plavšić, 2023, pp. 6–7, Omejec, 2013, pp. 973–976.

8 This article uses the terms 'possession' and 'property' as synonyms. Regarding terminological explanation, meaning and differences between 'possession', 'property' and 'ownership', see Omejec, 2013, pp. 954-955.

9 *Béláné Nagy v. Hungary* [GC], no. 53080/13, § 73 and *Broniowski v. Poland,* no. 31443/96, §129.

other assets,[10] "including claims, in respect of which the applicant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right that it has been impossible to exercise effectively cannot be considered a 'possession' within the meaning of Article 1 of Protocol 1, nor can a conditional claim that lapses as a result of the non- fulfilment of the condition".[11]

In the case of *Kopecký v. Slovakia*,[12] the applicant wanted to recover movable assets - gold and silver coins of numismatic value that belonged to his late father and were taken from him after he was convicted of illegal possession of coins. After the establishment of a democratic system, Slovakia adopted a special law on rehabilitation on the basis of which the applicant's father was rehabilitated, after which the applicant tried unsuccessfully at the domestic level to recover the said coins. In *Kopecký*, the Court analysed different cases regarding the legitimate expectation and clarified the autonomous concept and notion of 'legitimate expectation', providing guidelines and criteria for determining this notion, stating that 'legitimate expectation' must be of a nature more concrete than a mere hope and based on a legal provision or a legal act such as a judicial decision.[13]

In defining the autonomous concept of property, the Strasbourg Court expanded the scope of protected property to include various types of ownership and property rights, such as intellectual property, the right to rent based on contract, savings on bank accounts, various types of social benefits and pensions and a claim based on court decisions that has been sufficiently established to be enforceable. Various economic and financial interests connected to corporate business activities, as well as shares of enterprises having a specific economic value, are examples of property protected by the European court.[14]

On the other hand, the Convention does not guarantee, nor does the Court protect, the right to acquire property, and Article 1 of Protocol 1 cannot be interpreted as imposing a general obligation on Contracting States to return a property transferred to them prior to ratifying the Convention. Article 1 of Protocol 1 does not restrict the Contracting States' authority to establish the scope of property restitution or the conditions under which they agree to restore the property rights of former owners[15]. This situation was often analysed in cases against Central European countries, especially in the context of restitution of property and the laws that these

10 Plavšić, 2023, pp. 6–7.

11 *Kopecký v. Slovakia* [GC], no. 44912/98, §§ 35, 47, 50, 52.

12 *Ibid.*

13 In the *Kopecký* case, the Court determined that the applicant did not have 'possession' under Article 1 of Protocol No. 1, and so the safeguards of that provision did not apply. As a result, the Court determined that there had been no infringement of Protocol No. 1's Article 1, see *Kopecký v. Slovakia* [GC], no. 44912/98, §§ 60, 61.

14 See Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights Protection of property, Council of Europe/European Court of Human Rights, 2022, pp. 11–19 https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_ENG and Plavšić, 2023, pp. 7–8

15 *Jantner v. Slovakia*, no. 39050/97, §34.

countries adopted before the ratification of the Convention, but also in the context of fulfilment of different statutory conditions for restitution claims, such as time limits, nationality, place of residence, etc. In these cases, the Court analysed several aspects of the scope of the right to property, namely compatibility *ratione temporis* and *ratione materiae* in the context of 'legitimate expectations'. The Court repeatedly rejected complaints regarding deprivation and confiscation that occurred before Convention and Protocol 1 came into force in those countries as incompatible *ratione temporis* and *ratione materiae*, especially when applicants did not fulfil statutory conditions for restitution claims or the applicants belonged to categories of owner who were excluded from restitution.[16]

In the case of *Eparhija Budimljansko-Nikšićka and Others v. Montenegro*,[17] the applicants, monasteries, and churches of the Serbian Orthodox Church in Montenegro complained that the Government's failure to decide on their restitution request in accordance with the Just Restitution Act 2002 breached their property rights, in particular their 'legitimate expectation' to re-acquire the property that had been taken away from them after World War II. The Court ruled as follows:

"The Court accordingly concludes that the applicants did not have a claim which was sufficiently established to be enforceable, and they therefore cannot argue that they had a 'possession' within the meaning of Article 1 of Protocol No. 1. Nor do they have such a claim under the current legislation which simply envisages that the applicants' situation will be regulated by a separate piece of legislation. The scope of that legislation has never been defined, and there is no indication as to the modalities for the restitution of property including the procedures and responsible authority. The Court reaffirms that Article 1 of Protocol No. 1, as reiterated above, does not impose any general obligation on the Contracting States to restore property transferred to them before they ratified the Convention, nor does it impose any restrictions on their freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners. Consequently, the facts of the case do not fall within the ambit of Article 1 of Protocol No. 1."[18]

In the case of *Jantner v. Slovakia*[19] the applicant's restitution claim was dismissed as the national courts found that he had not established his permanent residence in Slovakia, which was a statutory condition under national law. That finding of the national courts was contested by the applicant, who alleged that he had met all statutory requirements for his restitution claim to be granted. The Court held that under the relevant national law, as interpreted and applied by the domestic authorities, the applicant had neither a right nor a claim amounting to a 'legitimate expectation'

16 *Kopecký v. Slovakia* [GC], no. 44912/98, §35.
17 *Eparhija Budimljansko-Nikšićka and Others v. Montenegro*, no. 26501/05.
18 *Ibid*, § 75 and see the similar *Malhous v. the Czech Republic* [GC] case, no. 33071/96.
19 *Jantner v. Slovakia*, no. 39050/97, §§33–35.

within the meaning of the Court's case-law to obtain restitution of the property in question.

In the similar Grand Chamber case, *Gratzinger and Gratzingerova v. the Czech Republic*,[20] the applicants, US citizens who had lost the citizenship of the former Czechoslovak Republic, requested the return of their property rights after being rehabilitated under the Extrajudicial Rehabilitation Act. The national courts dismissed their claim, noting that they had not met one of the legal prerequisites, namely Czech nationality, and hence were not entitled to try to recover the property. The applicants complained before the Court that they were unable to recover their former property on the ground that they no longer had Czech nationality, in spite of the fact that the decision to confiscate the property had been annulled with retrospective effect. In deciding whether the applicants had a possession, the Court concluded that the applicants have not demonstrated that they had a claim that was sufficiently established to be enforceable, and they therefore cannot argue that they had a 'possession' within the meaning of Article 1 of Protocol 1. The Court also emphasised that the Contracting States enjoy a wide margin of appreciation with regard to the exclusion of certain categories of former owners from such entitlement. Where categories of owners are excluded in this way, their claims for restitution cannot provide the basis for a 'legitimate expectation' involving the protection of Article 1 of Protocol 1.

In the pilot judgment *Broniowski v. Poland*,[21] the applicant alleged a breach of Article 1 of Protocol 1 to the Convention since his entitlement to compensation for abandoned property had not been fulfilled. In this very important judgment, the Court underlined that once a Contracting State, having ratified the Convention, including Protocol 1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be interpreted as creating a new property right protected by Article 1 of Protocol 1 for persons who meet the eligibility requirements. The Court emphasised that the same may apply with respect to arrangements for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the ratification of Protocol 1 by the Contracting State.

3. Three Forms of Interference with the Right to Property

For the effective recognition of the right to peaceful enjoyment of property, it is important that the State has fulfilled its positive obligations – adopted all measures necessary for protection of the right to property, including the legislative framework, as well as appropriate procedural guarantees for the effective protection of this right.

20 *Gratzinger and Gratzingerova v. the Czech Republic* [GC], no. 39794/98, §§ 70–74.
21 *Broniowski v. Poland* [GC], no. 31443/96, §§ 129–133.

There are special positive obligations of the State regarding enforcement proceedings both against the State and against private debtors.[22] In addition, the State must also fulfil its negative obligation – it must refrain from various forms of unjustified interference with the property rights of individuals.

In the case *Sporrong and Lönnroth v. Sweden*,[23] the Court, for the first time, described a different type of interference with the right to peaceful enjoyment of property, illustrating three so-called separate rules on property. The first rule is usually referred as a general rule that the Court applies when the second or third rules cannot be applied to a situation involving interference.[24]

The second rule, often assessed by the Court in cases brought against the countries under review, specifies the deprivation or confiscation of property and symbolises the classic seizure of goods and rights from the owner, including expropriation, confiscation and nationalisation of property.[25] For instance, the case of *Străin and Others v. Romania,*[26] is a typical case on the deprivation of property. The applicants, owners of a house nationalised in 1950, brought proceedings before domestic authorities in 1993 to regain the house, which had been converted into four flats. However, the State-owned company controlling the property sold one of the flats to a third party. The applicants unsuccessfully requested the domestic courts for the sale to be declared void. The Court observed that domestic law, as applicable at the time, including case law, lacked clarity regarding the consequences of recognising a private individual's title to the property that had passed into the State's ownership but had been sold by the State to a third party. Taking into account how the taking of their property had violated the fundamental principles of non-discrimination and the rule of law, as well as the complete lack of compensation, the Court determined that this had caused the applicants to bear a disproportionate and excessive burden incompatible with the right to respect for the peaceful enjoyment of possessions. The Court held that Romania must return the building in question to the applicants[27].

Restriction on property use is the third rule of interference with the right to property. The third rule on restriction and control of property rights applies where there is no transfer of ownership, but the owner is restricted in the use and/or disposal of the property that is the subject of that right.[28] Typical control of property cases in respect of Central European countries are cases addressing the question of

22 Plavšić, 2023, pp. 7-9 and *R. Kačapor and Others v. Serbia*, no. 2269/06, § 108. See footnote 7 for positive and negative obligations of the State.

23 *Sporrong and Lönnroth v. Sweden*, no. 7151/75, 7152/75, § 61.

24 Plavšić, 2023, p. 8.

25 Plavšić, 2023, p. 8 and *Nešić v. Montenegro*, no. 12131/18, *Bistrović v. Croatia*, no. 25774/05, *Pincová and Pinc v. the Czech Republic*, no. 36548/97.

26 *Străin and Others v. Romania*, no. 57001/00.

27 See also the status of execution of *Străin and Others v. Romania* group of cases, 16 judgments currently examined in this group originated in structural deficiencies in the mechanisms set up in Romania as of 1990 to afford restitution of or compensation for properties nationalised in the communist era, see on https://hudoc.exec.coe.int/.

28 Omejec, 2013, pp. 979–990 and Plavšić, 2023, p. 9.

a restrictive system of a rent control originated in laws adopted under the former communist regime.[29] In the pilot judgment *Hutten-Czapska v. Poland*, the applicant was one of around 100 000 landlords in Poland affected by a restrictive system of rent control, which originated in laws adopted under the former communist regime. The system imposed a variety of restrictions on landlords' rights, including a rent ceiling that was so low that landlords were unable to repay their maintenance costs, let alone profit. The Court found that this type of interference and property control that the Polish authorities had imposed a 'disproportionate and excessive burden' on the applicant, which could not be justified by any legitimate community interest.[30]

These three rules are interrelated since the second and third rules address specific forms of interference with the right to peaceful enjoyment of property, but they are interpreted in the light of the general principle of the first rule. When the Court does not qualify a measure under the second or third rule, the Court would normally evaluate such a matter within the framework of the general principle of the first rule.[31]

4. (Un)justified Interference with the Right to Property

"For the assessment of interference with the right to peaceful enjoyment of property and alleged violation of Article 1 of Protocol the Court performs a test consisted of a number of continuous phases that is often called 'step by step' test".[32] Although, there are different forms of interference with the right to peaceful enjoyment of property, the Strasbourg court applies a single fair balancing test to determine if the interference with the right to peaceful enjoyment of property is justified or not, regardless of the type of interference.[33]

The first question to be answered in this test concerns the existence *ratione materiae* of a property within the meaning of Article 1 of Protocol 1, which requires the Court to determine if something to be examined falls under this Article. The second step in this test addresses the question of the existence of an interference with the property right. The Court may, but is not required to, assess whether the impugned interference is related to positive or negative obligations, as well as examine the legal nature of the interference. A negative answer to one of these questions generally results in the rejection of the application.[34]

29 *Hutten-Czapska v. Poland* [GC], no. 35014/97 and *Bittó and Others v. Slovakia*, no. 30225/09.
30 Following the pilot judgment, from 2006 to 2010 several legislative reforms were adopted in Poland, see https://hudoc.exec.coe.int/.
31 Plavšić, 2023, p. 9 and *Đokić v. Bosnia and Herzegovina*, no. 6518/04, §§55, 56.
32 Plavšić, 2023, 10 and *Omejec*, 2013, p. 990.
33 Lopez-Escarcena, 2012, p. 543.
34 Plavšić, 2023, pp. 10–11.

The above-mentioned cases illustrate that the Court has repeatedly considered the question of incompatibility *ratione materiae* and the existence of property under Article 1 of Protocol 1 in cases involving Central European countries. As previously pointed out, this is clearly the outcome of the laws that these countries adopted throughout the changes in their political and economic systems, regarding the return or recovery of previously acquired property. The cited case law had a significant influence on how the autonomous meaning of possession evolved generally.

If the previous questions are addressed affirmatively, notably the question of *ratione materiae* conformity with Article 1 of Protocol 1, the Court will proceed with a fair balancing test to evaluate the justification for the interference. According to the Convention and the Court's case law, the interference is justified if the following conditions are cumulatively fulfilled: the interference was under the conditions stipulated by law; the interference occurred due to the existence of a clear legitimate goal established in the general or public interest; a fair balance was achieved between the general or public interest of the community and the protection of the individual's right to property; and such interference did not impose an excessive or disproportionate burden on the applicant.[35]

The interference with the right to peaceful enjoyment of property must meet the requirement of legality – it must be done under the conditions established by law and in conformity with the substantive and procedural principles of domestic law. However, simply having a legal basis for the intervention does not satisfy the requirement of legality. To pass the legality test, the domestic law provisions on which the interference occurred must be sufficiently accessible, precise and foreseeable in terms of their application.[36] In the Court's case law against Central European countries and former Yugoslav republics, this condition is generally fulfilled or is assessed together with the issue of proportionality. However, in *Nešić v. Montenegro,*[37] the Court found unlawful interference with the applicant's right to the peaceful enjoyment of his possessions on account of the deprivation of land he owned on the coast in 2014 without any compensation being paid to him. The Court assessed that the legal principles upon which the deprivation of property was based were not sufficiently accessible, precise and foreseeable.[38]

Interference with the peaceful enjoyment of property can only be justified if it is carried out in the general or public interest, which is clearly specified in relation to the deprivation of property ('public interest') and the control of use of property ('general interest').[39] As a result, in the next phase of the 'step by step' test, the

35 Plavšić, 2023, p. 11.

36 Plavšić, 2023, pp. 11–12 and *Grudić v. Serbia*, no. 31925/08, §§73–74.

37 *Nešić v. Montenegro*, no. 12131/18, §§ 54, 55.

38 In *Grudić v. Serbia*, no. 31925/08, the Court found that the Serbian Pensions Fund had unlawfully suspended the payment of pensions earned in the Autonomous Province of Kosovo and Metohija for more than a decade.

39 In practice the Court does not make a distinction between general and public interest. See: Popović, 2012, p. 408, Lopez-Escarcena, 2012, p. 529 and *James and Others v. the United Kingdom*, §§40–45.

Court considered whether the interference was caused by the existence of a clear legitimate objective established in the general or public interest. A genuine public or general purpose must exist, and it can be related to economic, social, cultural, or other public policies. Regarding these conditions, the States are more or less left with a wide margin of appreciation as to how to govern specific issues in the realm of public policies.[40]

The Court's case law concerning the former Yugoslav republics and Central European countries has made a significant contribution in determining justifications for legally interfering with private property rights, namely concepts of 'general' and 'public' interest – reform of the country following the collapse of the communist regime and economic well-being,[41] fight against money laundering,[42] confiscation of illegally acquired money,[43] protection the financial sustainability of the pension system,[44] the transition from a communist/socialist economy to a free market economy,[45] correction of errors committed by the State's officials in the context of Article 1 of Protocol 1,[46] as well as the protection of creditors[47] etc. Because the concepts of 'general' and 'public' interest are widely interpreted and governments have a wide margin of appreciation, this requirement is most likely met in the cases brought against the countries under review.

The fair balance test concludes with an assessment of proportionality. This step determines if a fair balance has been struck between general and public interests on the one hand, and individual property rights on the other. The Court will also consider whether the interference with property rights sets an excessive and disproportionate burden on the applicant.[48] The Court considers several factors when determining proportionality, the first of which is the assessment of the (non-) existence of adequate procedural safeguards at the domestic level. For example, in *Bistrović v. Croatia*,[49] the Court found that the delay in the calculation of compensation was to the greatest extent caused by the inaction of the domestic administrative body, while additional delays were caused by continuous orders to repeat the procedure, which additionally indicates a deficiency in the procedural system of the respondent State.

Another factor for the assessment of proportionality is the choice of measures that were used when interfering with property rights and the assessment of whether there were other less invasive measures of interference. For instance, in *Vaskrsić v.*

40 Tubić, 2017, pp. 1677–1679 and Plavšić, 2023, pp. 11–12.
41 *Hutten-Czapska v. Poland*, no. 35014/97, § 178.
42 *Boljević v. Croatia*, no. 43492/11, §40, *Gabrić v. Croatia*, no. 9702/04, § 34.
43 *Ulemek v Serbia*, no. 41680/13, § 65.
44 *Žegarac and Others v. Serbia*, no. 54805/15, § 96.
45 *Vasiljević and Drobnjaković v. Serbia*, nos. 43987/11 and 51910/15, § 46.
46 *Trgo v. Croatia*, no. 35298/04, § 61.
47 *Lekić v. Slovenia,* [GC], no. 36480/07, §§ 103–105.
48 Plavšić, 2023, p. 12.
49 *Bistrović v. Croatia*, no. 25774/05, § 37.

Slovenia,[50] the Court found disproportionate interference due to the sale of the applicant's house at a public auction for 50% of its market value in debt enforcement proceedings arising from a principal debt of EUR 124 and from the failure of domestic courts to carefully take into account other appropriate, but less intrusive alternatives for enforcement.[51] On the contrary, in *Vrzić v. Croatia*,[52] the Court found that judicial sale of an immovable property for a lower price than its market value, even at a significantly lower price, would not necessarily be considered disproportionate, especially if the applicant had assumed such a risk by accepting the contractual obligation from which his debt arose and which was settled in the enforcement procedure.

The behaviour of the applicant and whether the applicant acted in good faith could significantly influence the Court's assessment of proportionality in a fair balance test. In *Vukušić v. Croatia*,[53] the Court found no violation in the case in which the contract on the purchase and sale of real estate was annulled, since the Court concluded that the possibility that the applicant did not act in good faith could not be completely excluded in the final assessment.[54] In *Zvolský and Zvolská v. the Czech Republic*,[55] the applicants complained that their right to the peaceful enjoyment of their possessions had been infringed by the obligation imposed on them by the domestic courts to return to the former owner the land that had been transferred to them without consideration in 1967. The Court found that the obligation imposed on the applicants to return, without compensation, the land they had acquired in good faith under a deed of gift that was freely entered into in exchange for equivalent consideration amounts to a disproportionate burden that cannot be justified under the Article 1 of Protocol 1.

Errors made by State officials is another often analysed element in a fair balance test. For instance, in *Szkórits v. Hungary*,[56] the applicant argued that he had been registered as the owner of the land continuously from 1999 when it had been allocated to him by the Regional Office of Agriculture and that the domestic courts had refused to grant him protection. As a consequence, he could not enter into possession. The Court found that as a result of what was an oversight or mistake in the land register, the applicant suffered serious frustration of his property rights. The Court emphasised that the risk of any mistake made by a State authority must be borne by the State and errors must not be remedied at the expense of the individual concerned. In *Moskal v. Poland*,[57] the applicant alleged, that the *ex officio* re-opening of the social security proceedings concerning her right to an early-retirement pension,

50 *Vaskrsić v. Slovenia*, no. 31371/12, § 87.
51 Similar *Mindek v. Croatia*, no. 6169/13, §§ 82–86.
52 *Vrzić v. Croatia*, no. 43777/13, §§ 109–114.
53 *Vukušić v. Croatia*, no. 69735/11, § 66.
54 Similar in the case of *Zahi v. Croatia*, no. 24546/09, the Court rejected the application because the applicant did not act in good faith when acquiring the apartment.
55 *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, §§ 72–74.
56 *Szkórits v. Hungary*, no. 58171/09, §§ 44–45.
57 *Moskal v. Poland*, no. 10373/05, § 73.

which resulted in the quashing of the final decision granting her a right to a pension, violated property rights. The Court found that if a mistake has been caused by the authorities themselves, without any fault of a third party, a different proportionality approach must be taken in determining whether the burden borne by an applicant was excessive.[58]

The question of whether the national court awarded and paid compensation for expropriated immovable property could be an important factor it this balancing test.[59] In *Vajagić v. Croatia*,[60] the applicants complained about a violation of their right to property and their right to an effective legal remedy as a result of the domestic authorities' repeated failure to determine the amount of compensation to be paid by them, as well as the lack of an effective legal remedy to issue a legally binding compensation decision. The Court concluded that the State had not presented any evidence justifying the failure of the domestic authorities to decide on and to pay compensation to the applicants; that an excessive burden had been imposed on the applicants because of the deadline provided to the domestic authorities for paying a compensation for the expropriation; and that their right to property had been violated[61]. In *Bistrović v. Croatia*,[62] the Court addressed the way in which the value of partially expropriated property was determined and the devaluation of the rest of the property that was not expropriated. The Court found that the domestic authorities failed to establish all the relevant factors, including the reduction of the value of the remaining land, when assessing the compensation payable on the expropriation of a certain part of the applicants' farm.

In the case of *R. Kačapor and Others v. Serbia*,[63] the Court addressed the violation of the applicants' right to peaceful enjoyment of property through a denial of their right to access to court, rather than applying the proportionality test. In this specific case, as well as other large groups of similar cases decided later, the Court established the violation of Article 1 of Protocol 1 due to non-enforcement or delayed enforcement of domestic judicial decisions given in the applicants' favour against socially/State-owned companies ordering them to pay their debts for salary arrears or their commercial debts.[64] The *Kačapor* group of cases is distinctive in that the Court analysed the status of socially owned companies and determined that they did not have 'sufficient institutional and operational independence from the State'[65]

58 See also *Čakarević v. Croatia*, no. 48921/13, § 90.

59 It is important to underline that Article 1 of Protocol 1 does not explicitly require the payment of a compensation in the case of unjust interference. However, the case law regarding the deprivation of property shows that in this situation a compensation is required, whose amount is at least "reasonably related to its 'market' value, as determined at the time of the expropriation", see *Pincová and Pinc v. the Czech Republic*, no. 36548/97, § 53.

60 *Vajagić v. Croatia*, no. 30431/03, § 45.

61 Plavšić, 2023, p. 14.

62 *Bistrović v. Croatia*, no. 25774/05, §44.

63 *R. Kačapor and Others v. Serbia*, no. 2269/06.

64 See footnote 22 and the special positive obligations of the State.

65 *R. Kačapor and Others v. Serbia*, no. 2269/06, § 98.

to absolve the latter from its responsibility and obligation under the Convention. As a result, the State was ordered to pay their debts, including salary arrears and commercial debts.

Through a detailed analysis of the aforementioned factors and the circumstances of the specific case, the Court will establish a violation of property rights if there is a disproportionality - a disturbed balance between the public or general interests of the community and individual property rights, resulting in an excessive and disproportionate individual burden for the applicant.[66] Otherwise, the Court will find that the interference was justified if it establishes a fair balance between individual and general or public interests and the applicant does not bear an excessive burden. As a result, the Court will determine that there has been no infringement of Article 1 of Protocol No. 1.

Finally, it is important to mention that in cases involving the dissolution of former Yugoslavia and subsequent territorial changes, the Court's proportionality test has been reaffirmed, while taking into account country- or region-specific factors and circumstances. Namely, in the pilot judgment *Ališić and Others*,[67] the Court found unlawful interference with the applicants' property rights as a result of their inability to recover 'old' foreign-currency savings deposited in Bosnian-Herzegovinian branches of banks with head offices in Serbia and Slovenia following the dissolution of former Yugoslavia. Although certain delays in the repayment of the aforementioned debts could be justified in exceptional circumstances, and despite the respondent States' wide margin of appreciation in this area, the Court determined that the applicants' continued inability to freely dispose of their savings for over twenty years was disproportionate and thus in violation of Article 1 of Protocol No.1.

In cases addressing occupancy rights, the Court applied the proportionality test while taking into account the characteristics of national legislation passed during the dissolution of Yugoslavia. In *Đokić*,[68] the applicant complained about his inability to have restored to him his pre-war military flat in Sarajevo and to be registered as its owner, regardless of a legally valid purchase contract.[69] Pursuant to the Federation laws, those who had served in the armed forces of the successor States of the former Yugoslavia were not entitled to repossess their flats nor to register their title.[70] After completing the proportionality test, the Court found that the applicant and subsequently his property rights had been treated differently merely because of his service in the armed forces of former Yugoslavia and on the ground of his ethnic origin.[71]

66 Plavšić, 2023, pp. 15–16.

67 *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"* [GC], no. 60642/08.

68 *Đokić v. Bosnia and Herzegovina*, no. 6518/04, § 46.

69 Similar in the case of *Mago and Others v. Bosnia and Herzegovina*, no. 12959/05. The applicants did not purchase their flats before the war, but their occupancy rights were annulled under the national legislation.

70 *Đokić v. Bosnia and Herzegovina*, no. 6518/04, § 37.

71 *Ibid.*, §60.

5. Conclusions

Article 1 of Protocol 1 primarily provides for the peaceful enjoyment of possession and covers different elements of property rights, including the right of a person to have, to use, to dispose, to pledge, to lend, and even to destroy possession. Additionally, it provides for the opportunity of a person to fully exercise these rights and to access its own possession.[72] All this is compatible with the State's primary obligation, which derives from Article 1 of the Convention, to secure for everyone within its jurisdiction the rights and freedoms defined in the Convention. Article 1 of Protocol 1 also implies the protection of property rights from various forms of unjustified and arbitrary interference by the State. In the event that interference occurs, either through deprivation of property, limitation of property, or control of the use of property, the question that arises is whether the interference with the peaceful enjoyment of property is justified or not, where the Court performs a fair balance test.

The existence of property within an autonomous Convention meaning is one of the key issues that must be addressed in a fair balancing test, and the evolution of he scope of property was significantly impacted by the case law regarding Central European countries. The Court's interpretation of the concept of a 'legitimate expectation' and its *ratione materiae* applicability to multiple individual claims were considerably influenced by the Central European countries' national restitution legislation, which varied greatly in terms of circumstances. One could easily argue that the Court's case law on property rights would be less rich if restoration laws and redress of unjust property deprivation committed by communist regimes in these countries had not been enacted. The cases of *Kopecký, Broniowski, Gratzinger and Gratzingerova* shaped the scope of Article 1 of Protocol 1, encouraging continuous development of the Court's case law. One could also argue that there was no subsequent inconsistency over this case law, particularly after the Court 'opened' the notion of a 'legitimate expectation' in the case law of Central European countries. However, one could argue that the autonomous meaning of possession appears to have reached its limit in the case law of the Court and hence offers limited opportunity for further development.

Furthermore, the Court's case law concerning the former Yugoslav republics and Central European countries has made a specific contribution in the areas of 'general' and 'public' interest, which offer justifications for legally interfering with private property rights. These distinctive foundations resulted from the transformation and restructuring of the political and economic systems, as well as the correction of errors made by previous socialist and communist governments.

In addition, cases dealing with restrictive rent control systems adopted by the former communist regimes in these countries had a substantial impact on the third rule of property – property control. The cases of *Hutten-Czapska* and *Bittó*

72 Harris, O'Boyle, and Warbrick, pp. 662–663.

demonstrated the particularity of public and general interest for this form of property control that existed under communist systems, as well as the balance that must be struck when individual rights are restricted for years.

Finally, cases brought against these counties triggered a pilot judgment of the Court, since these transformation societies often dealt with structural and systemic situations that had an influence on a vast group of individuals.[73] These pilot judgments recognised all important specificity that existed in ex-communist regimes and transitions that happened in these countries, but also reaffirmed the importance of the principle of subsidiarity and the protection that individuals primarily have to achieve before domestic authorities.[74]

73 See *Hutten-Czapska v. Poland*, *Bittó and others v. Slovakia*, *Broniowski v. Poland, Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*.

74 About execution of pilot judgments in these cases and general measurers that countries adopted see https://hudoc.exec.coe.int.

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Chapter 21

Restitution of Property Nationalised by the Soviet-style Dictatorships: An Assessment on the Role of the European Court of Human Rights

Emőd Veress

Abstract

The intersection of the legacies of past totalitarian nationalisations and the current system of human rights protection reveals significant findings. This chapter emphasises the inherent tensions in the human rights framework when dealing with the mass seizure of private property by Soviet-style dictatorships in East Central Europe. This calls for a critical reevaluation of the ability of legal tools to effectively deal with the effects of former totalitarian regimes. The European Court of Human Rights (ECtHR) has approached these challenges with considerable deliberation, fully aware of the substantial and far-reaching implications of its rulings across East Central Europe. However, expecting the Court to resolve the complex issue of equitable restitution for nationalised property, particularly when individual states have struggled and failed to manage it in a fair manner, would be unrealistic. The complexity of this matter has required the ECtHR to adopt a cautious and measured stance, taking into account the broader regional context and the inherent limitations of its mandate.

Keywords: nationalisation, restitution, private property, Soviet-style dictatorship, transitional justice

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1. Introduction – Protocol No. 1 to the European Convention on Human Rights (ECHR) and the Problem of Nationalisations

Article 1 of Protocol No. 1 to the ECHR[1] states that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[2]

In consequence, the ECHR – through the additional Protocol No. 1 – protects property, or as is stated in the text of the ECHR, 'possessions'. Within the framework of human rights, the protection of property rights emerges as a fundamental principle, serving as a foundational element that upholds individual autonomy and contributes to societal stability. This principle is deeply embedded in the broader system of human rights, reflecting its essential role in maintaining both personal freedom and social order. "Every natural or legal person is entitled to the peaceful enjoyment of his possessions," declares this principle, echoing across legal codes and moral doctrine alike. Possessions, tangible or intangible, are more than mere material objects; they are extensions of self, repositories of labour, and embodiments of identity. They signify the fruits of endeavour, and the expressions of dreams nurtured into reality. For a person to be stripped of their possessions is to be deprived not only of their belongings but also of their dignity, agency, and a sense of place in the world.

Yet, this entitlement is not absolute but tied to the notion of the *public interest*, a nebulous concept often invoked to justify interventions into the private sphere. "No one shall be deprived of his possessions except in the public interest," the ECHR solemnly proclaims, hinting at the balance between individual rights and collective welfare. It is a recognition that the needs of the many may, at times, necessitate sacrifices from the few, but it is a principle that demands rigorous scrutiny and adherence to due process. Bound by legal frameworks and international norms, the deprivation of property rights must be carefully adjudicated within the confines of established law. The stipulation, "subject to the conditions provided for by law and by the general principles of international law" echoes a commitment to procedural fairness and strict compliance with legal standards. It is a safeguard against arbitrary

1 For an outstanding commentary of the ECHR from East Central Europe see Bîrsan 2010.

2 For a general analysis of the Article 1, Protocol No. 1, see Selejan-Guţan, pp. 2011, 219–229; Bercea, 2020, pp. 266–273.

confiscations and capricious exercises of power, ensuring that justice remains the guiding tool in matters of property rights.

Moreover, the framework of rights is intertwined with the principle of state sovereignty, which grants governments the authority to enact legislation in the pursuit of the common good. The legal text emphasises that "the preceding provisions shall not, however, in any way impair the right of a State", thereby affirming the prerogative of states to regulate property use in accordance with broader societal objectives. This includes measures such as taxation and the enforcement of legal claims, where states are tasked with creating a balance between protecting individual liberties and fulfilling the imperatives of governance. Within this equilibrium between individual rights and collective needs, the principle of the peaceful enjoyment of possessions remains a critical element of legal and social harmony.

The issue of nationalisations executed under Soviet-style dictatorships in East Central Europe presents a profound challenge, emphasising not only the vulnerability of property rights but also testing the limits of the human rights framework. This practice, particularly widespread in the volatile environment of post-World War II Eastern Europe, starkly challenges the principle of the sanctity of possessions. In the shadow of authoritarian rule, diverse entities such as businesses, religious institutions, and individuals were deprived of their property, subject to the arbitrary dictates of totalitarian regimes focused on power consolidation and ideological uniformity. Industrial and agricultural assets, and personal residences, were co-opted into the state apparatus, becoming tools in the expansive political schemes of governments that exercised unfettered dominion over both the economic and personal spheres of their subjects, often sidelining basic human rights in pursuit of ideological goals.

This assault on property rights also exposes the inherent vulnerabilities of the human rights system. Confronted with the brute force of authoritarian regimes, the legal and moral edifices constructed to safeguard possessions find themselves tested to their limits – even in the present. The principles enshrined in international law and conventions, intended to shield individuals from arbitrary deprivation, falter in the face of the past authoritarian measures. The goal of this chapter is to prove that the efficacy of human rights mechanisms becomes severely compromised faced with the nationalisations imposed by the Soviet-style dictatorships.[3] Additionally, it aims to explain why this is the case.

3 For a classic analysis of nationalisations, see Katzarov, 1964.

2. Some Remarks on Nationalisation and Restitution of Property (Reprivatisation)

The author of this chapter has previously written extensively on the legal nature of nationalisations from the perspective of legal history, trying to explain its nuances in relation to the nationalisations which took place in the West.[4] This chapter is based on the author's past views: there is no such self-standing legal institution as nationalisation. In legal discourse, the term 'nationalisation' carries significant ideological weight and fervour. There is no need to invent a self-standing legal concept for a *Soviet-style* phenomenon which can be explained using an extant and consistent terminology.

To dismiss nationalisation as a mere legal institution is to overlook its true nature as a veil of propaganda draped over the revolutionary act of seizing assets and placing them under state control. It is, in essence, a form of expropriation, albeit one tainted by the contagion of ideology. Unlike its predecessors in legal history, this brand of expropriation eschews the fundamental principles established well before – the principles of just and preliminary compensation – opting instead for a blatant usurpation of property rights. In short: nationalisation is nothing else than illegal mass expropriation.[5]

The question of whether the state should provide compensation for nationalisation presented a contentious issue. Although some nationalisation measures ostensibly acknowledged the notion of compensation, the actual practice of providing such compensation was virtually non-existent. Many nationalisation rules totally omitted any rule on compensation. Where such rules did exist, they served more as futile ornaments than substantive guarantees. This discrepancy between rhetoric and reality highlighted a troubling trend: the manipulation of law as a tool of deception and control within authoritarian regimes. The concept of fair compensation, rooted in capitalist notions of equity and property rights, ran counter to the ethos of socialist transformation espoused by many regimes. To offer compensation, therefore, was no less than to flirt with the resurrection of capitalism, a prospect antithetical to the revolutionary fervour driving nationalisation efforts. To put it simply, fair compensation would be a measure that would lead to a return to capitalism, essentially a revival of capitalism. Compensation, after all has the effect of preserving the exploiting class. For this reason, real compensation was unfathomable.[6]

4 For the latest of the author's texts on this topic, see Veress, 2023, pp. 281–310.

5 To maintain precision in this analysis, it is important to acknowledge that some expropriations in East Central Europe were carried out without fair compensation even outside the Marxist ideology. An example of this is the 1945 Romanian land reform. However, these expropriations were primarily driven by goals of redistribution into private property. As such, they fall outside the scope of this study.

6 Veress, 2023, pp. 297–299. For a debate on whether compensation is necessary for foreigners under international law, see Seidl-Hohenveldern, 1958, pp. 543–552. and Katzarov, 1964, pp. 283–368.

This ideological position rendered real compensation untenable, a concession that would betray the very principles upon which nationalisation was founded. The refusal to offer compensation acted as a strategic measure to prevent the re-establishment of classes perceived as exploitative, thereby preserving the achievements of the 'revolution'. From this perspective, the lack of compensation for nationalisation represents a calculated policy decision aimed at maintaining the purity of communist doctrines. This debate extends beyond legal technicalities, representing a conflict between philosophical perspectives.

Nationalisation, that illegitimate expropriation, represented a subversion of established norms in service of ideological imperatives. The absence of fair and preliminary compensation, pillars upon which the edifice of expropriation rests, rendered the act not only unlawful but morally reprehensible. It is a blatant reminder of the perils of unchecked power and the corrosive influence of ideology on legal institutions.

It is also important that expropriation, as a legal mechanism, indeed finds its foundation in the public interest. In the realm of property rights and the exercise of state power, the notion of public interest serves as both shield and sword, a principle intended to balance the needs of the collective against the rights of individuals. However, the concept of Soviet-style nationalisation twisted and distorted this noble notion, perverting it to cloak mass expropriation. The Manifesto of the Communist Party (1848) already stated that "the theory of the Communists may be summed up in the single sentence: Abolition of private property."[7] Nationalisation usurped this notion of public interest, transforming it into a guise for the extensive seizure of assets and industries in a frightful experiment of social engineering. Nationalisation was just a term to legitimise mass expropriation under the banner of class equality. In the hands of authoritarian regimes, nationalisation became a weapon of mass expropriation, a tool to consolidate power and control over the means of production and the entire society. The appearance of public interest was stripped away, revealing the true nature of nationalisation as a tool of oppression and exploitation. It is important not to lose sight of the true essence of public interest – a principle meant to serve the common good, not to justify the abuse of power.

After the dissolution of Soviet-style regimes in East Central Europe, a critical inquiry emerged within the discourse of political and legal reform: Was it feasible to restore nationalised properties to their original owners? This question provoked a varied display of responses across the region. The debate captured not only the logistical challenges of restitution but also the ideological and ethical considerations inherent in rectifying the legacies of authoritarian governance. The landscape of transitional justice presented a varied and at times profoundly disheartening tableau.

Following the transition from regimes characterised by Soviet-style dictatorships, the imperative of addressing reparations for nationalisations became a prominent issue. The ideal path to redress lay in unravelling the effects of nationalisation

7 Veress, 2023, p. 283.

by restoring properties to their rightful owners or their descendants (*restitutio in integrum*). However, this vision of reparation was met with a chorus of dissenting voices, each armed with their own arsenal of arguments and justifications. Foremost among these was the pragmatic consideration of legal transformations, governed by the principle of *tempus regit actum*, which posited that past actions are governed by the laws of the time in which they occurred. This legal maxim, rooted in the need for continuity and certainty, posed a formidable obstacle to the reversal of nationalisation.

Economic considerations also played a critical role in the discourse surrounding restitution, significantly influencing its perceived viability. The complexities associated with the restitution of industrial assets, deeply implanted within state-owned enterprises, posed substantial challenges. While reprivatisation seemed feasible for agricultural and residential properties, the industrial sector, having undergone fundamental transformations during the decades of dictatorship, appeared practically beyond the scope of reprivatisation. Instead, these state-owned enterprises often found their pathways to privatisation through sales to private investors. As political and legal debates progressed, the concept of reprivatisation remained an appealing yet largely unattainable objective. The aspiration for restitution, although strongly desired by many, was moderated by the realities of political and legal limitations and economic necessities. This juxtaposition of the ideal of justice against the pragmatic considerations of political and economic contexts characterised East Central Europe in transition.

'Post-communist' East Central Europe emerged from the Soviet-style mass nationalisations that had reshaped the region's economic and social fabric. The process of restitution, while emblematic of the region's transition from communist rule, was far from uniform. Instead, it manifested in a patchwork of measures, varying in scope and nature from one state to another. Compensation and restitution in kind emerged as the predominant forms of redress, albeit in different proportions and with varying degrees of effectiveness.

In some states, compensation materialised as the primary means of restitution, offering financial recompense to those whose properties had been seized or nationalised during the communist era. This monetary compensation, while providing a semblance of justice, often fell short of addressing the full extent of losses incurred, leaving many claimants disillusioned with the process. In contrast, other states opted for restitution in kind, returning nationalised properties to their rightful owners or their descendants. This form of restitution, while more directly addressing the injustices of the past, posed significant logistical and legal challenges, particularly in cases where properties had changed hands multiple times or had been repurposed for other uses.

Moreover, the process of restitution was further complicated by the partial and selective nature of its implementation. Political considerations, economic constraints, and legal ambiguities often influenced the scope and extent of restitution measures, leading to disparities in outcomes across the region. As a result, the promise of

restitution remained elusive for many, particularly those whose claims were deemed politically sensitive or economically unfeasible.

As the legacy of nationalisation and reprivatisation is addressed, the role of the European Court of Human Rights (ECtHR) becomes a central question. The mandate of the ECtHR is to adjudicate cases involving alleged violations of the ECHR, ensuring that member states uphold their obligations under this treaty.[8] However, despite its noble mission, the ECtHR faced and faces inherent limitations in addressing the complex issues surrounding nationalisations and reprivatisations. Now some of the details can be analysed.

3. The Temporal Scope of the ECHR and of Protocol No. 1

The first fundamental issue and tool to limit its jurisdiction used by the ECtHR is related to the temporal scope of the ECHR and of Protocol No. 1. The concerned states acceded to the ECHR and ratified it long after nationalisation took place. For example, Hungary ratified the ECHR in 1993,[9] more than three decades ago, while Romania did so in 1994.[10]

As an example, in the case of *Costandache v Romania*, the ECtHR examined the applicant's complaint regarding the refusal of Romanian State authorities to return a property that had been nationalised by the Romanian State under Decree No. 92/1950. The Court determined that the nationalisation had been carried out by Romanian authorities, as confirmed by domestic court judgments in 1950, prior to 20 June 1994 when the Convention entered into force for Romania. Therefore, the ECtHR concluded that it lacked jurisdiction, *ratione temporis*, to assess the circumstances of the nationalisation or its ongoing effects. Consequently, the Court stated that there was no basis for finding a continuing violation of the Convention

8 Paczolay, 2022, pp. 133–155.

9 1993. évi XXXI. törvény az emberi jogok és az alapvető szabadságok védelméről szóló, Rómában, 1950. november 4-én kelt Egyezmény és az ahhoz tartozó nyolc kiegészítő jegyzőkönyv kihirdetéséről.

10 Lege nr. 30 din 18 mai 1994 privind ratificarea Conventiei pentru apararea drepturilor omului şi a libertatilor fundamentale şi a protocoalelor aditionale la aceasta conventie.

attributable to Romanian authorities that would fall within the Court's jurisdiction over time.[11]

In accordance with the ECtHR, individuals who undergo deprivation of property during the process of nationalisation, in jurisdictions that are at the time not subject to the ECHR regime, do not possess a property right that falls within the protective scope of the ECHR. This statement, although apparently straightforward, holds significant implications for the course of legal proceedings and the boundaries of justice. It asserts that nationalisation measures themselves fall outside the jurisdiction of the ECHR system.

Applicants attempted to circumvent this approach by arguing that the nationalisation of their property constituted a continuous violation of their rights. However, the Court rejected this interpretation, asserting that the deprivation of ownership or other rights *in rem* is generally an instantaneous act and does not create a continuous situation of deprivation of a right (*Malhous v the Czech Republic (dec.) [GC];*[12] *Preußische Treuhand GmbH & Co. KG a.A. v Poland (dec.), § 57*).[13] Furthermore, the Court determined that the applicants did not possess a property right at the time when the ECHR and Protocol No. 1 came into force. In consequence, the ECtHR regarded the deprivation of ownership or other rights *in rem* as an immediate and singular occurrence, rather than an ongoing condition of rights deprivation. The Court viewed such acts as instantaneous events, not as prolonged or continuous infringements on property rights.

As a judge, the author would likely adopt a cautious approach similar to the Court's stance. However, in his capacity as a university professor, he has the freedom to express a broader perspective on justice. His concern lies in the complexity inherent in the *continuity argument*, which extends beyond the Court's ostensibly simplistic position. The crux of the matter lies in the conflation of disparate situations stemming from nationalisation, which can be categorised into three distinct forms. Firstly, nationalisation conducted in accordance with the laws of the Soviet-style dictatorship; secondly, nationalisation carried out in contravention of the legal conditions imposed by the dictatorship; and thirdly, nationalisation undertaken without any legal basis. All three forms are common in the history of nationalisations.

11 There is no official English translation of the judgement, the French official version states the following: "*La Cour relève que l'expropriation a été faite par les autorités de Roumanie, comme l'arrêt de la cour d'appel de Iaşi l'a confirmée, en 1950, soit avant le 20 juin 1994, date d'entrée en vigueur de la Convention à l'égard de la Roumanie. La Cour n'est donc pas compétente ratione temporis pour examiner les circonstances de l'expropriation ou les effets continus produits par elle jusqu'à ce jour (cf. Malhous c. République tchèque (déc.), n° 33071/96, 13 décembre 2000, CEDH 2000-XII). Elle estime que, dans ces conditions, il n'est nullement question d'une violation continue de la Convention imputable aux autorités roumaines et susceptible de déployer des effets sur les limites temporelles à la compétence de la Cour (cf., mutatis mutandis, l'arrêt Prince Hans-Adam II de Liechtenstein c. Allemagne, précité, § 85).*" *https://hudoc.echr.coe.int/eng?i=001-43536.*

12 https://hudoc.echr.coe.int/fre?i=002-5837.

13 https://hudoc.echr.coe.int/eng?i=001-88871.

In the first scenario, it may indeed be feasible to uphold a decision rejecting the continuity of the violation. However, in the latter two scenarios, such an argument may not hold true. In the second and third scenarios, nationalisation occurred outside the bounds of legality prescribed by the law of the Soviet-style dictatorship. It either transgressed the legal framework established by the dictatorship or lacked any semblance of legality altogether. In these cases, the state was divesting itself of a right it had never lawfully obtained. The complexity arises from the varying legal contexts and implications associated with each form of nationalisation, necessitating a nuanced approach to justice that acknowledges these differences.

The court's reluctance to engage deeply with the legacies of totalitarian regimes is understandable given the complex legal and moral issues such engagement entails. Historical contexts marked by systemic injustice and lawlessness under totalitarian rule present a formidable challenge. The expectation for the ECtHR to address historical injustices – issues that individual states themselves have inadequately reconciled – places an immense and unrealistic burden on the court. These legacies, fixed within the collective memory of nations, pose significant challenges to legal redress. Tasking the ECtHR to solve these historical grievances may exceed its intended judicial mandate and capabilities. While the court may opt to limit its engagement with these historical complexities, it retains an undeniable responsibility to uphold justice in contemporary issues. As a guardian of human rights, the ECtHR must remain vigilant against current violations and ensure state accountability, thus balancing its judicial restraint with its duty to protect fundamental rights.

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4. A Duty of the East Central European States to Restitute Nationalised Property?

Nationalisation certainly deviated from the standards of human rights. Can this deviation be construed as imposing a duty on post-communist East Central European states to restitute nationalised property?

The ECtHR, as a political institution by nature, approached the issue of state sovereignty with caution, aiming to minimise its intervention in this domain. Fully aware of the potential consequences, the Court sought to avoid acting with undue force, carefully designing its decisions and considering the broader implications of its rulings. Nationalisation, a comprehensive reconfiguration of property ownership on a massive scale, carried significant implications with far-reaching consequences. The Court was acutely aware of the complexities involved in this process and the macro-level impact that any of its decisions could have. Consequently, the ECtHR's approach was characterised by a careful balance between the imperatives of justice and the practical realities of political pragmatism. While dedicated to upholding human rights principles, the Court was mindful of the risks of intruding too deeply

into matters of state sovereignty. In doing so, it aimed to respect the autonomy of individual states in determining their approach to restitution.

The inquiry posed revolved around whether the ECHR, which had already been ratified and was in force in the relevant states, mandates these states to restore nationalised property. The response to this query is also negative.

Article 1 of Protocol No. 1 cannot be construed as imposing an obligation on the Contracting States to restore property that was transferred to them prior to their ratification of the Convention (*Jantner v Slovakia*, § 34).[14] This rationale is straightforward: Article 1 of Protocol No. 1, as mentioned, does not guarantee the right to *acquire* property. The justification for this stance is elegantly simple yet profound in its implications: Article 1 of Protocol No. 1, as articulated above, does not explicitly enshrine the right to acquire property. While the Article guarantees the right to peaceful enjoyment of possessions, it does not extend to encompassing a general obligation for states to restore property acquired prior to their ratification of the Convention.

5. Does the ECHR, Once in Force, Set Standards for Restitution?

A compelling question arises when considering whether the ECHR provides a framework for national legislators in conceptualising restitution cases. The Court has consistently responded in the negative in several landmark cases, maintaining that such matters are best left to the discretion of national legislators. This position highlights the balance between international human rights law and domestic legal systems. While the ECHR establishes a general framework for the protection of human rights, it intentionally refrains from prescribing specific mandates or guidelines for addressing complex restitution issues at the national level. Instead, it defers to the autonomy of national legislators, allowing them to develop solutions tailored to the unique sociopolitical contexts of their respective states. In essence, the Court's position acknowledges the diversity of approaches and interpretations within the East Central European legal landscape, recognising the importance of allowing national legislators the flexibility to determine the solutions for these difficult issues within their respective jurisdictions.

For example, the ECtHR stated that Article 1 of Protocol No. 1 does not impose any limitations on the freedom of Contracting States to define the scope of property restitution and establish the conditions under which they opt to restore property rights to former owners (*Maria Atanasiu and Others v Romania,* § 136).[15]

14 https://hudoc.echr.coe.int/eng?i=001-60964.
15 https://hudoc.echr.coe.int/eng?i=002-806.

Specifically, Contracting States are afforded a broad margin of appreciation in deciding to exclude certain categories of former owners from such entitlements. In cases where certain categories of owners are excluded by the national legislator, their claims for restitution cannot form the basis of a 'legitimate expectation' warranting protection under Article 1 of Protocol No. 1 (*Gratzinger and Gratzingerova v the Czech Republic* (dec.) [GC], §§ 70-74;[16] *Kopecký v Slovakia* [GC], § 35;[17] *Smiljanić v Slovenia* (dec.), § 29[18]).

In consequence, the East Central European states possess the freedom to formulate their own restitution policies. Each state has the power of determining whether restitution is necessary, as well as the scope, entitlement criteria, and procedural mechanisms for restitution. Each state independently chose its own regime in this regard.

6. The Role of the ECtHR in Restitution of Nationalised Property

Following the examination of the three grounds for refusal discussed in the preceding subchapters, the role of the ECtHR in the restitution of nationalised property emerges as a pertinent question. In the exploration of the complexities of the ECtHR, it became clear that its capacity to deal with restitution cases was circumscribed by specific limitations. What, then, fell within its jurisdiction? Essentially, the ECtHR was tasked with assessing the conformity of national legislation and procedures – autonomously and divergently established by each state – with the ECHR, specifically concerning the restitution of nationalised property implemented after the ECHR's ratification by a given state. The Court intervened only when these procedures were found to contravene the Convention. Yet, even in such cases, the ECtHR found itself grappling with some of the most convoluted legal dilemmas in its history. With hundreds upon hundreds of restitution cases emanating from East Central European states, the Court was thrust to the centre of a legal labyrinth and saw the limits of its jurisprudence tested.[19]

The ECtHR did not emerge with a comprehensive solution for the restitution of nationalised property. Despite the widespread recognition of the injustices perpetrated

16 https://hudoc.echr.coe.int/eng?i=001-22710.

17 https://hudoc.echr.coe.int/eng?i=002-4236.

18 https://hudoc.echr.coe.int/eng?i=001-93340.

19 The Interlaken process was initiated in 2010 to address the backlog at the European Court of Human Rights, notably intensified by the high volume of restitution cases from East Central Europe, with the objective of enhancing the court's efficiency. However, the Court tends to prioritise formal requirements and procedural grounds for rejecting cases to reduce this backlog – a strategy more suited to a commercial court than one dedicated to human rights adjudication.

by Soviet-style dictatorships and the myriads of uncertainties, ambiguities, and political considerations surrounding restitution, it would be unrealistic to anticipate the ECtHR to effectively address problems that remained unresolved by the affected states themselves in a fair and equitable manner.

Through meticulous examination and analysis of decisions rendered by the ECtHR, this article aims to highlight five specific issues.

a) Given the constraints elicited earlier, it is evident that numerous restitution cases are not adjudicated under the provisions of Protocol No. 1, but instead, they are scrutinised through the lens of the fair trial requirements stipulated in the civil limb of Article 6 of the ECHR, where procedural considerations take precedence.[20]

In the specific context of the restitution of nationalised properties in Romania, the ECtHR observed, under Article 6, that the absence of legislative coherence and conflicting case law regarding the interpretation of certain provisions of restitution laws contributed to a pervasive atmosphere of legal uncertainty (*Tudor Tudor v Romania*, § 27[21]). Therefore, given the inconsistent decisions rendered by domestic courts and the absence of justification for departing from the apparent logic of a prior judgment, the deprivation of an applicant's 'possessions' cannot align with the principles of the rule of law, must not exhibit arbitrariness, and consequently fails to satisfy the criterion of lawfulness as stipulated in Article 1 of Protocol No. 1 (*Parvanov and Others v Bulgaria*, § 50[22]).

A substantial portion of cases pertained to instances of non-compliance with final judicial decisions or non-enforcement of such decisions. According to the ECtHR, a judgment that imposes an obligation on authorities to provide compensation, whether in the form of land or monetary compensation, in accordance with domestic legislation governing the restitution of property rights grants the applicant an enforceable entitlement that qualifies as a 'possession' within the purview of Article 1 of Protocol No. 1 (*Jasiūniene v Lithuania*, § 44[23]). Consequently, in cases where a final court judgment favours the claimant, the concept of 'legitimate expectation' may be invoked (*Driza v Albania*, § 102[24]).

A subset of cases presented to the Court pertained to the failure to uphold the *res judicata* effect of a final judgment, leading to the annulment of the applicant's property title without compensation. In such instances, the Court has determined that the breach of the principle of legal certainty constitutes a violation of the requirement of lawfulness under Article 1 of Protocol No. 1.

20 For a general analysis of Article 6 ECHR, see Selejan-Guţan, 2011, pp. 128–152; Bercea, 2020, pp. 187–215.

21 https://hudoc.echr.coe.int/fre?i=001-91885.

22 https://hudoc.echr.coe.int/fre?i=001-72191.

23 https://hudoc.echr.coe.int/eng?i=001-60975.

24 https://hudoc.echr.coe.int/fre?i=001-83245.

This was exemplified in cases such as *Parvanov and Others v Bulgaria* (§ 50), *Kehaya and Others v Bulgaria* (§ 76)[25], and *Chengelyan and Others v Bulgaria* (§§ 49-50).[26] The requirement of lawfulness extends beyond mere adherence to domestic legal provisions; it encompasses compliance with the principles of the rule of law. Consequently, it entails safeguarding individuals from arbitrary actions, as was held in *Parvanov and Others v Bulgaria* (§ 44).

b) The ECtHR endorsed the excessive duration of restitution proceedings, also in the context of fair trial requirements (Article 6 of the ECHR).[27]

In the 2012 judgment of the case *Catholic Archdiocese of Alba Iulia v Romania*[28], the ECtHR unanimously concluded that there was a violation of Article 1 of Protocol No. 1 to the European Convention on Human Rights. The case revolved around a Catholic religious community seeking to reclaim, under an emergency ordinance (a provisional act adopted by the Government) enacted in 1998, ownership of assets nationalised by Romanian authorities during the communist era: the building and the collection of the Batthyaneum, a vast repository of valuable books, manuscripts, documents, and artifacts. The ECtHR observed that almost 14 years after the initiation of the preliminary procedure stipulated by the ordinance, the applicant had not received any notification of a decision, leaving it in a state of uncertainty regarding the fate of the assets. Moreover, the Court emphasised that the cultural and historical significance of the property in question exacerbated the inexplicable inaction. This occurred in 2012. Subsequently to this judgement, after another nine years, in 2021, the state rejected the restitution claim. While the author can comprehend (but not accept) the Romanian state's desire to retain ownership of this collection of globally significant codices and historical documents, it should have adjusted its legislation accordingly rather than committing another infringement.

The excessive duration of restitution proceedings has led to a violation of Article 6, as indicated in the case of *Sirc v Slovenia* (§ 182)[29]. In such instances, the Court often deemed it unnecessary to assess the applicants' complaints under Article 1 of Protocol No. 1. However, when delays occurred in proceedings subsequent to the recognition of the applicant's property rights, the Court identified a distinct breach of Article 1 of Protocol No. 1. This was primarily due to the uncertainty in which the applicants were left regarding the fate of their property, as illustrated in cases such as *Igarienė and Petrauskiene v Lithuania* (§§ 55 and 58)[30] and *Beinarovič and Others v Lithuania* (§§ 141 and

25 https://hudoc.echr.coe.int/eng?i=001-72559.
26 https://hudoc.echr.coe.int/eng?i=001-178697.
27 On the issue of excessive duration, for further details see Bălăşoiu, 2017, pp. 133–141.
28 https://hudoc.echr.coe.int/eng?i=001-113434.
29 https://hudoc.echr.coe.int/eng?i=001-85763.
30 https://hudoc.echr.coe.int/eng?i=001-93730.

154)[31]. In the case of *Kirilova and Others v Bulgaria* (§§ 120-121)[32], significant delays were observed in the delivery of flats offered as compensation for the expropriation of the applicants' properties.

c) If a state, subsequent to ratifying the Convention, enacts or maintains restitution legislation, such legislation bestows upon individuals a 'new right of ownership', thereby establishing a legitimate expectation safeguarded under Article 1 of Protocol No. 1.

However, the anticipation that a previously enforced law would be amended in the future to favour an applicant does not constitute a form of legitimate expectation within the context of Article 1 of Protocol No. 1. There exists a distinction between a mere hope for restitution, albeit understandable, and a legitimate expectation, which necessitates a more tangible foundation than a mere hope and must be rooted in a legal provision or act, such as a judicial decision. This differentiation was underscored in cases like *Gratzinger and Gratzingerova v the Czech Republic* (dec.) [GC] (§ 73) and *Von Maltzan and Others v Germany* (dec.) [GC] (§ 112).[33]

In the pilot judgment[34] *Manushaqe Puto and Others v Albania* (§§ 110-118),[35] the Court delivered a significant verdict, finding a violation of Article 1 of Protocol No. 1 to the Convention. This ruling was based on the failure to enforce a final decision that had granted the applicants compensation instead of restitution for their property.

When considering the execution of enacted reforms, the essence of the rule of law inherent in the Convention and the principle of lawfulness articulated in Article 1 of Protocol No. 1 mandate that States adhere not only to the enactment of laws but also to their consistent and foreseeable application. This encompasses not only the obligation to respect and implement laws in a coherent manner but also, as a natural consequence of this obligation, to establish the legal and practical frameworks necessary for their effective execution. This assertion, highlighted in the case of *Broniowski v Poland* [GC] (§ 184)[36], underscores the critical importance of ensuring not only the existence but also the operational efficacy of restitution legislation.

d) The ECtHR exercised caution also regarding compensation matters. In general, the ECtHR asserted that Article 1 of Protocol No. 1 mandates that the compensation awarded for property seized by the State must be 'reasonably related' to its value (*Broniowski v Poland* [GC], § 186). Furthermore, the Court

31 https://hudoc.echr.coe.int/eng?i=001-183540.
32 https://hudoc.echr.coe.int/eng?i=001-69311.
33 https://hudoc.echr.coe.int/eng?i=001-68660.
34 For the notion of pilot judgement see Haider, 2013 and Leach, 2011, pp. 223–241.
35 https://hudoc.echr.coe.int/fre?i=001-112529.
36 https://hudoc.echr.coe.int/fre?i=001-61828.

reiterated that regardless of the justification presented by the Government for its interference with the applicant's property rights, a lack of funds cannot excuse the failure to enforce a final and binding judgment on debt owed by the State (*Driza v Albania*, § 108; *Prodan v Moldova*, § 61[37]).

On the other hand, the ECtHR endorsed the reduction of compensation levels for expropriated land, implemented through amendments to subordinate legislation during ongoing domestic administrative proceedings, provided that such reduction aligns with the overarching objective of safeguarding the public finances and the compensation awarded is not deemed unreasonably low (*Serbian Orthodox Church v Croatia*, §§ 62, 65–68[38]).

In assessing the adequacy of compensation, the ECtHR confronted an exceptionally sophisticated and challenging scenario. Recognising the unique circumstances at play, the Court ultimately determined that a minimum threshold of 10% of the present-day value of the initial property could be deemed reasonable within the particular context of Albania, as articulated in the case of *Beshiri and Others v Albania* (§§ 194-196).[39] This judgment reflected the Court's recognition of the complex economic realities inherent in addressing compensation issues within the Albanian context.

e) Lastly, one of the most intriguing topics for a scholar in private law is the matter of sales by the State of a nationalised property to a third party acting in good faith. In Romania, Act No. 112 of 1995 initiated the process of restitution for buildings situated within localities, particularly in urban settings. However, this legislation only permitted the restitution in kind of residential buildings that were previously leased to the former owner (a Romanian citizen) or their heirs, or were unoccupied by other tenants at the time (Article 2).

Conversely, the law allowed all tenants, not just those affected by nationalisation measures, to purchase the nationalised real estate they were renting, well below the market price, effectively as a means to solidify the benefits of nationalisation for these individuals, akin to a consolidation of previous nationalisation in disregard of the restitution rights of previous owners. The sale of nationalised apartments to tenants was presented as a social policy measure by the ruling party, which argued that restitution would leave large segments of the population homeless. In reality, however, this policy served as a means to enable the party's supporters to acquire property, thereby securing their loyalty. Act No. 112 of 1995 impeded the comprehensive implementation of subsequent restitution measures. The tenants who purchased property were regarded as acquiring it in good faith from the state. The zenith of restitution

37 https://hudoc.echr.coe.int/eng?i=001-61757.
38 https://hudoc.echr.coe.int/eng?i=001-204082.
39 https://hudoc.echr.coe.int/fre?i=001-202475.

for nationalised buildings in Romania was achieved with Act 10 of 2001, which enabled a more expansive scope of in-kind restitution for nationalised buildings, excluding those that had already been sold to former tenants.[40] Based on these premises, this category of cases is characteristic to Romania.

According to the ECtHR, when a Contracting State, having ratified both the Convention and Protocol No. 1, introduces legislation allowing for the complete or partial restitution of property nationalised under a previous regime, such legislation may be interpreted as conferring a new property right protected by Article 1 of Protocol No. 1 upon individuals who meet the eligibility criteria. This was underscored in the case of *Maria Atanasiu and Others v Romania* (§ 136), highlighting the potential for legislative measures to reinforce property rights within the framework of international conventions.

Similarly, the establishment of arrangements for restitution or compensation under pre-ratification legislation may also trigger the protection of Article 1 of Protocol No. 1, provided that such legislation remains in force following the Contracting State's ratification of Protocol No. 1. This principle was affirmed in cases such as *Von Maltzan and Others v Germany* (dec.) [GC] (§ 74), *Kopecký v Slovakia* [GC] (§ 35), and *Broniowski v Poland* [GC] (§ 125), emphasising the continuity of property rights under evolving legal frameworks. Certainly, a perplexing question emerges: if the ECtHR acknowledges the continuity of the 'property right' (a claim for restitution) that originated before the Convention came into effect in a certain state and endeavours to safeguard it, why does a similar rationale not extend to cases concerning the persistence of property deprivations stemming from illegal nationalisation?[41] This disparity in approach prompts deeper inquiry into the court's interpretation and application of legal principles, inviting scrutiny of the underlying factors influencing its decisions.

The ECtHR considered the act of a state selling an individual's property to a third party who acts in good faith, particularly when this occurs before the final judicial confirmation of the individual's title, constitutes a deprivation of property. This deprivation, especially when accompanied by a complete absence of compensation, contradicts the principles outlined in Article 1 of Protocol No. 1. This assertion was affirmed in the case of *Vodă and Bob v Romania* (§ 23)[42], highlighting the significance of safeguarding property rights as enshrined in international legal frameworks.

In the case of *Katz v Romania* (§§ 30-36)[43], the ECtHR identified a widespread issue stemming from flawed legislation regarding the restitution of nationalised buildings sold by the State to third parties acting in good faith. Despite numerous amendments to the law, the situation failed to improve. The Court viewed this

40 Veress, 2022, pp. 261–262.
41 For this reasoning, see above, subchapter 3.
42 https://hudoc.echr.coe.int/eng?i=001-84892.
43 https://hudoc.echr.coe.int/eng?i=001-90757.

legislative inadequacy not only as exacerbating the violation of Article 1 of Protocol No. 1 but also as posing a threat to the future efficacy of the Convention machinery under Article 46 of the Convention, regulating the binding force and execution of ECtHR judgements.[44] This challenge persisted in subsequent cases such as *Preda and Others v Romania* (§§ 146-148)[45] and *Ana Ionescu and Others v Romania* (§ 29)[46], emphasising the ongoing significance of addressing systemic issues within the legal frameworks governing property restitution in Romania.

The failure to enforce final judgements, alongside various deficiencies within the Romanian property restitution system, culminated in a breach of Article 1 of Protocol No. 1 in the case of *Maria Atanasiu and Others v Romania*. This pivotal legal dispute not only highlighted systemic shortcomings but also prompted the initiation of a pilot judgment procedure (§§ 215-218). Such a development underscored the critical need for addressing structural flaws within the restitution framework to ensure the effective protection of property rights.

7. Conclusions

The ECtHR found itself entangled in a mesh of moral, legal, political, and economic dilemmas when confronted with legislation pertaining to the restitution of property seized by former Soviet-style totalitarian regimes or compensating those affected by such nationalisations in East Central Europe. In my opinion, the Court was hesitant to assume either the political or moral responsibility on behalf of the states involved. This cautious approach stemmed from the significant social and economic ramifications such decisions could potentially entail. Indeed, a ruling concerning Albania or Croatia, for instance, had the potential to reverberate across the entire region, affecting national economies and political landscapes alike.

Thus, the ECtHR undertook the formidable task of balancing justice with practical considerations, addressing a multitude of complex issues that extended beyond mere legal interpretation. As the arbiter of human rights, the Court was acutely conscious of its role in influencing the socio-economic landscape of the region, exercising caution to mitigate potential unintended consequences.

The Court was unable to undertake "the reform of the political, legal, and economic structure of the State concerned, which inevitably entails the adoption of economic and social laws on a large scale."[47] Similar to the partial solutions offered

44 On the article 46 ECHR, see Sicilianos, 2014, pp. 285–316.
45 https://hudoc.echr.coe.int/eng?i=001-142671.
46 https://hudoc.echr.coe.int/fre?i=001-191274.
47 Broniowski v Poland [GC], § 149.

by states, many of the former illegalities are now irreversible, resulting in the Court also providing only partial solutions to this issue despite its earnest intentions. Ultimately, the adequacy of the Court's actions is subject to subjective interpretation.

While the ECtHR plays a crucial role in safeguarding civil and political rights across Europe, its ability to address the complex issues surrounding nationalisations and reprivatisations was truly limited. The pursuit of restitution, though a noble endeavour aimed at rectifying historical injustices, encountered practical and legal obstacles that transcended the jurisdictional reach of a human rights court. Complex legal frameworks, competing claims, and political sensitivities rendered the process of restitution inherently challenging, with no easy solutions readily available. But the court undeniably possessed the capacity for further action, albeit within certain limits.

In this light, there can be observed a reluctance on the part of the ECtHR to engage directly with the difficulties of property rights processes in the eastern half of Europe. This may reflect a pragmatic recognition of its limitations rather than a dismissal of the importance of restitution.

Ultimately, while the pursuit of restitution for injustices suffered under communist nationalisations is a noble endeavour, it may necessitate a broader engagement encompassing legal, political, and socioeconomic dimensions beyond the remit of a human rights court. As East Central Europe struggles with the complexities of its past, the quest for justice and reconciliation, property rights must be tackled with sensitivity, nuance, and a recognition of the authentic challenges at hand. Simultaneously, a sense of pessimism arises as restitution processes remain forever incomplete in numerous countries. The opportunity to implement a more comprehensive and equitable solution to restitution, emerging over three decades following the regime changes, is perceived to have elapsed. The endeavour to revert a society altered by dictatorships to its pre-totalitarian state has proven unattainable – also in terms of property rights.

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Chapter 22

Migration and the ECtHR

Lilla Berkes

Abstract

European Court of Human Rights. The ECtHR's migration practice began to flourish in the early 1990s, in the context of expulsion and detention. Following the Soeringen and Abdulaziz cases, the Court rapidly adopted new and new expectations of States Parties, in particular in the wake of the refugee crisis of the 2010s. As a result of the Court's law-enforcement activities, States cannot be relieved of their legal obligations, particularly their human rights obligations, simply because they (in their view) act against a migrant outside their territory. They must now also be extremely careful when it comes to return, because they are also responsible for the practices and circumstances of the third country to which they return the applicant. A number of decisions have also been taken in relation to shorter and longer periods of detention, closed or semi-closed regimes. It cannot be ignored, however, that this tendency is counteracted by the need for sovereignty on the part of states. The study thus first points out the relationship between migration and sovereignty, and then presents the role of the ECtHR in human rights law and in the assessment of migration in general. As the ECtHR's practice has now become extremely diverse, the study focuses on border-related cases, with a focus on extraterritorial excision, border procedures, summary returns, indirect refoulement as current and challenging issues for the Eastern European states.

Keywords: migration, ECtHR, sovereignty, transit zones, asylum, territorial excision

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1. Introduction – Migration and Sovereignty

To start with a fact familiar to everyone, migration – whether it is forced or arbitrary – is a characteristic of humanity. But what varies from era to era is the *attitude* to migration.

This attitude, i.e. how communities, and ultimately the state, relate to other people and ethnic groups arriving on its territory, has traditionally been left to the sovereign decision of states. The resulting discretionary power has thus been quite wide: who to allow in, who to let resettle and how, who to consider desirable in becoming part of society and who to not – there are countless historical examples of the expulsion of groups considered alien. This discretion has made the state a fairly free-acting shaper of a process that affects its population, as it can choose to be in favour of immigration or – by controlling it – against it.

Some of these features still exist today, as (at least) in principle both EU law and the European Convention on Human Rights recognise the sovereign right of states to border control activities: to control entry to and residence in their territory.[1] At the same time, however, national specificities in relation to immigration are becoming increasingly unravelled, and more and more barriers are emerging which limit the scope for state action - and which constitute a certain degree of inertia, either against the will of the state or in excess of it.

These include the obligation to apply the principle of non-refoulement, the impact of compelling circumstances such as labour shortages, or illegal border crossing or residence -which, as we have seen through the history of many countries of destination, in many cases lead to *ex-post* legalisation of status. In the case of humanitarian obligations, the granting of asylum has been taken out of the realm of (more or less) absolute state discretion, and assumed by states (or at least some of them) as an international legal obligation – through which the granting of asylum has become a legally binding decision-making process.

In the 20th century, we have seen examples of two major regimes in the Western world in terms of their attitude to immigration. Prior to World War II, there were many examples of migration being tightly controlled and humanitarian considerations being taken poorly into account.[2] In contrast, after the Second World War – and particularly from the 1960s onwards – there was a growing emphasis on drawing lessons from the war. For example, the 1951 Geneva Refugee Convention, and the growing influence of social movements including anti-colonialism, the new left, ethnic and racial identity, and feminism.[3]

Partly as a result of these phenomena, a revolution in minority rights emerged: in the Euro-Atlantic area the prohibition of discrimination became a practically universal human right (see e.g. the UN Charter, the Universal Declaration of Human

1 Brouwer, 2010, pp. 206–207.
2 For an overview see Meyers, 2002, pp. 124–125.
3 Skretny, 2002, p. 3.

Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc.), which then permeated the approach to migration. Both universality and the treatment of migration within a purely legal framework created tensions, in the sense of how the ideal of human rights and immigration control as a crucial and fundamental aspect of state sovereignty balance each other.[4] The traditional efforts by states to control their national borders, and determine the numbers and types of people who can enter and remain in their territory, are no longer effective – and this has brought forth the idea that national sovereignty is now in decline.[5]

This era also saw the creation and rise of the European Court of Human Rights, whose work has helped to transform migration issues from the political sphere into a legal issue, and an increasingly universal one at that.

2. Migration and the ECtHR

A review of the rather extensive jurisprudence of the European Court of Human Rights (hereafter ECtHR) shows that, in many areas, states struggle to find a balance between their own interests and the consideration of legal and humanitarian aspects.

Under the European Convention on Human Rights (hereafter ECHR), as a general rule states have the right to control entry, residence and expulsion of non-nationals. However, there are a number of issues that could be covered by the ECHR in this context. These include travel bans, border checks, transit zones, access to asylum, family life and reunification, removal, expulsion, extradition, push-backs, immigration detention and procedural guarantees that embrace all of these questions. Some of these issues are relatively long-standing, recurring problems, while some have been brought to the fore by the various migration crises of the recent years (which is not to say that these are entirely new tactics), such as transit zones, or more broadly forms of territorial excision, or push-back solutions.

These issues are most relevant in relation to the convention's provisions on the prohibition of torture, inhuman or degrading treatment, deprivation of liberty, the right to a fair trial, the right to an effective remedy, respect for private and family life, and Article 4 of the Fourth Additional Protocol, which refers to the prohibition of collective expulsion of aliens.

In principle each of these issues requires a lengthy analysis, and the ECtHR itself has published a comprehensive summary of its immigration case-law,[6] so I have se-

4 Slingenberg, 2014, pp. 4–5.
5 Freeman, 1998, pp. 86–87.
6 Guide on the case-law of the European Convention on Human Rights. Immigration.

lected the topics of access to territory, mainly regarding the transit zones and forms of extradition, and with a view to the lessons these decisions have taught the Eastern European states that form the external border of the European Union. While Western European states have been confronted with the intersection of migration, sovereignty and human rights for many decades – and have thus tested the requirements of the ECHR through a diverse jurisprudence – in Eastern Europe these issues are still relatively new, and the answers to these questions are partly based on previous Western experiences and partly offer novel solutions. The aim is therefore to outline a framework that can be discerned from the ECtHR's practice at a given moment.

However, before addressing these issues it is worth clarifying the role that the court plays and can play in migration matters. What is the rationale behind international conventions, i.e. agreements that go beyond state sovereignty in the management of migration, and why do states entrust a supranational organisation with the task of setting limits to their potential for action?

International conventions seem to be the least controversial way to make international human rights law, though the extent to which they are then binding on states is not always obvious. Although mechanisms for the enforcement of international law in the UN system are practically non-existent, the regional systems do provide a framework for the protection of human rights. Among these, the ECHR is by far the most effective, because the member states have agreed to make their national legislation conform to the decision of the ECtHR.[7]

Péter Paczolay, a Hungarian judge at the ECtHR, briefly described how a multilevel protection of human rights was established in contemporary Europe after the Second World War. Freedoms in Europe are protected at the national level, at the Council of Europe level, and at EU level. National courts and constitutional courts defend rights based primarily on the grounds of their national constitutions, but also by international legal instruments. The Court of Justice of the European Union protects the rights embodied in the UN Charter. The ECtHR protects the freedoms and rights enshrined in the convention (i.e. the ECHR). Although formally this multilevel protection multiplies the guarantees for remedy violations of human rights, the complexity might also create difficulties.[8]

Christoph Grabenwarter also points out that the ECtHR – which was established and ratified by the states of Western Europe in the aftermath of World War II and the horrors of Nazism – has throughout its history shown that the protection of human rights is no longer an exclusive matter for national constitutions and national courts. Human rights have become an issue in European law and public international law, and the ECHR, as a charter of human rights, became a necessary element of a democratic society.[9] On the other hand, even with the universalism of human rights, we must recognise that migration is necessarily a phenomenon that affects several states

7 Nash, 2009, p. 35.
8 Paczolay, 2022, p. 134.
9 Grabenwarter, 2014, p. 101.

and requires a comprehensive and coherent legal response. This trend was already visible after the First World War, when the International Red Cross lobbied for comprehensive legislation on the situation of refugees.[10]

As already mentioned, the convention does not focus on migration issues and does not specify a right to asylum, and thus the states should have a wider scope of action in this field. The first prominent judgement of the ECtHR on migration was concerning family reunification,[11] and the strict obstacles spouses from abroad needed to face. It introduced the formula that states have – as a matter of well-established international law – the right to control the entry of non-nationals as the starting point of the human rights inquiry.[12] At the same time, it also stated that the meaning of a family must at any rate include relationships that arise from a lawful and genuine marriage – and that there was no breach of Article 8 because the applicants did not show that there were obstacles to establishing family life in their own or their husbands' home countries, or that there were special reasons why that could not be expected of them. Throughout the years, the ECtHR has developed the right to family reunification as a core value of Article 8 of the ECHR, and that guarantee now plays a major role in national immigration law throughout Europe.[13]

In another prominent case, Soering v. the United Kingdom,[14] the court held for the first time that the United Kingdom would be in violation of Article 3 of the convention if it extradited the applicant to the United States, since there he would be faced with the possibility of being sentenced to death. Thus, for the first time, it stated the responsibility of the extraditing state.[15] As such, this decision is also the basis for the decisions on chain-refoulement.

Before these decisions the ECtHR was silent regarding migration law, but the 1990s became a dividing line. "Articles 3 and 8 [of the] ECHR turned into veritable hotbeds of dynamic interpretation during an epoch that was described as the 'end of history' to illustrate the widespread expectation that globalisation would go hand in hand with a predominance of liberal constitutionalism. […] Experts in migration law who begin studying the subject today will find it difficult to grasp the sense of surprise with which the innovative early judgments were received […]. Rulings which are taken for granted nowadays were met with astonishment three decades ago. These innovations turned ECtHR judgments into an essential point of reference for anyone dealing with migration law, be it as academics or practitioners. Examples of dynamism are the human rights-based prohibition of refoulement and the transformation of the prohibition of collective expulsion into a free-standing

10 Jaeger, 2001, p. 728.
11 Abdulaziz, Cabales and Balkandali v The United Kingdom, Application nos. 9214/80; 9473/81 and 9474/81, 28 May 1985
12 Thym, 2023, p. 22.
13 Keller and Stone Sweet, 2008, p. 699.
14 Soering v. the United Kingdom, Application no. 14038/88, 07 July 1989
15 Breitenmoser and Wilms, 1990, p. 846.

procedural guarantee […]. At the same time, instances of thwarted dynamism and judicial standstill equally define the case law."[16]

3. Territorial excision and the ECtHR. Transit zones, border procedures, summary returns

One of the ways in which states have dealt with mass migration has been to redefine state borders and territories. The rationale behind this method was that, while the state must guarantee a full, meaningful range of fundamental rights to residents within its own territory, it must guarantee only a virtually discretionary part of these rights to those outside it. Territorial excision became one of these methods.

Territorial excision is practically a border control method, where the state creates new internal borders – whose existence might be enshrined in law, or simply maintained through extra-legal practice. However, the existence of these kind of borders is vulnerable to legal activism (among others by organised action by migrants and solidarity networks that can repurpose the law as an instrument to lift the frontiers of excision by exposing the incompatibility between border control and constitutional rights).[17] Excision has also been widely used as a spatial tool for territorial waters, which are considered not to be part of the territory.[18]

There are three main forms of territorial excision. The first is the operation of extraterritorial bases: these fall under the power of the state, but the state has reservations about its own jurisdiction and responsibility over them. The second form is redefining national territories' status according to state desires regarding immigration flows. Another method is to have a domestic space, where an internal excision of very specific areas can occur so as to avoid full state obligations regarding the treatment of unauthorised foreigners. The goal is to help manage the flow of refugees and illegal migrants. What we can see in Europe are cases when states have declared parts of their airports or harbours, in some cases even certain international railway stations, to be transit zones – international space where officials are not obliged to provide foreign nationals with some or all of the protections available to those officially on state territory.[19]

Thus the methods of territorial excision go hand in hand with the forms of border procedure. A border procedure is one in which the applicant for international protection is not granted entry to national territory during the time that the authorities examine their application. In general, persons whose applications for asylum are

16 Thym, 2023, pp. 130–131.
17 Gazzotti, 2023, p. 453.
18 Basaran, 2008, p. 345.
19 Davidson, 2003, p. 7, 9.

examined in a border procedure are present on the territory of the state in which an application is filed; thus that state exercises full jurisdiction over them, but through the forms of territorial excision a wide range of human rights guarantees are interpreted in a restrictive way. Border procedures are generally carried out in transit zones or international zones of airports, and during the procedure applicants for asylum are generally deprived of their liberty – either in a conventional detention centre, or because their situation legally and factually amounts to a deprivation of liberty.[20]

The ECtHR has acknowledged difficulties in regard to the reception of asylum seekers, taking into account that many states are faced with the arrival of mixed flows comprising both asylum seekers and irregular migrants at large European airports, ports and borders, and for interception and rescue at sea. The court has recognised that states have a sovereign right to control aliens' entry into and residence in their territory, and that detention is an adjunct of that right. But at the same time, it has reminded states that the provisions of the ECHR, including Article 5, must be respected – and a clear distinction should be made between asylum seekers and other migrants. [21]

These methods can be linked to the question of access to procedures and, because of the confinement, to deprivation of liberty. In one of the most well-known judgements of the ECtHR, Amuur v. France, the court stated: "Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions. Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered – into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country."[22]

On the other hand the court also ruled about the reasoning of the French government about the zone being partially open, in the sense of the zone being open to the outside and closed only on the French side. The court noted that "the mere

20 Cornelisse, 2016, pp. 74–75.
21 Hrnčárová, 2014, p. 326.
22 Amuur v. France, Application no. 19776/92, 25 June 1996

fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention. Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in."[23] It can therefore be seen that the ECtHR had clearly long ago laid the foundations that the use of transit zones is not a way of circumventing the migration requirements.

Following the case-law the ECtHR, in determining the distinction between a restriction on liberty of movement and deprivation of liberty – in the context of confinement of foreigners in transit zones and reception centres for the identification and registration of migrants – the factors taken into consideration are as follows:

- the applicants' individual situation and their choices
- the applicable legal regime of the respective country and its purpose
- the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events
- and the nature and degree of the actual restrictions imposed on or experienced by the applicants.[24]

Regarding this test, the Ilias and Ahmed case – where the Hungarian authorities also experimented with a partially open regime (i.e. the asylum seekers were free to leave towards Serbia) – overrules in some extent the Amuur v. France case. The Grand Chamber held that Article 5 of the ECHR was not applicable since the applicants could not be deemed in detention, based on the following elements: the applicants entered the transit zone of their own initiative, with the aim of seeking asylum; the duration of the stay was only 23 days, which is not unreasonable for the purpose of examining the asylum applications; and the applicants had a concrete and effective possibility to leave the transit zone and go back to Serbia. Regarding this reasoning, namely because of the softening of the Amuur-requirements, the decision was subject to criticism.[25] Since then, the ECtHR has followed the three factors test, among others in the cases O. M. and D. S. v. Ukraine[26], M. S. v. Slovakia and Ukraine[27], M. K. and Others v. Poland[28], in border procedures, confinement and removal.

23 Amuur v. France, Application no. 19776/92, 25 June 1996

24 This test was introduced via recent case-law, mainly in R.R. and Others v. Hungary, Application no. 36037/17, 05 July 2021, Ilias and Ahmed v. Hungary Application no. 47287/15, 21 November 2019, and Z.A. and Others v. Russia Applications nos. 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019. See also Key Theme, Article 5. The notion of deprivation of liberty. p. 2.

25 Davio, 2021.

26 O. M. and D. S. v. Ukraine, Application no. 18603/12, 15 December 2022.

27 M. S. v. Slovakia and Ukraine, Application no. 17189/11, 11 November 2020.

28 M. K. and Others v. Poland, Applications nos. 40503/17, 42902/17 and 43643/17, 14 December 2020.

Another question of the access to territory relates to the summary return or pushback cases. Access to territory may be by air, land or sea. Pushbacks are "various measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-refoulement. Pushback practices demonstrate a denial of State's international obligation to protect the human rights of migrants at international borders. Pushbacks result in human rights violations such as forced returns without individual assessment and often collective expulsions with high risk of refouelment, including chain refoulement."[29] The ECtHR has held on several occasions that individuals may fall within its jurisdiction when a state exercises control over them, even on the high seas. This applies even more when this happens on land.

In the Hirsi Jamaa and Others v. Italy case[30] the applicants were part of a group of about 200 migrants who had been intercepted by the Italian coastguards on the high seas. The base of the decision was an agreement – the Treaty on Friendship, Partnership and Cooperation between Italy and Libya – that aimed at preventing irregular migration to Italy. The migrants were given no opportunity to apply for asylum.

The ECtHR stated that the case falls under the jurisdiction of Italy. According to the ECtHR, the undertaking of the contracting states is to secure to everyone within their jurisdiction the rights and freedoms defined in the convention. Though the jurisdiction is presumed to be exercised normally throughout the state's territory, and the court has accepted only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction, if the state exercises effective control and authority of an area outside its national territory, or an individual in this area, the state practically exercises jurisdiction over that area.[31] The events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel - thus in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. In response to the Italian authorities' claim that they were implementing an international agreement, the court ruled that this cannot be a reason for not having to comply with international human rights obligations in general.

29 Questionnaire of the Special Rapporteur on the human rights of migrants: pushback practices and their impact on the human rights of migrants.

30 Hirsi Jamaa and others v. Italy, Application no. 27765/09, 23 February 2012.

31 Loizidou v. Turkey, Application no. 15318/89, 18 December 1996; Banković and Others, Application no. 52207/99, 12 December 2001; Al-Skeini and Others v. the United Kingdom, Application no. 55721/07, 7 July 2011.

It comes directly from the statement of jurisdiction that the ECtHR also stated that "the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4."

Regarding the summary return, the court – citing among others the Soering decision – noted that expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the expelling state under the convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country. To decide that there is a real risk, the foreseeable consequences of the removal must be examined, taking into account the general situation in a particular country; and if the applicant alleges that they are a member of a group systematically exposed to a practice of ill-treatment, Article 3 of the convention enters into play when the applicant establishes that there are substantial grounds for believing in the existence of the practice in question and their membership of the group concerned.

The ECtHR also noted that the states which form the external borders of the EU are experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers. It does not underestimate the burden and pressure this situation places on the states concerned, and is particularly aware of the difficulties related to the phenomenon of migration by sea. However, this statement did not really play much of a role in the decision. At the same time, the court also has some questions left open: what if the Italian vessels had forced the migrant boats to return to Tripoli without transferring the migrants to their own vessels, or what if an Italian-Libyan joint patrol had carried out the interception?[32]

It is also an open question whether the ECtHR's statement about migrants on board ships 'registered in, or flying the flag of, that State' can be extended to other forms of de facto control – in particular when border guards are not in physical contact with migrants, taking into account e. g. the private vessels for search and rescue in the Mediterranean. However, these cases increasingly show that that States cannot avoid establishing their jurisdiction by not treating proceedings at sea, airports or in transit zones as taking place on their territory.[33]

There are some exceptions. The lack of active cooperation with the available procedure for conducting an individual examination of the applicants' circumstances leads the ECtHR to find that the authorities could not be held responsible for the fact

32 Pijnenburg, 2018, p. 402.
33 Thym, 2023, pp. 306–307.

that no such examination was carried out.[34] Also, in N. D. and N. T. v. Spain case, the court stated that in its view, the same principle must also apply to situations in which the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety. At the same time, however, the court also takes into account whether the state provided genuine and effective access to means of legal entry.[35] The decision was subject to criticism for the reason that "the exception is too broad and open to abuse: in principle, the very act of crossing the border fence in more than one person might qualify as unlawful entry: for instance, the Spanish domestic law explicitly classifies as an illegal and disruptive entry the mere penetration beyond Melilla's internal fence […]. But border control measures should not frustrate the access to the most basic procedural protections of refugees, which shall not be entirely defeated by an irregular entrance in a group. The 'unless clause' grants effectiveness to the border fence *qua* tool for preventing (would be) refugees from applying for asylum."[36]

In summary, where applicants can arguably claim that there is no guarantee that their asylum applications would be seriously examined by the authorities in the neighbouring third country – and that their return to their country of origin could violate Article 3 of the convention – the respondent state is obliged to conduct a thorough examination and allow the applicants to remain within its jurisdiction until such time that their claims have been properly reviewed, and cannot deny access to its territory to persons presenting themselves at a border checkpoint who allege that they may be subjected to ill-treatment if they remain on the territory of the neighbouring state, unless adequate measures are taken to eliminate such a risk.[37]

In general, if the authorities choose to remove asylum seekers to a third country, they need to consider whether their action would expose them, directly or indirectly, to treatment contrary to Article 3.[38] The core question of removal to a third country is whether or not the individual will have access to an adequate asylum procedure in that country. The other question that needs to be examined is whether there is a risk of being subjected to treatment contrary to Article 3 in the third country. In "all cases of removal of an asylum seeker from a Contracting State to a third intermediary country without examination of the asylum requests on the merits, regardless of whether the receiving third country is an EU Member State or not or whether it is a State Party to the Convention or not, it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum

34 Berisha and Haljiti, Application no. 18670/03, 16 June 2005; Dritsas and Others, Application no. 2344/02, 01 February 2011.

35 N. D. and N. T. v. Spain, Applications nos. 8675/15 and 8697/15, 13 February 2020.

36 Sardo, 2021, p. 321.

37 M. K. and Others v. Poland, Application nos. 40503/17, 42902/17 and 43643/17), 14 December 2020.

38 M. S. S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011.

seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum seekers should not be removed to the third country concerned."[39] The state has practically two options before removing an asylum seeker: they either examine their asylum application in merits, including the safety of the country of origin, or examine thoroughly whether the third country they remove the individual to has an adequate asylum system.

The core elements of an adequate asylum system is its accessibility and reliability.[40] It includes the need for the authorities to carry out of their own motion an up-to-date assessment of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice. It is the duty of the authorities to seek all relevant generally available information.[41] The expelling state cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the convention standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice.[42]

Thus we have arrived to the question of chain refoulement, when sending individuals to countries with heavily defunct asylum systems can be contested as indirect refoulement under the ECHR. The indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling contracting state to ensure that they are not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the convention.[43] Indirect refoulement also deals with the effectiveness of the third country's asylum determination system, which in turn determines the risk of refoulement to the country of origin. This principle can occur even between two EU member states: some courts have acknowledged that returning asylum seekers to Greece would violate international and human rights law through indirect refoulement, due to the ineffective asylum system. This view was confirmed by the ECtHR in the M. S. S. case. In this case, Belgian officials required asylum applicants to meet a high evidentiary threshold showing tangible information that expulsion to Greece would violate Article 3 of the convention. This practice of interstate trust exposed asylum applicants to the risk of indirect refoulement.[44]

While the concept of indirect refoulement puts a heightened pressure on states – because it establishes their responsibility not only for their own actions but for the actions of other counties too – Lehmann states there are some controversies

39 Ilias and Ahmed v. Hungary Application no. 47287/15, 21 November 2019.

40 M. S. S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011.

41 F. G. v. Sweden, Application no. 43611/11, 23 March 2016; Ilias and Ahmed v. Hungary Application no. 47287/15, 21 November 2019.

42 M. S. S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011.

43 T. I. v. the United Kingdom, Application no. 43844/98, 7 March 2020; Salah Sheekh v. The Netherlands, Application no. 1948/04, 11 January 2007; Sufi and Elmi v the United Kingdom, Applications nos. 8319/07 and 11449/07, 28 June 2011; Oudejans, Rijken, Pijnenburg, 2018, p. 617.

44 Sy, 2015, pp. 469, 471.; Rodenhäuser 2018.

with regard to returns to countries with a poor quality of protection, but below the threshold of indirect refoulement or an exposure to inhuman or degrading treatment in the receiving state, too. "The Convention does not compel refugees to seek protection in the first state where there is an opportunity to do so, but neither explicitly prohibits return to a place where refugees are not granted all the rights under the Convention. This void has led to numerous arrangements that can be referred to as 'protection elsewhere', such as 'first country of asylum' and 'safe third country' concepts. While it has been argued that the Convention precludes stripping refugees of acquired rights (and thus bars return to countries that disregard Convention rights), the minimum standards for 'protection elsewhere' arrangements remain contested."[45]

At the same time, there are concerns regarding the extraterritorial application of non-refoulement too. Although non-refoulement does not raise any issues under Article 1 of the ECHR, because the applicant is on the territory of the state concerned and therefore within its jurisdiction. However, while the ECtHR has formulated non-refoulement as an obligation to refrain from removal, it has not adopted a definition of what a positive obligation is. Given that "if non-refoulement is a positive obligation, it is a duty to prevent or protect against violations occurring extraterritorially, then fear that it might open the door to accusations of extraterritorial application of the ECHR offers another explanation as to why the European Court has not explicitly relied upon the theory of positive obligations in the non-refoulement context. Focusing on the act of removal as a violation of a negative duty to refrain from removal makes it easier for the European Court to deny that non-refoulement is an example of extraterritorial application of the ECHR. […] The ECHR should not require states to act as worldwide guarantors of the rights it contains, and that its proper function is not as an indirect guide for the conduct of states outside of Europe."[46]

4. Conclusions

The article mainly focused on questions on some aspects of asylum law. Naturally, there are more classical immigration law cases or cases that have connection to immigration law, including in ECtHR case-law. This includes travel bans,[47] residence

45 Lehmann, 2019, p. 10.
46 Greenman, 2015, p. 280, 285.
47 See e. g. Nada v. Switzerland, Application no. 10593/08, 12 September 2012; Stamose v. Bulgaria, Application no. 29713/05, 27 November 2012.

permits,[48] and human trafficking.[49] At the same time, however, asylum cases are more in the spotlight because they are more prone to serious violations and, on the other hand, in the fight to control irregular migration, states are constantly testing the convention's system of legal protection.

As we have seen, the approach taken by international law towards immigration changed fundamentally after the Second World War. "Human rights law has turned into an essential normative compass precisely because it rises above the inter-state paradigm. Human rights instruments usually apply to 'everyone' within the jurisdiction of a state, not only nationals of state parties; the 'right to have rights' was detached from nationality, with individuals being protected *qua* personhood. The open-ended texture of human rights means that they serve as a conceptual and doctrinal counterweight to state sovereignty, feeding the interests of migrants into decision-making. They will continue to play this role as a result of a built-in potential for dynamic interpretation.[50]

Recent migration-related jurisprudence provides a high level of protection at international level, essentially for those seeking to benefit from asylum procedures, regardless of whether they have a legitimate reason to seek such procedures or whether they are seeking to circumvent the stricter immigration admission procedure. States experiment with streamlining the procedure at the border as much as possible, avoiding substantive examination of applications, various forms of extraterritoriality, or summary returns - but this high level of protection is high precisely because it is increasingly closed. While the ECtHR has recognised and acknowledged that states are struggling with migratory pressures, it has not relaxed its practice on the question of jurisdiction or on return in any meaningful way. States must now, from the first contact, examine the merits of the applicant's application, at least as regards where they will be returned, what the circumstances there will be, and what their fate will be. In the case of chain or indirect refoulement, responsibility is not shared between the chambers, but each is individually responsible for everyone else involved in the return process.

For this reason, too, there is a growing perception that state sovereignty is declining, at least in terms of its influence on the composition of its population. While every state has the need to control the migratory movements affecting its territory and population, which can have a long-term impact on the country and the exercise of power, the discretionary nature of sovereignty is increasingly in decline. On the one hand, there is the need for states to be able to decide, not within their borders, but at the border or even outside the border, who should be subject to a substantive examination of their asylum claim and who should have recourse to other legal

48 See e. g. Hoti v. Croatia, Application no. 63311/14, 15 September 2014; Novruk and Others v. Russia, Application nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, 15 June 2016.

49 See e. g. Chowdury and Others v. Greece, Application no. 21884/15, 30 March 2017; Rantsev v. Cyprus and Russia, Application no. 25965/04, 7 January 2010.

50 Thym, 2023 p. 148.

channels, i.e. the immigration regime. They should do this efficiently, using human and financial resources, not to the detriment of their own population, and taking into account security concerns. On the other hand, there are the human rights traditions which became the cornerstone of Western culture after the Second World War - and from which it is not customary, or even encouraged, to retreat. These two trends should be balanced.

The practice of the ECtHR points in the direction of an increasing extension of the responsibility of European states, which also raises the risk that, while the ECHR is the most effective human rights protection system, states will tend to refuse to comply with the court's decisions in the area of enforcement. However, if we look at migration from a historical perspective, we can always see that the attitude of the modern state towards foreigners has changed with circumstances – see the labour shortages of the industrial revolution, or various crises. We seem to be living in a period of crises now, which does not favour a positive reception of migration. However, in a more secure and prosperous future, the current imbalance may well be redressed.

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