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ON HUMAN RIGHTS
A CENTRAL AND EASTERN EUROPEAN PERSPECTIVE

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THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A CENTRAL AND EASTERN EUROPEAN PERSPECTIVE

Edited by
Péter PACZOLAY



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A Central and Eastern European Perspective

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Introduction

Péter PACZOLAY

Ever since the Universal Declaration of Human Rights (1948), human rights have been a constant subject of debate in the international legal system. The acceptance of the universality of human rights, and their enforcement by supranational institutions after World War II was developed in a context burdened by contradictions:

1. The counter-majoritarian dilemma: tension between majoritarian democracy and the limits set by Rule of Law, and the-non majoritarian judicial bodies.
2. The revival of natural law in an age ruled by legal positivism.
3. The rise of supra-national organisations and international courts in the post-Westphalian age of sovereign states.

The concept of counter-majoritarian difficulty became a well-known problem in constitutional theory after Alexander Bickel introduced it in his famous book *The Least Dangerous Branch* (1962). The counter-majoritarian difficulty states a problem with the legitimacy of the institution of judicial review: when unelected judges use the power of judicial review to nullify the actions of elected executives or legislators, they act contrary to “majority will” as expressed by representative institutions.

The argument of “lack of democratic legitimacy” has been raised against the Strasbourg Court as well. One can rightly mention that the whole point of judicial review, whether national or international, is to provide a check on democratic decision-making; on a process that may, disproportionately, restrict individual human rights. Courts are, thus, by definition counter-majoritarian.

As regards the revival of natural law in an age ruled by legal positivism, it should be recalled that the Second World War also led to a revival of the justification of human rights in natural law, after the long reign of positivism. A typical example of this is the theory of “relativised natural law”, developed by the formerly positivist German legal philosopher Gustav Radbruch, when he linked legal certainty and justice, and when he referred to human rights: ‘which are superior to all written legal doctrines – the

inalienable and unquestionable rights which deny validity to the criminal commands of inhuman tyrants.’

As a counterpoint to the value pluralism, moral and philosophical relativism of our time, we are witnessing the global spread and universalism of human rights, their acceptance as universal values. However, these universalistic rights are also positive rights and can be enforced. But if we think of the mass of violations of individual rights, of the diverse forms of human suffering, from discrimination to acts of terrorism and genocide, we can see that the assertion of rights is an ongoing struggle. A striking expression of this struggle is the approach that identifies the reduction of human suffering as one of the main objectives of human rights.

The consequence of scepticism about values is the secondary status of human rights, especially in relation to economic interests. Nowadays, the reference to the value element of law, the moral element in law, appears mainly in the concepts of human rights (as inalienable rights) and constitutionalism (the transformation of natural law principles and values, including moral principles, into man-made positive law), mainly in the judgments of constitutional courts and international courts (Strasbourg, International Criminal Court).

Another source of contradictions emanates from the rise of supra-national organisations and international courts in the post-Westphalian age of sovereign states. In order to create peace and a kind of European unity, several attempts were made to establish supranational organisations, including tribunals from the Middle Ages to the first half of the 20th century. Enough to recall the names of Pierre Dubois, Sully, Abbé Saint-Pierre, Kant, Coudenhove-Kalergi and the Pan-European Movement, the League of Nations.

The historical development of the Convention and the Court has greatly influenced their present state. The Convention is the fruit of post-World War II developments, which championed human rights in response to the inhumane political and legal system of Nazism. This long and arduous process culminated in the adoption of the Universal Declaration of Human Rights in 1948. Initially, all the major powers, including the Soviet Union, were part of these efforts, but Europe soon split into two opposing blocs. Despite this tragic turn of events, the democratic Western countries took a historic step towards creating an organisation above sovereign states. Churchill, who stated in his Fulton speech on March 5, 1946 that an “iron curtain” had descended across Europe founded the European Movement. The first major success of the European Movement was the establishment of the Council of Europe in May 1949. Although limited in scope compared to the federalist ideals articulated by many, the creation of the Council of Europe was a historic step because it was the first supranational political organisation to be established in Europe. Its aim was to preserve peace based on justice and international cooperation, to promote commitment to the spiritual and moral values that form the common heritage of the peoples, and to ensure genuine and fundamental freedoms and the rule of law in the interests of economic and social development. To put these objectives into practice, the Member States signed the European Convention on Human Rights (ECHR) in 1950 (its precise, though rarely

cited, title is ‘Convention for the Protection of Human Rights and Fundamental Freedoms’) and the European Commission of Human Rights and the European Court of Human Rights (ECtHR) were established to apply it.

Despite its limited capabilities, the Council of Europe played a major role in unifying Europe on the basis of common values after the fall of the Iron Curtain, and the organisation, originally founded by 10 states, now has 46 members. The Court began operating in 1959 and delivered its first judgement on November 14, 1960. This expansion of the organisation is understandably also a source of serious difficulties, as countries with very different political, historical, cultural, and religious backgrounds, which experience their common heritage in very different ways, work together within the institutions of the Council of Europe. The democratic states concerned had a highly developed legal culture and considered their own law to be the most appropriate and rooted in tradition. These legal systems were also very different from one another, as in the case of the English and Irish, French and Italian, German and Scandinavian legal systems and families. It is easy to imagine the challenges the Strasbourg Court faced in declaring a breach of the Convention by a measure taken by a Member State, even if it was a court judgment, but over time it has gradually strengthened its authority. These challenges are also evident in the work of the Court, which can be described without bias as the most influential institution of the Council of Europe, since its primary task, in addition to redressing individual violations of rights, is to shape and influence the legal systems of Member States and the development of international human rights law.

The second major era came in the 1990s, after the fall of the Soviet-style dictatorships, when the Council of Europe expanded to include countries with no democratic traditions, or at least countries that had been without democracy for decades. These states had to learn about the institutions of the rule of law, how they work, and the mechanisms for protecting human rights. The case law of the Strasbourg Court contributed to this by providing effective remedies for specific violations of rights and promoting normative and legislative changes. The increase in the size of the territory and population covered by the Council of Europe, together with the opening up of the possibility of individual applications, can rightly be called a success story of recent decades. However, it is also true that the Court has become a victim of its own success. This necessitated the development and adoption of reforms in terms of jurisdiction, institutions, and procedures. This resulted in the most fundamental change in the life of the institution, the merger of the Commission and the Court of Justice, which met periodically, and the establishment of the permanent Court of Justice in 1998.

A serious problem of Strasbourg case-law is the relationship between the Court and the Member States: the fact that an international court is ruling over Member States that are sovereign. However, the implementation of the Convention is primarily a matter for national judges: it is for the judges of the Member States concerned to interpret and implement the provisions of the Convention, and they are the ones who know the domestic law and circumstances the best. The Strasbourg Court plays a subsidiary, complementary role in cases where the breach of the Convention is not

remedied at national level, in which case the Court enforces the rights of the Convention against the Member State concerned, but it must be particularly careful not to act as a court of fourth instance.

A new solution to the relationship between national sovereignty and international responsibility is essential to the further development of the universality of human rights. Indeed, the universality of human rights cannot be legitimately invoked only in the case of the most serious violations, since the scope of protection of these rights is much broader.

In this broader context, it is also true that those who, in human rights debates, brushing aside the experience of history and the present, defend to the hilt the unlimited sovereignty of the state and reject international responsibility, deny above all the moral foundations of the new system: that the cause of human rights, as a matter of the innate and inalienable rights of all human beings, cannot depend solely on the whims and political will of the governments of the day. A debate on the concrete content of human rights and the consistency of international accountability does not give anyone the right to question these moral foundations. There is room for debate on specific issues before international forums, since they are a common concern of the international community and not the dictates of individual actors, but no one should question the legitimacy of international responsibility.

This is particularly true in the context of our European commitment and our national sovereignty. In contrast to the ineffectiveness of global institutions for the protection of human rights, European mechanisms for the protection of human rights seek to defend the rule of law, democracy and fundamental rights through several fora. The decisions of the Council of Europe, and above all the European Convention on Human Rights and the Strasbourg Court of Human Rights, which enforces it, are a much debated but increasingly effective form of European legal protection. The decisions of the Strasbourg Court in specific cases are binding on the Member States and, if not binding on the courts of the Member States, they provide them with guidance. The European Union, and its Court of Justice, is acting increasingly as a court of fundamental rights. The decisions made by the European Courts, like those of any court, can be subject to criticism. However, this criticism should not stem from a rejection on a challenge to common moral principles. Instead, it should take the form of a dialogue — a civilised way of expressing criticism, asserting interests, and arguing convincingly for one's own position.

We cannot lose sight of the reasons for the historical development of the European institutions, which in the case of the Council of Europe is the foundation of “true democracy” through individual freedom, political freedom and the rule of law. Regardless of its initial economic framework, the real aim of European integration was to establish peace in Europe. These goals, although they may be overshadowed by the successes and failures of recent decades, are still valid today. I repeat: a debate on the specific content of certain rights and the consistency of the accountability of some of them does not in any way constitute an argument against the foundations of the mechanisms for the protection of rights and the legitimacy of their existence.

Despite the difficulties referred to above, one of the keys to the success of the Strasbourg Court is that it can only shape the internal legal systems of the Member States within certain limits and constraints. First and foremost, the Convention has a different legal status in the legal systems of the Member States – it may have constitutional status, higher than ordinary laws, or simple legislative status, and its enforcement varies accordingly. The Court itself can only rule on violations of the limited rights regulated in the Convention, while the catalogue of fundamental rights in national constitutions covers a wider range. It consistently applies the principle of subsidiarity and cannot replace the highest national courts. As the Council currently consists of 46 countries with significantly different legal systems and traditions, it allows a wide margin of appreciation for national characteristics and seeks to find a common denominator on which there is consensus among the Member States. This does not mean that serious conflicts do not arise with the Member States concerned after certain judgements.

The authority of the Strasbourg Court is reinforced by the fact that the Convention has developed a strong system of sanctions. The Court enforces the international convention, which is binding on the Member States, and which authorises it to impose “just satisfaction”. The parties to the Convention undertake to consider the judgments of the Court binding on them in all cases in which they are parties. The execution of final judgments declaring a violation of the Convention is supervised by the Committee of Ministers. The state found to be in violation is obliged to remedy the violation, but it enjoys broad discretion in doing so, meaning that the state determines how to remedy the violation of the Convention. The measure chosen may be individual in nature (e.g., reopening court proceedings) or general in nature (e.g., legislation).

It is mainly the latter factor, beyond individual legal violations, that has led to the Court being viewed by an increasing number of people as exercising a kind of constitutional jurisdiction, with many considering the ECtHR itself to be the European constitutional court. I agree with those who distinguish between the Convention and the Court. In my opinion, this distinction weakens the arguments in favour of the Strasbourg Court’s role as a constitutional court. The binding nature of the Convention under international law is recognised by the States Parties, but the Convention is not a European constitution; rather, it guarantees rights to persons under the jurisdiction of the states. Moreover, the catalogue of protected rights is partial, even compared to other international conventions. At the same time, there are many common or at least similar elements in the functioning of the Court and national constitutional courts: the fundamental rights protected, the procedures, the methods and techniques of argumentation, and the principles developed. It is fair to say that the Court’s reasoning is rooted less in international law and much more in constitutional law.

Indeed, signs pointing towards judicial review cannot be ignored in the changes to the text of the Convention and in the practice of the Court. Under Article 46(4) of the Convention, the Committee of Ministers may request the Court to decide whether the Contracting Party has failed to fulfil its obligations in connection with the execution of the judgement, and this provision seeks to address the flood of similar or identical

motions resulting from the significant expansion of the Council of Europe and the removal of restrictions on the right of individual complaint. As a general rule, judgments that declare or prescribe solutions to systemic problems can be remedied by legislation, which indirectly criticises the regulations in force in the state concerned that are causing mass problems. This current example also proves that the application of the Convention and court practice are not based solely on the text of the Convention. The pilot judgment as a specific procedure is not included in the Convention but has been institutionalised by the Court in its own rules of procedure. This procedure may be applied if, on the basis of the facts set out in the application, a structural or systemic deficiency in the legal system of the Member State complained of can be identified and if, as a result of this deficiency, a number of further similar complaints are likely to be lodged. On the one hand, the Court must identify the defect or deficiency in national law that may cause mass violations, and on the other hand, it must indicate what remedies the State concerned must provide at the national level to remedy the violation. So, again, this is not a matter of judicial review, but rather the state must determine the preventive or compensatory remedies that meet the criteria laid down by the Court. In my opinion, therefore, although the ECtHR is not a constitutional court, it does indeed show signs of playing a constitutional role.

The present volume contains 21 chapters. The volume gives an overview, article by article, of the European Convention on Human Rights and its additional protocols, which are not included in the text of the Convention but are directly applicable. The chapters are structured according to the articles of the Convention. Following an introduction (which covers the circumstances surrounding the creation of the provision in question), they discuss the scope and content of the protected right, all relevant issues, the relevant case law of the Court up to the most recent judgements, the negative and positive obligations incumbent on states, and the relationship between the right in question and other rights. The provisions of the Convention relating to the procedure and institution of the Court are also analysed. And each chapter focuses on the implementation of the Convention in Central and Eastern European countries.

I introduce shortly the most essential topics covered by those chapters not aiming to cover all the issues addressed by them but only highlighting some of the topics dealt with.

The first chapter of the volume, The protection of human rights in the Council of Europe. The European Convention on Human Rights in general terms, focuses on the aims of the foundation of the Council of Europe, and how it developed into a complex intergovernmental organisation.

It describes its adoption, structure, content, protocols and doctrines developed by the European Court of Human Rights. The chapter presents the incorporation of the Convention at the domestic level, its impact on the national legal systems and its role in the constitutional order of Europe.

The second introductory chapter (The European Court of Human Rights: Procedural and Jurisprudential Framework) describes the institutional framework of the Court. It demonstrates how the structure of the Court changed after the adoption

of the additional protocols, namely Protocol 11 (abolition of the Commission, rules regarding the judges, the tasks of the different formations of the Court, admissibility criteria, third-party intervention, friendly settlements, and public hearings), Protocol 14 (terms of office of the judges to nine years and no re-election, single-judge formation to declare applications inadmissible) and Protocol 15 (principle of subsidiarity and the margin of appreciation doctrine), and describes the current institutional structure. The next section is about the procedural framework of the Court, the procedure of inter-state cases and individual applications (criteria for victim status) and the adoption of the advisory opinion (Protocol 16).

The following chapters analyse one by one the most important human rights under the Convention.

The chapter on Right to life. Abolition of death penalty provides an analysis of Article 2. It starts with a historical overview of the abolition of death penalty, with special focus on the perspective of human rights protection (its irreversibility, chances of judicial mistake, human dignity), and the questions of abolition in Central and Eastern Europe. It also gives a contextual analysis of Article 2.

The chapter on Article 3: Prohibition of torture analyses the appearance, application, implementation and presence of the prohibition of torture in several international human rights instruments. The chapter starts with providing a definition of torture and examining it in three aspects (criminal law, procedural law, migration and refugee related matters) and talks about the evolution of the prohibition on international level. It examines Article 3 through the case-law of the Court. It describes among others the adoption of this provision, its codification in domestic criminal law, and the evolution of its interpretation.

The chapter on Article 4: Prohibition of slavery and forced labour starts with the interpretation of the provision as the Convention outlines two distinct prohibitions from which universally recognised subjective rights are derived. The interpretation has been expanded by the Court to cover among others human trafficking. The chapter provides the analysis of the case law of the ECtHR with special focus on the definition and interpretation of slavery, servitude, forced or compulsory labour and human trafficking.

The chapter on Article 5: Right to liberty and security explains that the terms used in this provision refer to physical freedom and security and lists the conditions to legally deprive someone of his/her liberty. In the following the chapter examines the case law of the ECtHR and based thereon, describes the interpretations of the Article (distinction between “deprivation of liberty” and “mere restriction of liberty”). Subsequently, the author presents the most important principles when it comes to deciding on the lawfulness of the detention (the individual’s specific circumstances, subject-oriented and object-oriented aspects, compliance with the Convention, procedural and substantive aspects).

The chapter on Article 6: Right to a fair trial, analyses of the interpretation of the terms “right to a fair trial”, “criminal charge” and “civil rights and obligations”. The author explains who can be a subject to Article 6, the question of misdemeanours

and how to determine the civil rights and obligations. The next section is about A6 (1), regarding the independence and impartiality of tribunals, established by law (the right to a court and the right of access, definition of a tribunal, independence and impartiality, interpretation of “established by law”), the right to a fair and public hearing (its interpretation, principle of due process and adversarial proceeding, right to be present in court, right to a statement of reason) and the criterion of reasonable time (principle of expeditiousness of proceedings, interpretation of “reasonable period of time” by three criteria: complexity of the case, the conduct of the parties/authority to the proceeding, overload of the competent authority). The chapter ends with the analysis of the specific requirements found in A6 (2)–(3), namely the presumption of innocence, and minimum rights of those charged with a criminal offence.

The chapter on Article 7: (No punishment without law) is composed of 5 main parts and all of them aims to give definitions and provide interpretations of Article 7, then Article 4 of Protocol 7 (Right not to be tried or punished twice), Article 2 of Protocol 7 (Right of appeal in criminal matters), Article 3 of Protocol 7 (Compensation for wrongful conviction), Article 1 of Protocol 41 (Prohibition of imprisonment for debt) and to discuss the issues in connection with their applicability.

The chapter on Article 8: Right to respect for private and family life, provides an analysis of this right and describes how the right to private and family life developed in Europe, especially in the Central and Eastern European states. The next section of the chapter is a detailed case law analysis of the ECtHR including the elements that are under the protection of Article 8, the three spheres of the right to the protection of private life (the physical, psychological or moral integrity of individuals, privacy and the protection of personal autonomy and identity) and the broad interpretation of the right to family life (relations between spouses or persons in a stable or causal relationship, relations between parents and their children, issues related to adoption and assisted procreation).

The chapter on Article 9: Freedom of thought, conscience and religion describes the scope of the article, its terminology, the subjects and the scope of the protection of those rights and its extension by the Court.

The chapter on Article 10: Freedom of expression starts by emphasising the significance and the historical development of the freedom of expression. Then the author delves into the analysis of the Article starting with the dogmatic structure of the article, justification of the protection of expression, the definition of expression and finishing with the challenges of today.

The chapter on Article 11: Freedom of assembly and association, first emphasises the close connection between the right of assembly and right of association. The author continues with the analysis of the interpretation of Article 11 and Article 15 on derogation in time of emergency, with special focus, on the one hand on the underlying meaning of the title of the provision (the relationship between the state and the individual and the fundamental difference between the two rights, namely in the purpose for which they are exercised), on the other hand analysing the scope of the Article (what it includes and excludes).

The chapter on Article 12 provides an analysis of the right to marry, with special focus on the current challenges and limits of the interpretation. The author gives a case law analysis of the ECtHR regarding the scope of the provision and stating that it is being extended by the Court far beyond the traditional marriage (e.g. between two people of the opposite sex). It also explains the limitations of Article 12 such as marriageable age, consanguinity, the number of spouses, consent and capacity. It also presents the interpretation of Article 5 of Protocol 7 (equality between spouses) and examines the questions of transsexuality and same-sex couple marriages in this context.

The chapter on Article 13: The right to an effective remedy, emphasises the obligation of the state to effectively protect the rights enshrined in the Convention and explains that due to the “proceduralisation” of the Convention rights, in some cases there is an overlap between Article 13 and other rights.

The chapter on Article 14: Prohibition of discrimination, starts with historical overview of the evolution of the notion of non-discrimination and equality. It deals with the characterisation of Article 14, its ancillary nature (its interpretation and relation to other rights enshrined in the Convention), the “ambit-test” and relative autonomy (the changes in the scope of the Article), the doctrine of additional rights and the horizontal effect of Article 14 (state obligation to ensure that prohibition of discrimination is also respected in relations between private individuals, thereby imposing both negative and positive obligations on the states). Furthermore, it explains the significance of Article 1 of Protocol 12 (general prohibition of discrimination) and the scope of its protection.

The chapter on Article 1 of Protocol 1 provides a description of the genesis and evolution of the protection of property, relying on the case law of the Court. By examining many cases of the Court, the author places special emphasis on the guarantees in case of deprivation of possessions, its definition, the subsequent procedure, the Court’s test of “fair balance”, when it is permissible, and also the concept of “public interest” and “general interest” and the question of general protection of the environment.

The chapter on Article 2 of Protocol 1: Right to education, underlines the importance of education and gives a short summary of how the availability of education changed over time. In the next section the author gives a general overview of the right to education (its definition and features such as: generality, universality, mutuality, accessibility etc.), analyses the ECtHR case law (the scope of the protection, the right of parents to have their children educated in accordance with their religious and philosophical beliefs, the right to establish so-called non-state schools, the limitations on the rights, the obligation of the state to regulate how education is implemented, the issue of discrimination and the teachers’ right to strike).

The chapter on Article 3 of Protocol 1: Right to free elections starts by emphasising the importance of the right to election and gives a brief description of the history of voting rights, from the formation of the first parliament to the principle of universal, free, equal, secret and direct suffrage. In the next section the author gives a contextual analysis of the provision.

In the chapter on Article 2 of Protocol 4: Freedom of movement, the author gives a conceptual analysis of the Article, focusing on the conditions of restriction and their consequences (difference between individual interest and societal need, comparison between this Article and other rights in the Convention, and criteria for the admissibility of restrictions). The chapter ends with a very detailed analysis of the case law, analysing each paragraph of the Article and highlighting the importance of its distinction from Article 5 (right to liberty and security) and Article 8 (right to respect for private and family life), with a special emphasis on the Central and Eastern European countries, by giving a detailed description of several cases of the Court.

The chapter on Article 3 of Protocol 4 (Prohibition of expulsions of nationals) and on Article 4 of Protocol 4 (Prohibition of collective expulsion of aliens) first gives an overview on the prohibition of expulsion of nationals, its interpretation and fundamental importance. It then analyses the relationship between state sovereignty and individual rights (the redefinition of state sovereignty, the question of national interest, the principle of mutual recognition, and the principle that sovereignty must comply with universally accepted international norms). The next section is about the prohibition of collective expulsion of aliens, which starts with the purpose of Article 4 of Protocol 4, and the states' obligation to individually access each case, then it analyses the case law of the Court and the legal framework built by it, and the end of the section is about the mass migration issues in Europe. The last section is about the principle of non-refoulement, its definition, the obligations of the state and the case law of the Court.

The last chapter of the volume deals with the Concluding Reflections on the Central and Eastern European Region and the European Court of Human Rights. The chapter starts with the description of the enlargement process of the Council of Europe with the former socialist countries in the 1990s and 2000s; and the author emphasises the importance of the democratic consolidation of the Central and East European (CEE) countries. In the next section the author analyses the development of the Court's jurisprudence through CEE cases. It starts by demonstrating the pilot judgement procedure through cases about structural and systemic problems (e.g. detention conditions, deficiencies of the compensation system, restitution of the properties nationalised during the communist regime and compensation, excessive length of proceedings and the lack of domestic remedies) in CEE countries. Next, the author analyses the Court's jurisprudence by describing milestone cases regarding specific CEE countries.

I warmly recommend this volume to readers: it is a useful and indispensable handbook for those interested in European human rights jurisprudence, and it opens up a new world for those who have not heard much about the subject before. The future of human rights and the legitimacy of international legal protection are currently the subject of lively political and legal debate. This makes the publication of such an objective commentary particularly timely.

The special added value of this volume is that it examines the human rights protected by the Convention from a Central and East European perspective,

presenting also the emphasis of the Strasbourg jurisdiction on the legal system of these countries.

The Court refers to the Convention as a “living instrument,” and this is true in two senses: on the one hand, the Member States are constantly reforming it and adapting it to changing challenges and on the other hand, the Court interprets the provisions of the Convention in a deliberately “evolutionary” manner, i.e., in accordance with the spirit of the Convention. This dual development is well illustrated in the book. Thus, in addition to an up-to-date description of each article, the reader is also presented with a very interesting historical dimension.

The Protection of Human Rights in the Council of Europe – The European Convention on Human Rights in General Terms

Tanja KARAKAMISHEVA-JOVANOVSKA

‘The dark shadow we seem to see in the distance is not really a mountain ahead, but the shadow of the mountain behind – a shadow from the past thrown forward into our future.’
David Trimble¹

ABSTRACT

The Council of Europe (CoE) mission is to keep the peace in Europe and protect human rights and freedoms. It tackles, systematically, the root causes of tensions and disputes before they erupt into conflicts. The consequences of the Second World War (WWII) on the European continent were one of the main reasons for establishing the CoE, as human rights were under serious threat. After WWII and the Holocaust, there was a need to protect people from the State, ensure that the atrocities would never be repeated and safeguard fundamental rights. Furthermore, there were discussions about transforming relationships in international law, so that individuals could protect their rights internationally as well. The CoE declared its peace orientation, based on justice and international cooperation, as a vital element for the preservation of human society and civilisation. According to Article 1, paragraph 1, of the Council’s Statute, ‘The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress’. However, greater unity cannot be achieved without peace and human rights protection.

In the new European era, the issue of human rights has grown into a key topic. The CoE is part of the European architecture and its role should not be seen in cooperation with other international organisations and states. The ideals and principles of the CoE have been codified in more than 200 treaties drawn up by the CoE over 75 years. These documents, coupled with the judgments of the European Court of Human Rights (known as the Strasbourg Court; ECtHR), the recommendations and resolutions of the Committee of Ministers, the Parliamentary Assembly and the Congress of Local and Regional Authorities, and the recommendations of the Venice Commission and other CoE’s monitoring and advisory bodies, including the Commissioner for Human Rights, are the cornerstones of a

1 Trimble, 1998.

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unique system that protects the fundamental rights of more than 700 million people in 46 Member States.²

KEYWORDS

CoE, human rights, fundamental freedoms, peace, human dignity, rule of law, democracy

1. Introduction

The establishment of the Council of Europe (CoE) in 1949 represents one of the earliest and most significant institutional manifestations of the European peace project that emerged in the aftermath of the Second World War (WWII). Conceived as a forum for dialogue, cooperation and the promotion of shared values among European states, the CoE laid the foundations for a new continental order based on the principles of human rights, democracy and the rule of law. Its creation was the culmination of a long intellectual and political evolution rooted in centuries of philosophical reflection on the idea of a united Europe. Thinkers and statesmen alike, ranging from Richard Coudenhove-Kalergi and Aristide Briand to Winston Churchill and Ernest Bevin, contributed to shaping the conceptual and political groundwork for European unity, advocating for cooperation that could prevent the recurrence of war and totalitarianism. Within this historical and ideological framework, the CoE emerged as the first pan-European political organisation with a mandate to achieve closer unity among its members through common action in the pursuit of peace, justice and international cooperation.

The CoE's founding statute, signed in London on 5 May 1949, explicitly reaffirmed the commitment of its Member States to the 'spiritual and moral values' constituting Europe's shared heritage, values seen as the true source of individual freedom, political liberty and democracy. This foundational vision positioned the CoE as a moral and institutional response to the devastation of war and the emerging ideological divide of the Cold War, aspiring to rebuild Europe through economic reconstruction and a renewed commitment to democratic governance and human dignity. Over the following decades, the CoE evolved into a complex intergovernmental organisation, encompassing a range of institutional mechanisms designed to uphold these objectives. Through its Parliamentary Assembly, Committee of Ministers, and the establishment of the European Court of Human Rights (ECtHR), the CoE developed a distinctive model of supranational governance that combined legal enforcement with political deliberation and cooperation. Its expanding membership (including nearly all European states) reflects its continuing relevance as the continent's primary guardian of human rights and democratic standards. Hence, the CoE has become more than a post-war political experiment; it stands as Europe's 'School of Democracy', shaping the legal and institutional culture of an entire region.

2 High-Level Reflection Group of the Council of Europe, 2022.

The following analysis explores the historical development, institutional architecture and normative significance of the CoE. It examines its foundation as a peace project, its organisational structure and its principal organs, particularly the Parliamentary Assembly, the Committee of Ministers, and the ECtHR, and its broader impact on European integration, human rights protection and democratic consolidation. By tracing the CoE's evolution and functions, the discussion illuminates how it has redefined the political, legal and ethical landscape of post-war Europe, providing the normative backbone of what is understood as the European democratic order.

2. The Establishment of the CoE as a Peace Project – Its Mandate and Relevance

The CoE is considered the first European political organisation built to achieve closer unity and cooperation among European states.³ The idea of a united Europe was analysed by eminent philosophers for centuries. As early as the Enlightenment, Immanuel Kant's seminal essay *Perpetual Peace* (1795)⁴ articulated the vision of a federation of free states, governed by law and reason, to secure lasting peace on the continent. In the 19th century, Italian philosopher Carlo Cattaneo used the term "United States of Europe" to express his aspiration for a federation grounded in liberty and civic autonomy.⁵ Simultaneously, Victor Hugo, in his famous speech at the Paris Peace Congress of 1849,⁶ imagined a Europe reconciled under the banner of fraternity, where wars between nations would give way to the unity of people.

These early intellectual blueprints shaped the European imagination, providing the moral and philosophical scaffolding for later political projects of integration. In the turbulent decades that followed the First World War, this ideal was revived by visionaries, such as Richard Coudenhove-Kalergi, whose *Pan-Europa* movement called for a continental federation to secure peace and resist totalitarianism,⁷ and Aristide Briand, who in 1929 presented his famous proposal for a "federal link" among European states before the League of Nations.⁸ Together, these initiatives transformed the idea of European unity from a philosophical aspiration into a concrete political agenda, paving the way for institutional developments after WWII.

French statesman Aristide Briand, who served 11 times as the prime minister of France during the Third French Republic, in a Memorandum on European Federal Union, proposed to the League of Nations a "federal link" between the European people. His ideas of "European Federation" primarily focused on economic matters

³ Bates, 2010; See, Duranti, 2017.

⁴ Kant, 1795.

⁵ Arban, 2018.

⁶ European Society, 2019.

⁷ He was a politician, philosopher and the Count of Coudenhove-Kalergi. As a pioneer of European integration, he served as the founding president of the Pan-European Union for 49 years.

⁸ Roobol, 2002.

without encroaching upon national sovereignty. However, the memorandum was not welcomed in France or anywhere in the world. The idea of a full economic European union was rejected and the mention of “federal link” as a political aspect of the project awakened suspicion. Nevertheless, in 1946, in his famous speech in Zurich, Winston Churchill used the term “United States of Europe”. Similarly, in a speech to the House of Commons on 22 January 1948, the British Foreign Secretary Ernest Bevin declared that British foreign policy aimed to create a Western European “spiritual union” based on respect for human rights. This was a reaction to the Union of Soviet Socialist Republics’ attempts to force occupied Eastern and Central European countries into a military, economic and political alliances.⁹

The movement in favour of European unity took place at the Hague Congress of Europe in May 1948, attended by 660 delegates, including 20 prime ministers and former prime ministers. It called for a United Europe, the protection of free movement of persons, ideas and goods, a Charter of Human Rights, a Court of Justice and a European Assembly. These ideas were further developed in a political resolution, proposing an economic and political union in which the European nations would transfer and merge certain sovereign rights. The proposals were taken up by the foreign ministers of France, the UK and the Benelux countries. On 5 May 1949, the CoE was founded in London when 10 European countries (Belgium, Denmark, Ireland, Italy, France, Luxembourg, the Netherlands, Sweden, Norway, and the UK) signed the CoE’s statute known as the Treaty of London. This treaty defined the CoE as an international organisation open to all European states devoted to ‘the pursuit of peace based on justice and international cooperation’.

The CoE is a part of the European architecture. In the opinion of Robert Schuman, the Council of Europe was, first and foremost, a testing ground for ideas. Paul-Henri Spaak was the first President of the Assembly, whose members included eminent political personalities in Western Europe. The Assembly raised hopes because various visions of a united Europe were discussed openly. Its representatives were not tied by electoral concerns in their home countries or partisan voting instructions. Hence,

9 Polakiewicz, 2019. In a speech in 1929, French Foreign Minister Aristide Briand floated the idea of an organisation, which would gather European nations together in a “federal union” to resolve common problems. However, it was Britain’s wartime leader, Sir Winston Churchill, who first publicly suggested the creation of a “Council of Europe” in a BBC radio broadcast on 21 March 1943, while WWII was still raging. In his words, he tried to ‘peer through the mists of the future to the end of the war’ and think about how to re-build and maintain peace on a shattered continent. Given that Europe had been at the origin of two world wars, the creation of such a body would be, he suggested, “a stupendous business”. He returned to the idea in a well-known speech at the University of Zurich on 19 September 1946, throwing the full weight of his post-war prestige behind it. However, there were several statesmen and politicians across the continent, many of them members of the European Movement, who were quietly working towards the creation of the council. Some regarded it as a guarantee that the horrors of war could never again be visited on the continent, others came to see it as a “club of democracies”, built around a set of common values that could stand as a bulwark against totalitarian states belonging to the Eastern Bloc. Others saw it as a nascent “United States of Europe”, the resonant phrase that Churchill had reached for at Zurich in 1946. Churchill, 1946.

the CoE became a forum for dialogue, cooperation and drafting framework texts on matters concerning the European identity. In the Preamble of the CoE's statute, the countries emphasised the motive of association, 'reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'. The Member States believed that, for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there was a need for a closer unity between like-minded European countries. Hence, it was necessary to create an organisation which would bring European States into closer association.¹⁰

The most important political and sociological fact of the post-war world was the ideological and military conflict between the East, socialist block of countries and the West, led by the US. This conflict was manifested in various crises, such as the Korean War (1950–53) and the Soviet intervention to crush the uprising in Hungary in 1956.¹¹ By the 1950s, the Soviet Union had largely given up its opposition to international law in favour of a pragmatic acceptance of international law as a form of peaceful coexistence, creating a wide network of procedural rules to regulate inter-block relationships. However, US lawyers began to consider international law as a technique for pursuing American values and foreign policy goals.

The CoE's main objectives are to ensure pluralistic democracy within its Member States, protect human rights and the rule of law. Apart from these primary goals, the CoE, as the oldest European organisation, promotes and stimulates the development of the European cultural identity and diversity; attempts to find solutions to the problems facing European society, such as discrimination of minorities, xenophobia, intolerance, human cloning, terrorism, human trafficking, organised crime and corruption, internet crime, protection of the human environment, drug addiction, violence against children; and consolidate democratic stability in Europe by supporting political, legislative and constitutional reforms. The CoE has developed policies and practices in all spheres of political society related to human rights and the maintenance of peace and stability, except defence policies, which are considered an exclusively national issue.¹² Hence, the CoE is an international organisation that deals with four key areas: legal affairs, human rights, social cohesion, and education and culture, organised in four general directorates, with several secretariats and departments.

The key functions of the CoE are effective supervision and protection of fundamental rights and freedoms, identifying new threats to human rights and dignity, develop public awareness about the importance of human rights and promote human rights education and professional training. Its statute states that serious violations of human rights and fundamental freedoms are grounds for suspension or exclusion

10 Council of Europe, 2015.

11 Koskeniemi, 2011.

12 Council of Europe, 1949, Chapter 1, Art.1.

of a Member State from the organisation.¹³ The CoE is often called Europe’s “human rights watchdog”. The establishment of democratic structures based on the rule of law and its political culture is a time-consuming process, which requires patience. It takes more than a single generation to familiarise people thoroughly with the values behind these structures and the behavioural patterns which sustain them.¹⁴

3. Organisational and Institutional Structure of the CoE

The CoE is the oldest European intergovernmental organisation. Its founding states were convinced of their common heritage of political traditions, ideals, rights, freedoms and the rule of law. They agreed that fundamental freedoms were the foundation of justice and peace. Hence, they created the European Convention on Human Rights (ECHR) with twofold objectives. The ECHR was set up to prevent atrocities like the ones committed during WWII from repeating, achieve a greater unity between the Member States, promote the development of democracy in Europe and bring lasting peace to the continent.¹⁵

The CoE has 46 Member States, representing over 700 million Europeans. Of these, 27 are European Union (EU) members. Any European country that supports the rule of law, human rights and democracy can join the CoE. Six countries – the US, Canada, Japan, Mexico, the Vatican and Israel – have observer status. Membership is voluntary and countries can leave anytime by notifying the General Secretary. However, if a member violates CoE principles, it can be suspended or removed.

The CoE has several key bodies. The Parliamentary Assembly discusses European social and political issues. The Committee of Ministers is the main decision-making body, made up of foreign ministers or diplomats. The Congress of Local and Regional Authorities supports local and regional democracy. The Conference of International NGOs connects policymakers with citizens. The Commissioner for Human Rights promotes human rights awareness and protection. The Secretariat includes a staff of about 1,000 people supporting CoE operations. The Secretary General leads the CoE, managing strategy, activities and the budget, with help from the Deputy Secretary General.

3.1. Parliamentary Assembly

The CoE’s Parliamentary Assembly is the oldest international parliamentary body composed of democratically elected members. In 1974, its name changed from “Consultative Assembly” to “Parliamentary Assembly” to better reflect its role. According to Article 22 of the CoE’s statute, the Assembly serves as the Council’s deliberative body, discussing relevant matters and presenting recommendations to the Committee

13 Article 8 of the Statute.

14 Europe’s Human Rights Watchdog, n.d.a.

15 Council of Europe, 1950.

of Ministers. National delegations vary in size based on the country's population, with major states like France, Germany, Italy, Turkey and the UK having 18 representatives, while the smallest states, such as Andorra, Liechtenstein, Monaco and San Marino, have two. In total, the Assembly consists of 612 members – 306 representatives and 306 substitutes – appointed or elected by their national parliaments.

Delegations must reflect the political balance of the country's national legislatures, including members from both ruling and opposition parties. The Assembly operates with European political groups, including Socialists, Christian Democrats, Liberals, European Democrats, the Unified Left, Free Democrats and independents. Gender balance is required in delegations and participation may be suspended if this requirement is not met or if a country fails to uphold democracy, human rights and the rule of law.

As a driving force, the Parliamentary Assembly discusses and makes recommendations to the Committee of Ministers on relevant issues, either on its own or at the Committee's request. It adopts resolutions that do not require ministerial approval. Additionally, it elects key CoE officials, including the Secretary General, the Deputy Secretary General, its own Secretary General, judges of the European Court of Human Rights (ECtHR) and the Human Rights Commissioner. The Assembly meets four times a year for five-day sessions, during which parliamentarians debate Europe's most pressing socio-political issues. They can adopt three types of texts: recommendations (proposals for the Committee of Ministers), resolutions (decisions the Assembly can implement independently) and opinions (responses to questions from the Committee of Ministers).

The Assembly has nine general committees, each focusing on specific topics, with some having sub-committees. Furthermore, ad hoc committees may be created when needed. The general committees include:

Committee on Political Affairs and Democracy – Handles political matters (includes sub-committees on the Middle East, External Relations and the Western Balkans); Committee on Legal Affairs and Human Rights – Covers legal and human rights issues (includes sub-committees on human rights, artificial intelligence (AI) and human rights and ECtHR judgments); Committee on Social Affairs, Health and Sustainable Development – Focuses on social policies, public health and sustainability (includes sub-committees on the European Social Charter, Children, Public Health and the European Prize); Committee on Culture, Science, Education and Media – Deals with cultural, educational and media issues (includes sub-committees on culture and democratic values, youth and the future and media and information society); Committee on Migration, Refugees and Displaced Persons – Handles migration and refugee issues (includes sub-committees on migrant children, diasporas and human trafficking); Committee on Equality and Non-Discrimination – Promotes equality (includes sub-committees on gender equality, minority rights and disability); Committee on Rules of Procedure, Immunities and Institutional Affairs; Committee on Election of Judges to the European Court of Human Rights; Committee on Monitoring of Member States' Obligations.

These committees meet regularly, sometimes in different Member States. Public debates in the Assembly address major European issues, often with government leaders and ministers participating. The Assembly operates independently, monitoring compliance through the Monitoring Committee and participating in international election observations. It issues resolutions, that is, statements on key issues directed at national parliaments, and recommendations, that is, policy proposals for the Committee of Ministers, requiring a two-thirds majority to pass (resolutions need only a simple majority). The Bureau, the Assembly's steering body, meets thrice a year between sessions to maintain continuity. The Assembly defends human rights, democracy and the rule of law. It holds governments accountable, monitors human rights violations, ensures compliance with democratic standards and recommends sanctions when necessary.

3.2. Committee of Ministers

The Committee of Ministers is the decision-making organ of the CoE. Its first meeting took place on 8 August 1949 at Strasbourg Town Hall, under the leadership of the then French Foreign Minister Robert Schuman. The Committee of Ministers consists of the Foreign Affairs Ministers of 46 Member States. The Holy See, Japan, Mexico and the US have an observer status. The Committee meets at ministerial level annually for a plenary session. During the *Ministerial Conference*, pre-negotiated decisions are formally adopted and become operative. The presidency is held by Member States on a rotating six-month basis, in accordance with the alphabetical order of their English names, consistent with the general institutional practice of the Council of Europe. The Committee of Ministers performs three main roles. As the voice of the governments, it enables foreign ministers to express their national approaches to the actual European problems. As a collective forum, it is a platform where European responses to these problems are presented. As a watchdog, with the Parliamentary Assembly, it represents the CoE's values.¹⁶ Its work includes political dialogue and communication with the Parliamentary Assembly and with the CoE Congress of Local and Regional Authorities. Furthermore, it has the authority to invite European countries to become CoE members (Articles 4, 5 and 6 of the statute) and can suspend or terminate countries' membership. The process of admission begins when the Committee of Ministers receives an official application for membership, followed by consultations with the Parliamentary Assembly, which finally adopts an opinion.

Permanent CoE representatives meet weekly. To prepare all aspects for the forthcoming CoE's session, the delegates and the diplomats under their authority meet regularly within the framework of the following seven rapporteur groups:¹⁷ Rapporteur Group on Legal Co-operation, on Education, Culture, Sport, Youth and Environment, on Social and Health Organisations, on Programme, Budget and Administration, on Democracy, on Human Rights and on External Relations. The Committee of Ministers

¹⁶ Ministry of Foreign Affairs and International Cooperation.

¹⁷ Europe's Human Rights Watchdog, n.d.b.

is composed of the Ministers of Foreign Affairs of the Member States. It determines the CoE's priorities and adopts recommendations, conventions, and agreements, as well as the CoE's budget and staff regulations. Its recommendations are commonly described as *soft law*, as they are not legally binding on Member States. Accordingly, Member States are under no legal obligation either to implement these recommendations or, initially, to sign the ECHR. A Member State may choose not to engage with the ECHR at all, treating it as irrelevant or inapplicable to its national context; in such a case, it is not bound by its provisions. A State may also sign the ECHR, thereby expressing political commitment to its values, but signature alone does not create binding legal obligations. Only once a State has both signed and ratified the ECHR does it become legally bound under international law to implement its provisions domestically. At that point, the State becomes a party to the ECHR and must ensure respect for its rights throughout its territory. Most of the CoE's conventions are not directly applicable within a Member State. However, they are implemented through an appropriate national legislation or by adapting the domestic law to correspond with the Convention's rules.¹⁸

The conventions and recommendations are drafted by government experts who report to the Committee of Ministers. They only have a legal status after the Committee of Ministers adopts them. The conventions focus on current political issues, formulate the priorities of the organisation and supervise the intergovernmental work of numerous expert committees and the execution of the ECtHR's judgments. Decisions regarding the suspension of the rights of representation, withdrawal or exclusion of a Member State are under the Committee of Ministers. Under Statutory Resolution Res (51) 30, it must consult the Parliamentary Assembly before inviting a Member State to withdraw from the CoE. Furthermore, according to Article 20 (d) of the Statute, for most decisions, including the adoption of conventions and agreements, two-third majority is needed. In practice, consensus is required on major decisions, which favours the adoption of resolutions reflecting the lowest common denominator. The Committee of Ministers may accept, reject or modify the Parliamentary Assembly's proposals or take *a priori* decisions on the proposal of one or several governments or of one of the intergovernmental committees. Article 17 of the CoE's statute empowers the Committee of Ministers to set up advisory and technical committees or commissions for specific purposes. In 2018, there were more some 20 steering committees or other bodies implementing the CoE's programme of activities. Apart from governmental experts, representatives of international non-governmental organisations may participate as observers. Around 300 non-governmental organisations currently have participatory status with the CoE.

3.3. The European Court of Human Rights (ECtHR)

The ECtHR was established in 1959 under the ECHR. It enjoys all the prerogatives of an independent international tribunal. The ECtHR is a regional human rights judicial

¹⁸ De Leeuw, 2005.

body in Strasbourg. Till date, it has delivered more than 10,000 judgments regarding violations of the ECHR provisions. In 1998, the European human rights system was reformed to eliminate the now-former European Commission of Human Rights, which decided on the admissibility of complaints, oversaw friendly settlements and referred some cases to the Court. Individual victims may submit their complaints directly to the ECtHR.¹⁹ Applications submitted by individuals and States concern civil and political rights violations, and the Court cannot take up a case on its own initiative. An individual, group or non-governmental organisation submitting a complaint does not have to be a citizen of a Member State. However, they must refer to violations of the Convention allegedly committed by a Member State, which directly and significantly affected the applicant.

The ECtHR is organised into five sections, each with a judicial chamber and a President, Vice-President and several judges. The Court's 46 judges are selected by the Parliamentary Assembly from a list of applicants proposed by the Member States. The judges work in four judicial formations:

Single judge – One judge who rules on the admissibility of the applications that are inadmissible based on the material submitted by the applicant.

Committee – Composed of three judges, the Committee rules on the admissibility of cases and the merits when a case concerns an issue covered by existing case law. Its decision must be unanimous.

Chamber – Composed of seven judges, the Chambers primarily rule on the admissibility and merits of cases that raise issues that have not been ruled on repeatedly. A decision is made by majority of votes. Each Chamber includes a President and a judge with nationality from the State against which the application is lodged.

Grand Chamber – Composed of 17 judges and at least three substitute judges, the Grand Chamber is composed of the President and Vice-Presidents of the Court and the Presidents of the different sections. Any Vice-President of the Court or President of a section, who is not a member of the Grand Chamber, is replaced by the Vice-President of the relevant section. The Grand Chamber works on a small, selected number of cases that are either referred to it or when the case involves an important issue.²⁰

If the Court finds a Member State guilty of violating the human rights as defined in the ECHR, the offending party has to pay material damage to the applicant in accordance with the Court's orders, eliminate the consequences of the violation, take the necessary steps to ensure that the same violation is not repeated and publish the judgement in relevant national legal journals. The Court's decisions are public, final and legally binding.²¹ Privileges and immunities of the ECtHR and its judges, and their conditions of service, are governed by the CoE's instruments, such as the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (1996) and the Resolution CM/Res (2009) 5 on the Status and Conditions of

19 Northeastern University, n.d.

20 Northeastern University, n.d.

21 Europe's Human Rights Watchdog, n.d.c.

Service of Judges of the European Court of Human Rights and of the Commissioner for Human Rights.

Regarding staff matters, the ECtHR has administrative autonomy. Article 25 of the ECHR states that ‘The Court shall have a Registry, the functions and organisation of which shall be laid down in the Rules of Court’.²² The Registry provides legal and administrative support to the Court in exercising its judicial functions. Therefore, it is composed of lawyers, administrative and technical staff and translators.²³ Its main function is to process and prepare for adjudication applications submitted by individuals to the Court. The Registry’s lawyers are divided into 31 case-processing sections, each of which is assisted by an administrative team. The lawyers prepare the files and the analytical notes for the Judges. They communicate with the parties on procedural matters. However, they do not decide on the cases. The cases are assigned to different divisions based on the knowledge of the language and the legal system concerned. The documents prepared by the Registry for the Court are all drafted in one of its two official languages – English and French.²⁴ Furthermore, the Registry is divided into groups working on information technology, case-law information and publications, research and library, just satisfaction, press and public relations, language and internal administration.

The ECtHR has grown into a legal factory for producing laws with legislative and political authority for Europe. It is a legislative authority because it has the power to make state parties modify their national laws in accordance with its views about the laws a democracy ought to have. Its case-law influences the development of human rights law that goes beyond Europe. It has initiated numerous legislative and administrative reforms and changes in the case-law of numerous national courts. Historically, from the late 1960s, the now former Commission found 54 applications admissible, of which the ECtHR examined the merits of only ten cases. However, by the end of the 1980s, the number of ratifications matched the number of states that consented to the optional provisions of the right to individual application and the Court’s jurisdiction.

With the introduction of Protocol 11 in 1998, the ECtHR became a permanent and full-time body, while the Commission was abolished. Until the 1970s, the constraints on the effective functioning of the system were not limited to the optional provisions. The Convention bodies contributed to them with their strategies. To describe their cautious moves in this early period, Mikael Rask Madsen used the concept of “legal diplomacy”.²⁵ He indicated that while the Commission was busy with preventing applications from reaching the ECtHR by qualifying them as “manifestly ill-founded”, the ECtHR found violations only in a small number of cases throughout this period. Based on the early performance of the ECtHR and the Commission, Madsen noted that the

22 European Court of Human Rights, n.d.

23 There are currently around 640 staff members of the Registry, 270 lawyers and 370 support staff.

24 Council of Europe Office in Georgia, n.d.

25 Kay and Bradley, 2008, p. 21.

tension between the ‘European integration through law’ and the national sovereignty ‘was hardly a settled issue’. For the sake of argument, it remains difficult.

The ECtHR is a progressive force in human rights law, especially in civil and political rights. Its universal link with other treaties is an increasingly significant element for the Court’s work. When J. G. Merrills²⁶ wrote his analysis of the Court’s role in the development of international law, he found that, in Strasbourg, other treaties were used for three types of interpretation: 1) strengthening the Convention, 2) indicating omissions and 3) providing evidence of new developments. Years after Merrills’ contribution to the academic discourse, the legal experiences highlight a network of international human rights courts, with references to different national jurisprudence. There are several examples of this cooperation between the human rights instruments and their supervisory mechanisms.²⁷

Another important question is the concept of the European consensus, which refers to the level of uniformity in the legal system of the CoE Member States on a particular topic. The Court uses this principle to justify a broad spectrum of appreciation given to the Member States in the absence of a consensus and impose new standards, where a trend exists in most states to advance the interpretation of the Convention. The margin of appreciation refers to the operating space, which the national authorities enjoy in fulfilling their obligations under the Convention. The narrower the degree of consensus, the greater the margin of appreciation left to the States.²⁸ The Court often conducts a comparative analysis to support its arguments in the interpretation of the Convention. It is developed through case law and is defined as the result of an analysis of cases where it has been used. A general remark is that the Court has never explicitly clarified what this concept of comparative analysis means. It is usually analysed in relation to the margin of appreciation; however, this approach is not thorough. As a relative concept, like the margin of appreciation, its scope and underlying factors included in the Court’s reasoning can vary considerably.²⁹

26 Merrills, 1993, pp. 218–226.

27 Viljanen, 2008. The Court has often linked its analysis with wider trends of international human rights law, as in the prohibition of the death penalty in *Öcalan v. Turkey* (2005). Regarding forced disappearances *Kurt v. Turkey* (1998), the Court followed the interpretative line chosen by the Inter-American Court of Human Rights and the UN Human Rights Committee. The protection of the rights of sexual minorities has been a theme where the Court has spoken about international trends and its support for their reasoning. The change of interpretation regarding the rights of transsexuals was based partly on the international argumentation exemplified in *Christine Goodwin v. the United Kingdom* (2002). The less discussed fields in which development of international human rights law is taking small steps are environmental rights *Lopez Ostra & Guerra v. Spain* (1994), minority rights *D.H. and Others v. the Czech Republic* (2007), and the economic, social and cultural rights and the right to health *D. v. the United Kingdom* (1997).

28 For example, *Lautsi v. Italy* (GC), 18 March 2011.

29 Council of Europe, n.d.a.

3.4. Congress of Local and Regional Authorities

The Congress of Local and Regional Authorities of Europe was established in 1994 under the Committee of Ministers' Resolution (94) 3 and was revised with Resolution (2000). Unlike the 1957 Conference of Local Authorities, the Congress is a *de facto* CoE body. It is composed of local and regional elected representatives and consists of two chambers: Chamber of local authorities and Chamber of regions, representing over 200,000 European municipalities and regions. In 2007, the Committee of Ministers adopted a new Charter of the Congress, which underlined the importance of close cooperation with national associations, which represent local and regional authorities within the EU Committee of the Regions.

The Congress serves as a forum for dialogue where representatives of local and regional authorities discuss common problems, share experiences and propose action to the national governments. It implements the principles set forth in the European Charter of Local Self-Government. Furthermore, it is in charge of the local and regional election monitoring and assists new Member States in their legislative reforms.

3.5. Commissioner for Human Rights

By Resolution (99) 50, the Committee of Ministers established the CoE's Commissioner for Human Rights as a non-judicial institution mandated to promote education, awareness, and respect for human rights as embodied in the Council of Europe's human rights instruments. The Commissioner is elected by the Parliamentary Assembly of the CoE for a non-renewable six-year term. The Commissioner conducts country visits to all Member States in order to assess and evaluate the human rights situation on the ground. In doing so, the Commissioner identifies possible shortcomings in law and practice relating to compliance with CoE's human rights standards, promotes their effective implementation, and provides advice and assistance to Member States in addressing such shortcomings.³⁰ *The Commissioner cannot take up individual complaints and draw conclusions for human rights violations in individual cases.* Part of their mandate is to engage with the Human Rights Defenders in the Member States, meet with a broad range of defenders during their country visits and publicly report on the situation with the human rights defenders. The Commissioner publishes opinions, reports on country visits and thematic and annual reports regarding the human rights situation in the CoE Member States.

3.6. Conference of International Nongovernmental Organisations

The Conference of International Non-Governmental Organisations is composed of 400 civil society organisations (CSOs), holding participatory status with the CoE. It brings together federations of national and local associations in each of the 46 Member States, and from the other parts of the world, covering a range of sectors (humanitarian, social, educational, legal, trade, etc). The CSOs combine all players

30 Conscientious Objection, n.d.

and governance levels, both public and private, as a forum for participatory democracy. Their role is vital in guarantying freedom of expression and association and transparency and accountability of democratic governments. Hence, they form the real link between the European political institutions and its 800 million citizens.³¹

3.6.1. Secretariat and Secretary General

The CoE Secretariat is composed of:

Office of the Secretary General and the Deputy Secretary General who advise, assist and report to the Secretary General and the Deputy Secretary General in all matters relating to their office.

Secretariat of the Committee of Ministers, which ensures the proper functioning of the Committee of Ministers as a CoE decision-making organ.

Secretariat of the Parliamentary Assembly, which assists the Assembly in its proper functioning and the fulfilment of its political mandate.

European Court of Human Rights Registry, which assists the Court and the judges to fulfil the Court's role under the Convention, that is, ensuring the observance of the engagements undertaken by the contracting states.

Secretariat of the Congress of Local and Regional Authorities, which ensures the functioning of the Congress and its organs and supports it in the pursuit of its main goals, as defined in Article 2 of Statutory Resolution (2007).

Office of the Commissioner for Human Rights ensures the functioning of the Commissioner for Human Rights and supports them in their pursuit of the objectives, as defined in the original terms of reference (Resolution (99) 50 of the Committee of Ministers) and subsequent texts related to the institution.

Directorate of the Coordination Programme contributes to the development and implementation of the CoE's strategic objectives and priorities of the Programme and the Budget, in close coordination with other relevant services. Particularly, it coordinates the CoE's cooperation dimension, including its field offices.

Directorate General Human Rights and Rule of Law is responsible for the development and implementation of the human rights and the rule of law standards of the CoE, including promotion of democracy through law, implementation of relevant treaties and related monitoring mechanisms and the development and implementation of activities in these fields.

Directorate General of Democracy and Human Dignity supports the implementation of the CoE's action promoting democratic governance, participation, diversity, gender equality, safeguarding individuals against threats to their dignity and integrity (trafficking, violence, etc.) and protection of children's rights.

Directorate General of Administration assists the Secretary General in defining the CoE's strategic objectives and priorities and provides the Organisation with the administrative and general services needed to carry out its activities concerning innovation, client-orientation and cost-efficiency.

31 Council of Europe 2013.

Protocol office advises and assists the Organisation as a whole, along with the representatives of Member States, observers and candidate States on matters related to protocol, privileges and immunities, official events and relations with host countries.

Directorate of Communications provides clear and accurate information about the CoE's work and promotes its values, positions and decisions.

Directorate of Political Affairs and External Relations assists and advises the Secretary General, the Deputy Secretary General, the statutory organs and other bodies and major administrative entities of the Secretariat on specific political matters affecting the member and applicant states. Furthermore, it advises them about institutional and political relationships with other international organisations and institutions, particularly the EU, OSCE and UN, and relationships with non-Member States, including observer states and states in the neighbouring regions.

Directorate of Programme and Budget assists the Secretary General, Deputy Secretary General, the Committee of Ministers and other bodies and major administrative entities on programme and budgetary questions.

Directorate of Legal Advice and Public International Law enables the Secretary General to fulfil its role as the depositary of the CoE treaties, Head of the Secretariat and representative of the legal personality of the Organisation in conformity with the General Agreement on Privileges and Immunities.

Directorate of Internal Oversight provides independent oversight, objective assurance and consulting services to add value to and improve the Organisation's operations.

European Directorate for Quality of Medicines & Healthcare protects the public health by enabling development, implementation and monitoring of applications.³²

4. Significant Conventions Adopted Under the CoE Other Than the ECHR

The CoE is home to key European conventions, resolutions, declarations, conclusions and agreements that protect various areas of human rights. The crown of this work and its great achievement is the ECHR.³³ However, over the years, the protection of human rights has been extended by numerous other legal instruments, some of which have set up independent human rights monitoring mechanisms:³⁴

European Social Charter (1961) protects fundamental labour and social rights. Its monitoring procedure is based on national reports submitted by States and a collective complaints procedure. The developments in labour law and social policies led to revisions in the Charter, which entered into force in 1999.

32 Council of Europe, n.d.b.

33 Council of Europe, n.d.c.

34 Polakiewicz, 2019.

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and its Additional Protocol (2001) were revised and merged into a single treaty, Convention 108+, through an amending protocol, which was opened for signature on 10 October 2018.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) set up a preventive mechanism to protect persons deprived of their liberty, based on a system of visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

European Charter for Regional or Minority Languages (1992) protects regional or minority languages as part of Europe's cultural wealth. It protects linguistic rights and the committee of independent experts pursues a human rights approach in its monitoring activity.

European Commission against Racism and Intolerance (1993) was established by the first summit of heads of State and government in Vienna. It combats racism, xenophobia, antisemitism and intolerance for the protection of human rights. It regularly monitors the situation in all Member States and adopts general policy recommendations.

Framework Convention for the Protection of National Minorities (1995) involves country visits and country-specific opinions by an advisory committee of independent experts, which form the basis for the Committee of Ministers' targeted conclusions and recommendations.

European Convention on Realisation of Children's Rights (1996) aims to ensure that children can effectively exercise their rights in judicial proceedings that affect them. It focuses on procedural guarantees rather than creating new substantive rights, requiring States to enable children to be informed, heard, and consulted in accordance with their age and maturity. By strengthening children's participation and access to justice, the Convention gives practical effect to the principle of the best interests of the child within domestic legal systems.

Convention on Human Rights and Biomedicine (1997) is complemented by four protocols.

Convention on Action against Trafficking in Human Beings (2005) established a monitoring mechanism consisting of the Group of Experts on Action against Trafficking in Human Beings (GRETA), a multidisciplinary panel of 15 independent experts, and the Committee of the Parties to the Convention. GRETA draws up country evaluation reports, with an analysis of the implementation of the Convention by each party and proposals for further action. Based on GRETA's reports, the Committee of the Parties may adopt recommendations concerning the measures to be taken to implement GRETA's conclusions.³⁵

Notably, only the ECHR provides a judicial process following submitted applications (complaints) by individuals or by Member States. It sets a minimum standard in the preservation of human rights and enables them to use an independent judicial

35 Haule, 2006.

system for their protection. The ECHR is the first international human rights instrument that protects civil and political rights and freedoms in the form of a treaty that legally binds signatory states. It establishes a national system of control over the application of rights. The ECHR's validity starts with its ratification as a necessary condition for the admission of states to the CoE. By ratifying the ECHR, the state guarantees to all persons under its jurisdiction that it will ensure the fulfilment of the rights and freedoms established by the Convention and its protocols. The expression “to all persons” emphasises the universal nature of the rights, as it protects the rights of citizens, foreigners and stateless persons.

5. The ECHR in General Terms

The ECHR is an international treaty of the CoE, adopted on 4 November 1950 in Rome, which entered into force in September 1953. Taking the UN Universal Declaration of Human Rights from 1948 as an inspiration, the creators of the Convention established its principles as the goals of the Council through the realisation and strengthening of human rights and fundamental freedoms. The Convention grew into the European Charter of Rights, while the ECtHR is similar to the constitutional courts in federal and republican legal systems.³⁶ By its legal nature, the ECHR is a multilateral international agreement, with legal consequences only for the states that have ratified it. As a product of intergovernmental cooperation, together with its protocols, it represents a source of international law. This legal status is confirmed by Article 38, para. 1a of the Statute of the International Court of Justice of the UN in The Hague.³⁷

The ECHR was prepared in accordance with the rules of the 1969 Vienna Convention on the Law of Treaties, which refer to its entry into force, the rules for the interpretation of treaties, reservations, cancellations, etc.³⁸ The Vienna Convention directed the ECtHR to consider the ordinary meaning of the ECHR's terms, its object and purpose as an instrument for the protection of certain human rights, the subsequent practice of the contracting parties and any relevant rules of international law.³⁹ The ECtHR has developed the principles of autonomous interpretation, evolutive interpretation and the margin of appreciation doctrine. Autonomous interpretation explains that the ECtHR defines certain Convention terms, instead of the national laws of the States parties. Evolutive interpretation reflects the Court's understanding that the Convention is a ‘living instrument’, which must be interpreted in the light of present conditions. The margin of appreciation doctrine permits States a certain measure of discretion in the interpretation of the Convention.⁴⁰ Hence, the ECHR,

36 Campbell, 2017.

37 Carić, 2008, p. 85.

38 Carić, 2008, p. 85.

39 Wheatley, 2024, pp. 1–23.

40 McGoldrick, 2016, p. 22.

with its additional protocols and interpretations, forms the 'European constitution of public law in the field of human rights'.⁴¹

The ECHR is composed of a preamble, a normative part consisting of 59 articles and a total of 16 Protocols. The preamble emphasises that the preservation and development of basic human rights and freedoms are one of the ways to create greater unity among the CoE Member States. Its main goal is to take the first step towards a common realisation of the rights specified in the UN Universal Declaration of Human Rights. However, the ECHR only assumes certain rights from the Universal Declaration, precisely, only those that it can effectively realise and protect through general formulations. Furthermore, the ECHR, as a legal instrument, supervises its implementation.⁴²

The normative part has 59 articles, with legal matters of a different nature – substantive legal provisions, procedural provisions and provisions related to general issues dedicated to the practical application of the Convention. The substantive legal provisions include the part of the Convention that follows the preamble (Articles 2–13) and the legal norms for exercising or limiting rights, freedom from discrimination (Article 14), the permitted modality for derogation of rights during war and other forms of general danger threatening the life of the nation (Article 15), along with Articles 16–18 that prescribe other types of restrictions on the Convention's rights. The procedural provisions regulate the ECtHR's organisation and competences, the procedure following an appeal filed before the Court, the criteria for evaluating the admissibility of the appeal, the course of the procedure and the participation of third parties interested in the procedure (Articles 19–51). The general provisions are regulated in Articles 52–59, including the territorial application of the ECHR, the exclusion of other ways of resolving disputes, the right to make reservations regarding the ECHR's text and the possibility of its cancellation.⁴³

Protocols, which are an integral part of the convention, can be divided into two types: Protocols that regulate issues of a material-legal nature and a procedural-legal nature. The material-legal rights are located in Protocols 1, 4, 6, 7, 12 and 13, while the procedural-legal rights are located in Protocols 2, 3, 5, 8, 9, 10, 11, 14, 15 and 16. Most of these protocols lost their legal validity after the entry into force of Protocol 11 in 1999. It conferred a stronger Court capacity for its role as overseer of the European public order in human rights, since its procedural action was strengthened by a more coherent set of remedies and admissibility tests. The Court's role is only referred to in the pan-European system of human rights protection. However, this institutional position of the Court sidestepped the increased difficulties that the ECHR had to face after Eastern European enlargement and the overwhelming number of applications it was called upon to decide.⁴⁴

41 Wheatley, 2019, pp. 175–180.

42 Caca-Nikolovska, 2009, str. 182.

43 Vikićević and Čupić, 2013.

44 Repetto, 2013.

The legal environment during the ECHR's adoption and the interest of national governments to protect a certain corpus of rights caused the creators of this multi-lateral legal instrument to consider the protection of civil and political rights. At the time of the ECHR's adoption, these rights were in an established legal form based on the natural law founded in the 18th century. Therefore, the ECHR is not an international protective mechanism for social, economic and cultural rights as these rights appeared on the legal scene in the 20th century. Hence, if it were incorporated in the ECHR, it could become a reason for its non-acceptance by certain states. Therefore, the creators opted for a more cautious approach, in contrast to the Universal Declaration of the UN, whose content covers economic and social rights. The ECHR rights are divided into two categories: affirmative rights, whose exercise is not in question, and rights that are imposed on the state as a positive and negative obligation. The negative obligation requires the state to refrain from interfering and respect the established human rights and freedoms. The positive obligation is where the state must take actions for ensuring the human rights, and 'mainly have financial implications'.⁴⁵

The ECHR's system of human rights protection puts the individual and their rights at the centre, unlike other similar treaties that are more concerned with systemic and mass violations of rights. Human rights have long been the exclusive domain of states and any attempt to internationalise this issue has been perceived as a violation of the sovereign rights of the state. The ECHR is one of the first documents based on objective standards and the right of the individual to seek protection against the abuse of rights and freedoms by state authorities. In principle, the ECHR distinguishes several basic legal principles and doctrines that shape the ECtHR's operations. The principle of subsidiarity protects human rights with an identical character as the one prescribed by the national level for the constitutional courts. The principle of subsidiarity implies that the system of protection established in the ECHR has an additional character concerning the national system of human rights protection. It allows each state to prevent human rights violation before the procedure is initiated in the ECtHR. Hence, the applicant must exhaust all effective national legal mechanisms before turning to the ECtHR.

45 Repetto, 2013.

This basic principle is followed by the doctrine of the fourth instance⁴⁶, according to which the Court does not examine whether the law in the specific case has been correctly applied. Instead, it determines whether a certain act or action by a state authority violated the right protected by the ECHR. This doctrine implies that the Court, when evaluating the submitted application, is not bound by the national court's case facts. According to the doctrine of freedom in decision-making, the Court respects the right of each state to an autonomous judicial, administrative or legislative authority regarding the content of the values.

Another important principle is proportionality, according to which the Court determines the fair balance between the general interest of the community and the protection of individual rights when evaluating each case. The Court can refer to other sources of international law. These sources include relevant CoE instruments and the instruments of other international organisations from the specific field. The principles of efficient, consistent and autonomous interpretation of the Convention, within its effective and practical applicability, are of great importance for the Court. These principles reduce the theoretical or illusory applicability of the ECHR. When the Court considers the submitted application, it is not guided by the national definitions of titles and principles in criminal, administrative or civil proceedings, and gives an autonomous meaning in accordance with the normative text of the ECHR. According to the interpretive doctrine, the ECHR is a living document. The meaning of its norms is determined according to the time when the interpretation was made, instead of according to the meaning of the norms at the time of adoption.

Each Member State has the right to put a reservation on some of the conventional provisions, shaping the action of the Court. The stated reservation must be clear, precise and concise. It must not be provisional, indefinite, general and imaginary, expressed by a state that does not exist at the time of its publication. The importance of this legal document is confirmed by the States' signatures as a necessary condition for full CoE membership. The ratification procedure was opened for signature by the then 15 Member States in 1950. The ECHR is significant for three reasons: the rights and freedoms of everyone are guaranteed by the "contracting states" according to the regulations of international law, it is the first adopted international agreement on

46 The doctrine of the fourth instance expresses the ECtHR' understanding of its own role within the Convention system. The Court consistently emphasises that it is not a further level of appeal above national courts and does not function as a supreme or cassation court for domestic legal systems. Its task is therefore not to verify whether national courts have correctly established the facts of a case or properly interpreted and applied domestic law. Instead, the Court limits its review to assessing whether the effects of a national decision or the conduct of public authorities are compatible with the rights guaranteed by the ECHR. Even if a national court has made errors of fact or law, such errors do not automatically engage the responsibility of the State under the ECHR. The Court will intervene only where those errors result in arbitrariness, manifest unreasonableness, or procedural unfairness of such gravity that a ECHR right is impaired. By adhering to this doctrine, the Court respects the principle of subsidiarity and the autonomy of national judicial systems, while preserving its own function as a guardian of Convention rights rather than a "fourth-instance" appellate body.

human rights with a concrete protection mechanism, and parliaments and judicial bodies have a solid human rights reference point that helps them enact and interpret laws.

From the 1950s to the end of the 1980s, the ECHR was applied only in Western European countries. With the collapse of communism in Central and Eastern European countries, the CoE decided to accept these countries and entered a new phase. The ECHR began its “second” life, playing a key role in connecting the European East and West. Accession to the ECHR and CoE membership was extremely important for countries with a former socialist orientation. Historically, the CoE is the oldest regional international organisation formed by Western European states whose legal visibility in international law was acquired in London. Article 3 of the CoE statute obliges the ECHR signatory states to respect the rule of law, which implies that the Member States should enable the full and unhindered exercise of human rights and fundamental freedoms within their legal systems. The basic guarantee in the Convention was supplemented by additional rights stipulated in Protocols 1, 4, 6, 7, 11, 12, 13 and 14. However, with Protocol 14, which entered into force on 1 July 2010, the ECtHR’s procedure and organisation changed. The procedural reform was continued with Protocols 15 and 16. On 2 October 2013, Protocol 16 was opened for signature by the CoE Member States.

6. Relevance of the ECHR

The ECHR’s relevance should be analysed doctrinally and practically. A doctrinal analysis includes the theoretical premises enshrined in the alternative between dualism and monism of domestic law *vis-a-vis* international law, the ECHR’s impact on national legal orders and its constitutional status in domestic legal order. This analysis follows the implementation of the ECtHR jurisprudence in the domestic legal order and the interactions between different legal practices at international and national levels. In some states, the ECHR is not subject to *lex posteriori derogat legi priori*; however, it takes precedence over all conflicting constitutional norms. Per the monist-dualist theory, the status of these systems towards the ECHR can be characterised as strongly monist (Austria, Belgium, the Netherlands, Spain and Switzerland). However, the formal distinctions between systemic monism and dualism *ex ante* does not determine the ECHR’s status in national law *ex post*. What matters are if and how the ECHR is incorporated. For example, under Article 55 of the French Constitution, France is a monist country. However, for decades, this article was overridden by the prohibition of judicial review of laws. Similarly, Belgium is a dualist state; however, its courts, on their own and without constitutional authorisation, embraced a sophisticated monism concerning the ECHR (and EU law).⁴⁷ Moreover, a doctrinal analysis refers to the formal understanding of the ECHR’s reception process,

47 Greer, 2006.

as a first step in explaining its impact on national legal systems. This addresses the ranking that the legal system assigns to the ECHR in the national hierarchy of norms and the Convention's guarantees directly binding on public authority. However, can these guarantees be pleaded before national courts and can judges directly enforce them against conflicting national norms, including statute? This remains the most frequently asked question regarding the relationship between the ECHR and the national legal system.

The practical analysis of the ECHR's relevance requires a closer examination of specific cases regarding their (non) implementation by the national constitutional and regular courts in the Member States. Comparative inquiries share the view that CoE's law is, in several cases, marked by a "conflict of laws". However, there is an increasing compliance with the ECtHR's judgments in traditionally dualistic countries. Hence, scholars state that the dualistic or monistic approach of a legal order is no longer relevant to the ECHR's impact. Nonetheless, there is a trend of reconciliation of the traditional image of the ECtHR to intervene subsidiarily in human rights violation cases, that is, after domestic remedies have been exhausted. The recent practice of pilot judgments operated as *a priori* judgment regarding an unpredictable number of cases entailing a systematic violation of a certain right. In these cases, the national legal systems faced the complexity of the ECHR's impact by expanding the channels of interaction, from Parliaments to constitutional or regular courts judges. Furthermore, articulating judicial discourse regarding the ECHR, as a form of internal dialogue between judicial actors, is very important.

The ECHR has constitutional relevance in domestic law, which stems from an internal process of contestation and continuous reassessment of competences and boundaries,⁴⁸ influencing the ways in which national fundamental rights are protected and enhanced. This influence is not synonymous with better and/or higher protection of national rights although the subsidiarity imperative limits the ECHR's action to protecting a minimum standard of rights. The commitment to subsidiarity has legitimised the Court before national courts and institutions, as it has respected the basic features of national identities. However, it has not prevented its case law from questioning some basic assumptions of constitutional models by endorsing a constitutional scenario in which the state and the individuals are often deemed to be in conflict. Hence, the "living instrument" Court doctrine and the evolutive method of interpretation created the ECHR's doctrinal position in the CoE's legal space and the national legal systems. To borrow from a former President of the Court, Sir Humphrey Waldock, 'The meaning and content of the provisions of the Convention will be understood as intended to evolve in response to changes in legal or social concepts'.⁴⁹

48 Keller and Stone-Sweet, 2008, p. 686: 'The assumption that dualistic States have, *a priori*, an unfriendly attitude towards international law, and will, therefore, generate a relatively poorer rights record, is untenable.'

49 Waldock, 1981, p. 547.

The ECHR established a pan-European constitutional order in human rights. It is closely related to the construction of an ordered pluralism, with different constituencies entitled to concur with the Court, particularly, for rights that do not embody a clear-cut preference for individual protection over public interest. The ECHR's constitutional agency is not discussed when the ECtHR is called upon to ascertain the violations of Article 3 of the Convention, as the European consensus on the values enshrined therein is widely shared. However, the more its judicial action is contested due to the lack of consideration for basic national interests, the better its 'constitutional relevance' can be understood, starting from the consideration the Court gives to national claims and interests. Thus, the focus on margin of appreciation regarding the Member States and the changing interactions with the EU represents a key element for such an inquiry.

7. The European Social Charter

The European Social Charter represents one of the principal instruments for the protection of social and economic rights within the European human rights framework. Adopted in 1961 and revised in 1996,⁵⁰ the Charter complements the ECHR by addressing a broader spectrum of rights related to labour, social protection and human security, ensuring a dignified and decent standard of living. While the Convention primarily focuses on civil and political rights, the Charter affirms the importance of economic and social dimensions of human dignity within community life. At its core lies the commitment to safeguard economic and social democracy, underpinned by the principles of social justice and human well-being.

The Charter is a significant legal instrument that enshrines the right to work under fair and equitable conditions, the right to just remuneration, access to social security, protection against poverty and social exclusion, the right to housing and specific rights for children, older persons and individuals with disabilities. Furthermore, it guarantees trade union freedoms, including the right to form and join trade unions,

50 Council of Europe, 1996. All workers have the right to safe and healthy working conditions. – All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families. – All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests. – All workers and employers have the right to bargain collectively. – Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed. – Employed women, in case of maternity, have the right to a special protection. – Everyone has the right to appropriate facilities for vocational guidance with a view to helping him choose an occupation suited to his personal aptitude and interests. – Everyone has the right to appropriate facilities for vocational training. – Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable. – All workers and their dependents have the right to social security. – Anyone without adequate resources has the right to social and medical assistance. – Everyone has the right to benefit from social welfare services, etc.

collective bargaining and strike. These provisions reflect a vision wherein individual welfare and social cohesion are prioritised. The 1996 Revised Charter expanded and modernised these protections by incorporating new rights, such as protection against poverty, the right to housing, the rights of elderly persons and the promotion of gender equality in working life, adapting the Charter to emerging societal challenges, including the rise of precarious employment and the demand for gender equity.

As a legally non-binding yet normatively powerful document, the Revised Charter functions as a key mechanism for the promotion and monitoring of social rights across Europe. It comprises 31 substantive rights, particularly emphasising the right to work, just conditions of employment, fair remuneration, freedom of association, social security, protection from poverty and exclusion and the right to housing. Unlike several human rights instruments that articulate abstract guarantees, the Charter imposes specific and concrete obligations on state parties, enabling the effective evaluation of national social policy frameworks. The oversight of the Charter's implementation is entrusted to the European Committee of Social Rights (ECSR), an independent body composed of legal experts.⁵¹ Member States must submit periodic reports, following a rotating schedule, detailing their compliance with Charter provisions. The ECSR issues legal assessments in the form of conclusions, which, although not legally binding, carry significant political and moral authority. Moreover, the 1995 Additional Protocol introduced the Collective Complaints Procedure, empowering international NGOs, trade unions and certain national institutions to lodge complaints regarding violations of the Charter. While the outcomes of these procedures are non-binding, they have had a demonstrable influence on states to amend national laws and policies.

Beyond its monitoring function, the Charter has evolved into a key normative reference point in European legal and policy discourse. Its interpretative authority, as developed by the ECSR, has informed constitutional debates and judicial reasoning in several Member States, particularly those with monist legal systems. Although the EU is not a party to the Charter, the instrument has influenced EU legal developments.⁵² For instance, the EU Charter of Fundamental Rights incorporates several provisions inspired by the European Social Charter, particularly regarding social protection, labour rights and the right to strike. During the 2008 global financial crisis and subsequent austerity measures, civil society actors and legal scholars invoked the Charter to challenge the erosion of social protections. Notably, the ECSR concluded that certain austerity policies adopted by Greece violated the Charter, affirming that fiscal consolidation must be balanced with the obligation to protect vulnerable populations.

Nevertheless, the Charter's effectiveness remains circumscribed by several structural limitations. Not all CoE Member States have ratified the Revised Charter or

51 The ECSR was created by Article 25 of the European Social Charter to monitor States' compliance with the rights contained in the Charter. Child Rights International Network, 2018.

52 De Schutter, 2016.

accepted all its provisions. The non-binding nature of the ECSR's findings limits their enforceability, as implementation depends on the political will of national authorities. Furthermore, national courts are not formally obligated to follow the ECSR's interpretations, although some, particularly France, Italy and Sweden, have cited the Charter in their jurisprudence.⁵³

An ongoing debate persists regarding the legal status and justiciability of international social rights, enforceable entitlements, restricting individuals' access to legal remedies for violations. The lack of universal ratification, the limited legal enforceability of the ECSR's conclusions and the heterogeneous commitment to social rights across Europe reflect enduring tensions between economic imperatives and social justice. Despite these challenges, the European Social Charter remains an indispensable normative instrument for advancing human dignity and promoting equitable and inclusive societies. It constitutes a cornerstone of the European human rights architecture and offers a framework of guarantees for social justice and a set of standards and mechanisms for the realisation of economic and social rights. As European societies confront complex transformations, including demographic change, digitalisation and climate challenges, the Charter serves as a vital guide for policy-making that prioritises human well-being and reinforces the foundational values of solidarity, equality and dignity.

8. Conclusion

Even though the post-WWII period increased the commitment to the principle of sovereignty, most Western European states were ready to sacrifice a degree of their hard-won sovereignty to CoE as an intergovernmental body charged with maintaining peace and security. These two incompatible post-war needs overlap with the paradox inherent in the principle of sovereignty, shown in Arendt's quote.⁵⁴ In the aftermath of WWII and in the face of the Cold War, Western European countries needed to rebuild the so-called international community in Europe. The CoE's establishment was a way of strengthen the states' unity to protect their sovereignty from the "threats" that might stem from other states' acts and policies. In the face of fears of another war and the challenge of communism, European recovery, prosperity and security required new political and legal arrangements, including a regional human rights regime. The

⁵³ Spangolo, 2023.

⁵⁴ It had been hidden throughout the history of national sovereignty that sovereignties of neighbouring countries could come into deadly conflict in the extreme case of war and in peace. It became clear that full national sovereignty was possible only as long as the comity of European nations existed; it was this spirit of unorganised solidarity and agreement that prevented any government's exercise of its full sovereign power. Theoretically, in international law, it had always been true that sovereignty is nowhere more absolute than in matters of 'emigration, naturalization, nationality, and expulsion'. However, practical consideration and the silent acknowledgement of common interests restrained national sovereignty until the rise of totalitarian regimes. See: Arendt, 1976, p. 278.

preservation of Europe was tied to human rights, the rule of law and democracy and the preservation of sovereignty, which became the ECHR's interdependent goals. The CoE has produced several important conventions, agreements and protocols. The most important is the ECHR, concluded on 4 November 1950, which has been supplemented by 16 Protocols. All these documents are prepared and negotiated within the CoE's institutional framework.

The CoE has been at the forefront of establishing and protecting human rights through binding treaties, non-treaty-based mechanisms and institutions. In most cases, when the European system of human rights protection is mentioned, it refers to the ECHR and the ECtHR. Some authors consider this system as the most successful, effective and well-known international system of human rights protection.⁵⁵ While it is going through an increasingly difficult period, its success in the previous decades inspires some optimism about its future. The CoE is seen as a mechanism of pan-European cooperation for preserving and promoting human rights, democracy and rule of law. Its cooperation in legal and human rights fields, where common European standards are developed and monitored and assistance is provided for the implementation of these standards, and the results of such monitoring, is an essential contribution to the rule of law in Europe. The Parliamentary Assembly's documents are an important driving force for state's legal systems and greater coherence between them for justice. It gives rise to common legal standards, which reflect rule of law principles, building a common European legal space.

The ECHR contains several rule-of-law-related provisions and Court judgments, which underline its relevance. Referring to the preamble, the Court stated that 'one of the reasons why the signatory Governments decided to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights was their profound belief in the rule of law'. Several subsequent judgments have confirmed that principles, such as rule of law, legality, efficiency, effectiveness, proportionality and subsidiarity, are the most important mechanisms for the ECHR's application and interpretation. The ECtHR case law has clarified that all these principles inspire the ECHR and is inherent in all its articles. Based on this case law, it is possible to list several requirements and sub-principles that form the CoE's law. The adherence of all CoE Member States to the ECHR and their being subject to the ECtHR's jurisdiction was highly instrumental in creating a common European core of legal requirements, which is still under development.

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The European Court of Human Rights: Procedural and Jurisprudential Framework

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ABSTRACT

This chapter examines the role and functioning of the European Court of Human Rights (ECtHR) with a focus on its institutional structure, procedural framework, and the main interpretative doctrines shaping its jurisprudence. It explores how the Court adjudicates individual and inter-State applications and develops the standards of the European Convention on Human Rights (ECHR) in response to contemporary legal challenges. It also examines key interpretative doctrines, including the margin of appreciation and the living instrument doctrines, which illustrate the Court's dynamic interpretative approach and its effort to balance evolution with respect for State sovereignty and democratic legitimacy.

KEYWORDS

ECtHR, human rights, procedure, margin of appreciation, living instrument doctrine, jurisprudence

1. Introduction

Since its establishment in 1959, the Strasbourg-based European Court of Human Rights (ECtHR) has served as the guardian of the rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR).¹ Over the decades, the Court has developed a rich jurisprudence, comprising more than 10,000 judgments,² addressing a wide array of human rights issues across the Member States of the Council of Europe, the organisation that provided the framework for the Convention's adoption. Its judgments are binding on the State concerned and frequently prompt significant changes in national laws and practices.

1 ECHR, 1950.

2 Council of Europe, 2025a. For further statistical data, see: European Court of Human Rights, 2025a.

Enikő Krajnyák (2026) 'The European Court of Human Rights: Procedural and Jurisprudential Framework' in Paczolay, P. (ed.) *The European Convention on Human Rights A Central and Eastern European Perspective*. Miskolc–Budapest: Central European Academic Publishing, pp. 57–78. https://doi.org/10.71009/2026.pp.tecocr_3



This chapter examines the ECtHR's role in shaping human rights law in Europe, focusing on its institutional structure, procedural safeguards, and the interpretative doctrines guiding its decisions. By analysing the Court's interpretative approaches, the chapter also considers questions, such as how the Court balances national discretion with evolving international standards, and how it responds to emerging challenges in Europe and beyond. The chapter is structured as follows. Section 2 gives a brief historical overview of the Court's creation and early decades, and introduces its current institutional framework, including the composition and functioning of its judicial formations. Section 3 examines the procedural framework, including the types of proceedings and the Convention's procedural rules, with particular attention to the admissibility criteria. Section 4 discusses key doctrines and principles of interpretation, highlighting the margin of appreciation and living instrument doctrines characteristic of the ECtHR's jurisprudence. The final section addresses the Court's role in addressing new challenges and offers concluding reflections on the implications of its jurisprudence for contemporary human rights protection in Europe.

2. Institutional Framework

2.1. Historical Overview of the ECtHR: Its Creation and the First Decades

As noted above, the ECtHR was established in 1959, following the Convention's adoption (1950) and entry into force (1953). In the early period, the Convention's control mechanism consisted of the European Commission of Human Rights, established in 1954, which operated alongside the Court from 1959. Until the Commission's abolition in 1998, individuals did not have direct access to the Court; rather, the Commission received petitions from any person, non-governmental organisation or group of individuals alleging a violation by one of the Contracting States, provided the State had recognised the Commission's competence.³ The first cases were declared admissible in 1958: *de Becker v. Belgium* and *Lawless v. Ireland*. The former concerned the conviction of a Belgian journalist for collaborating with German authorities during the Second World War,⁴ while the latter involved the detention without trial of a suspected member of the Irish Republican Army (IRA) in a military detention camp.⁵ *Lawless* was also the first case decided by the Court, adopted on 1 July 1961.⁶

The *Lawless* case arose in the context of IRA activity in the 1950s, which the Irish government regarded a threat to national security and public order. The applicant, an Irish citizen and suspected IRA member, complained of detention without trial, invoking violations of several human rights under the Convention, including liberty (Article 5), the right to a fair trial (Article 6), and the principle of non-retroactivity

3 Article 25 of the original text of the Convention, cited in: Nussberger, 2020, p. 9.

4 *De Becker v. Belgium*, Application no. 214/56.

5 *Lawless v. Ireland*, Application no. 332/57.

6 The *Lawless* case, 1962, p. 249.

under criminal law (Article 7). The Court accepted the government's arguments under Article 15 of the ECHR (derogation in time of emergency), concluding that the detention was necessary to address a public emergency in the Republic of Ireland threatening the life of the nation, and thus found no violation of any of the rights invoked by the applicant.⁷

This case was followed by numerous complaints arising from the conflict in Northern Ireland, including the inter-State case *Ireland v. the United Kingdom* and *McCann v. the United Kingdom*. The first case concerned the treatment of suspected IRA members. The Irish government alleged that the United Kingdom's use of the so-called "five techniques" of interrogation – wall-standing, hooding, exposure to noise, sleep deprivation, and deprivation of food and drink – amounted to a violation of the prohibition of torture (Article 3). The Court held that the techniques amounted to inhuman or degrading treatment under Article 3, but did not constitute the threshold of torture,⁸ thereby drawing a sensitive line between torture and inhuman treatment.

McCann v. the United Kingdom arose from the killing of suspected IRA members in Gibraltar, by British Special Air Service soldiers who believed the suspects carried a remote detonation device. The applicants alleged that the use of lethal force violated the right to life (Article 2). The Court examined whether the lethal force used was absolutely necessary, and found that the killing was disproportionate to the aims pursued (Article 2(2)).⁹

Another important case from the Court's early jurisprudence was the so-called *Belgian linguistic case*, involving multiple applications and addressing complex issues of language rights and non-discrimination. The applicants, arguing on behalf of more than 800 children, claimed that Belgian linguistic legislation relating to education violated their rights under Article 8 (right to private and family life), Article 14 (non-discrimination), and Article 2 of Protocol No. 1 (right to education). The complaints centred on the State's failure to provide French-language education in municipalities where the applicants resided, which, however belonged to a region classified as Dutch-speaking. Furthermore, the applicants complained that State withheld grants from institutions that failed to comply with the linguistic provisions of the legislation, refused to homologate leaving certificated issued by such institutions, and did not allow the applicants' children to attend the French classes available outside their municipalities. It forced the applicants to either enrol their children in local schools or send them to school in the Greater Brussels area, where the language of instruction was Dutch or French according to the child's mother-tongue, thereby entailing various risks and hardships. On the other hand, the government argued that the right to education in one's own language was not included in the Convention, and that the applicants did not belong to a national minority within the meaning of Article 14.

7 The Lawless case, *ibid.*, pp. 256–257.

8 *Ireland v. the United Kingdom*, Application no. 5310/71, Operative paragraphs.

9 *McCann and Others v. the United Kingdom*, Application no. 18984/91.

The Court held that the principle of non-discrimination under Article 14 is violated where a distinction lacks objective and reasonable justification, does not pursue a legitimate aim, or is disproportionate to the aim pursued. Nevertheless, the Court found no violation of the rights invoked by the applicants.¹⁰ Given the sensitive linguistic tensions in Belgium, the Court's stance may be regarded as cautious, indicating its tendency at the time to balance human rights protection with respect for national discretion.

In addition, linguistic rights were also examined in the inter-State case of *Austria v. Italy*, which concerned fair trial rights of German-speaking residents in Northern Italy, and resulted in a finding of no violation of the Convention.¹¹ Other inter-State applications in the Court's early jurisprudence centred around the political situation in Greece following the military *coup* in 1967. In these cases, other Contracting States lodged applications against Greece concerning widespread and serious human rights violations, thereby acting as guardians of the Convention rather than intervening on behalf of their own citizens.¹² Although Greece denounced the Convention in 1969,¹³ these early inter-State cases established an important precedent that grave human rights violations could attract scrutiny from other Member States of the Council of Europe, as later reflected in cases such as *Cyprus v. Turkey* and, more recently, *Ukraine and the Netherlands v. Russia*.

2.2. The Structure of the ECtHR after Protocols 11, 14 and 15

Protocol 11 to the ECHR, adopted in 1994 and entering into force in 1998, brought major reforms to the control mechanism of the Convention, replacing Articles 19–56 of the original text. It replaced the former dual control mechanism of part-time monitoring institutions (the Commission and the Court) and replaced them with a single, permanent Court. The Preamble of the Protocol explains the reform by ‘the urgent need to restructure the Convention’s control machinery in order to maintain and improve the efficiency of its protection of human rights and fundamental freedoms, mainly in view of the increase in the number of applications and the growing membership of the Council of Europe’.¹⁴

Following the collapse of the Soviet Union (USSR) and Yugoslavia (SFRY), the Council of Europe welcomed a significant number of new Member States from Central and Eastern Europe. The new members of this period included Hungary (1990), Poland (1991), Bulgaria (1992), Estonia, Lithuania, Slovenia, the Czech Republic, Slovakia, and Romania (1993), followed by Andorra (1994), Latvia, Moldova, Albania, Ukraine, North

10 Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium, Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.

11 *Austria v. Italy*, Application no. 788/60.

12 *Denmark, Norway, Sweden & the Netherlands v. Greece (I)*, Application nos. 3321/67 to 3323/67 and 3344/67, and *Denmark, Norway, Sweden & the Netherlands v. Greece (II)*, Application no. 4448/70. See also: Janis et al., 2008, pp. 24–68.

13 See: Committee of Ministers, *The Greek Case*, 1969.

14 Protocol No. 11, Strasbourg, 11 May 1994, Preamble.

Macedonia (1995), Croatia, the Russian Federation (1996), Georgia (1999), Armenia, Azerbaijan (2001), Bosnia and Herzegovina (2002), Serbia (2003), Monaco (2004), and Montenegro (2007).¹⁵ This wave of accessions had a profound impact on the Convention system. It extended the reach of the ECHR to hundreds of millions of new rights-holders and significantly increased the Court's workload, as many applications arose from the legal and social aftermath of the post-communist transitions.¹⁶ Therefore, post-Cold War enlargement transformed the Court into a continent-wide institution, and went hand in hand with major reforms of its control mechanism.

The new control system introduced by Protocol 11 laid down the fundamental rules governing the operation of the ECtHR. In this light, judges are elected by the Parliamentary Assembly of the Council of Europe by a majority of votes cast from a list of three candidates nominated by each Contracting State. The candidates for the office must be of high moral character and either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. During their term of office, judges may not engage in any activity incompatible with their independence, impartiality, or the demands of a full-time position. Protocol 11 initially set the term of office for a period of six years, with the possibility of re-election, and provided that the terms of office of one-half of the judges shall be renewed every three years. It also introduced a maximum age limit of seventy years for the judges.¹⁷

Protocol 11 further established the Court's internal structure and the tasks of its various formations. According to it, the plenary Court shall have the following competence: (a) the election of the President and one or two Vice-Presidents, (b) the establishment of Chambers, (c) the election of Presidents of the Chambers, (d) the adoption of the rules of the Court, and (e) the election of the Registrar and Deputy Registrars. The composition of committees consist of three judges, Chambers of seven judges, and the Grand Chamber at seventeen judges. The latter shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers, and other judges.

The committees may declare individual applications inadmissible by unanimous decision. In case where no such decision is possible, a Chamber determines the admissibility and merits of individual and inter-State applications. Cases may be referred to the Grand Chamber if they raised serious questions affecting the interpretation of the Convention or its Protocols, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court. In such instances, the Chamber could relinquish jurisdiction in favour of the Grand Chamber.¹⁸

15 See: Our member States [Online]. Available at: Council of Europe, 2025b.

16 A significant amount of such cases centered around the property expropriated by the communist regimes, and the status of public officials after the change of regime. See: Gross, 1996, pp. 92–100.

17 Protocol No. 11, Article 1.

18 Protocol No. 11.

Protocol 11 further addressed procedural questions, such as admissibility criteria, third-party intervention, friendly settlements, and public hearings, which are analysed in the following section. At this point, it is sufficient to note that these reforms fundamentally reshaped the operation of the Court, establishing its accessibility and efficiency. Therefore, the key aspects of the reformed structure that form the basis of today's institutional framework can be summarised as follows. Protocol 11 abolished the former part-time monitoring institutions, the European Commission on Human Rights and the European Court of Human Rights, and replaced them with a single, full-time European Court of Human Rights based in Strasbourg. With the abolition of the Commission, applicants gained direct access to the Court in both individual and inter-State cases. In addition, Protocol 11 limited the role of the Committee of Ministers to supervise the executive organ of the Council of Europe, removing its former jurisdiction to decide on the merits of cases.¹⁹

The current institutional structure of the Court is shaped not only by Protocol 11 but also by Protocols 14 and 15, which introduced further adjustments to its composition and functioning.

The adoption of Protocol 14 in 2004, entering into force in 2009, was explained by the urgent need to maintain and improve the long-term efficiency of the Convention's control system, particularly in the light of the Court's steadily increasing workload.²⁰ This Protocol extended judges' terms of office from six to nine years and abolished the possibility of re-election.²¹ It also introduced the single-judge formation, empowered to declare applications inadmissible or to strike an individual application from the Court's list without further examination.²² Furthermore, the competences of the committees were amended to allow them to render a judgment on the merits, where the underlying question in a case is already the subject of well-established case law.²³

Protocol 15, adopted in 2013 and entering into force in 2021, sought to strengthen the ECtHR's role in the protection of human rights in Europe.²⁴ As elaborated below, it explicitly enshrined the principle of subsidiarity and the margin of appreciation doctrine, placing them at the end of the Preamble to the ECHR.²⁵ It also clarified structural rules brought by Protocol 11. In particular, it supplemented the rules on judicial age limits by requiring candidates to be under 65 years of age on the date on which the list of three candidates is requested by the Parliamentary Assembly.

In light of these amendments, the following paragraphs outline the current institutional structure of the European Court of Human Rights, as enshrined in the text of the Convention. The Court consist of a number of judges equal to the number

19 Drzemczewski, 1999, pp. 224–225.

20 Protocol No. 14, Strasbourg, 13 May 2004, Preamble.

21 Protocol No. 14, Article 2.

22 Protocol No. 14, Article 6.

23 Protocol No. 14, Article 8.

24 Protocol No. 15, Strasbourg, 24 June 2013, Preamble.

25 Protocol No. 15, Article 1.

of Contracting Parties of the ECHR.²⁶ As of 2025, the Court is composed of forty-six judges,²⁷ following the Russian Federation's departure from the Council of Europe in March 2022, and its withdrawal from the Convention six months later, which terminated the office of the judge elected in respect of that State.²⁸ The criteria for office remain as proposed in Protocol 11, as adjusted by Protocol 15, therefore, the judges must be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. Candidates must also be under 65 years of age at the moment when the Parliamentary Assembly requests the list of three nominees.²⁹ Judges are elected by the Parliamentary Assembly by a majority of votes cast from a list of three candidates nominated by each Contracting State.³⁰ Based on Protocol 14, the judges are elected for a period of nine years, without the possibility of re-election.³¹

The competences of the plenary Court remain largely as established by Protocol 11, with the addition under Protocol 14, with the power to request the Committee of Ministers to reduce the number of judges in Chambers to five for a fixed period.³² For the consideration of cases, the Court sits in different formations, depending on the nature of the cases, namely in a single-judge formation, in committees, chambers, and the Grand Chamber. Single judges may declare an individual application inadmissible or strike it out of the list of cases, where such a decision can be taken without further examination. The single judge's decision is final. However, if the judge does not declare an application inadmissible or strike it out, they may forward it to a committee or a Chamber for further consideration. A judge acting in the single-judge formation may not examine any application lodged against the State in respect of which they were elected.³³

Committees, composed of three judges, may adopt final decisions by unanimous vote in two cases. First, similar to the competence of single judges, they may declare an individual application inadmissible or strike it out. Second, they may declare an application admissible and render a judgment on the merits simultaneously, where the underlying question in the case is covered by well-established case law. In this formation, if the judge elected in respect of the State the application concerns, the committee may invite the judge to sit in place of one of its members.³⁴

If no decision was taken by a single judge or a committee, Chambers composed of seven judges decide on the admissibility and merits of individual applications. Chambers may also adjudicate inter-State applications. If a case pending before a

26 ECHR, Article 20.

27 The list of current judges of the Court: European Court of Human Rights, 2025b.

28 Committee of Ministers, Resolution CM/Res(2022)2 of 16 March 2022; European Court of Human Rights, Resolution of 22 March 2022.

29 ECHR, Article 21.

30 ECHR, Article 22.

31 ECHR, Article 23.

32 Protocol No. 14, Article 5; ECHR, Article 25.

33 ECHR, Article 27.

34 ECHR, Article 28.

Chamber raises a serious question affecting the interpretation of the Convention or its Protocols, or where the resolution of the question may lead to inconsistency with a previous judgment, the Chamber may relinquish jurisdiction in favour of the Grand Chamber.³⁵

The Grand Chamber, composed of seventeen judges, has three principal competences. First, it determines individual and inter-State applications where a Chamber has relinquished jurisdiction, or where a case has been referred to it within three months of the Chamber judgment. In the latter situation, a panel of five Grand Chamber judges may accept the request if it raises a serious question affecting the interpretation or application of the Convention or its Protocols, or a serious issue of general importance.³⁶ Referral is therefore relevant only after a judgment has been adopted and concerns cases already declared admissible and examined on the merits. As of 2021, nearly five per cent of referral requests were accepted,³⁷ demonstrating the exceptional nature of the procedure: it does not constitute an appeal against the judgment, rather a reconsideration.

Second, the Grand Chamber decides on issues referred to it by the Committee of Ministers when a Contracting State is alleged to have failed to abide by a final judgment of the Court. Third, the Grand Chamber considers requests for advisory opinions submitted to the Court. These procedures are discussed in greater detail in the next section. For present purposes, it suffices to note that the Grand Chamber functions as the Court's highest judicial formation, responsible for resolving questions of general importance and safeguarding the authority and coherence of the Court's jurisprudence.

3. Procedural Framework

3.1. Types of Proceedings before the Court

The European Court of Human Rights exercises competence in both contentious proceedings and advisory opinion procedures. Its contentious jurisdiction encompasses applications brought by individuals under Article 34 and by States under Article 33, as well as infringement proceedings under Article 46(4) of the convention. The following paragraphs address these procedures before turning to the Court's advisory competence, which underwent notable changes with the adoption of the newest protocol to the ECHR, namely Protocol 16.

Inter-State proceedings are regulated in Article 33, providing that 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party'.³⁸

35 ECHR, Articles 29–30.

36 ECHR, Article 31.

37 Note prepared by the Registry, 2021, pp. 4–5.

38 ECHR, Article 33.

Although inter-State cases form a small proportion of the Court's workload,³⁹ they can significantly impact large groups of individuals, as they often relate to crises or conflicts between two or more States. The first inter-State case, *Greece v. the United Kingdom (I)*, was lodged in 1956 regarding the alleged human rights violations attributable to the United Kingdom in the administration of Cyprus.⁴⁰ Inter-State applications also arose in connection with the conflict over Northern Ireland, particularly concerning interrogation techniques and the arbitrary detention of individuals suspected of terrorist activities. The most prominent example, *Ireland v. the United Kingdom*, became the first inter-State judgment issued by the Court in 1978. The Court also dealt with inter-State disputes arising from Turkey's military operations in Cyprus, which led to findings of systemic violations of the rights of the Greek Cypriots.⁴¹

A significant group of cases concerned the armed conflict between Georgia and Russia, including allegations of collective expulsion of thousands of Georgian nationals from Russia (*Georgia v. Russia (I)*),⁴² the killing of civilians, and the torching and looting of houses in Georgian villages during armed hostilities (*Georgia v. Russia (II)*),⁴³ and practices associated with "borderisation", namely the demarcation of a de facto border with physical infrastructure, surveillance, and crossing regime (*Georgia v. Russia (IV)*).⁴⁴ Taken together, the Court found mass violations of several Convention rights, including the right to life (Article 2), the prohibition of torture (Article 3), the right to liberty (Article 5), and the protection of property (Article 1 of Protocol 1). However, the Court's approach to extraterritorial jurisdiction in *Georgia v. Russia (II)* was subject to strong criticism,⁴⁵ as it held that events occurring during the "active phase of the hostilities" did not fall within the jurisdiction of the Russian Federation, limiting jurisdiction to the period following the cessation of hostilities.⁴⁶

Given the pending applications, the Court's cautious approach may set a questionable precedent for future cases arising from armed conflicts, such as those between Ukraine and Russia or between Armenia and Azerbaijan. The first set of cases between Ukraine and Russia concerns events in Crimea and Eastern Ukraine,⁴⁷ while subsequent cases relate to the large-scale human rights violations arising from the invasion starting in February 2022.⁴⁸ The outcome of these cases is yet to be seen;

39 Mondré highlights that, as of 2021, there have been 27 inter-State applications in light of the total of around 920,000 applications to the Court. See: Mondré, 2021, p. 47.

40 *Greece v. the United Kingdom (I)*, Application no. 176/56.

41 See: *Cyprus v. Turkey (I) and (II)*, Application nos. 6780/74 and 6950/75; *Cyprus v. Turkey (III)*, Application No. 8007/77; *Cyprus v. Turkey*, Application no. 25781/94.

42 *Georgia v. Russia (I)*, Application no. 13255/07.

43 *Georgia v. Russia (II)*, Application no. 38263/08.

44 *Georgia v. Russia (IV)*, Application no. 39611/18.

45 The controversies of this aspect of the judgments are also shown by the significant number of dissenting opinions. See also: Dzehtsiarou, 2021; Tan and Zwanenburg, 2021; Marcinko, 2022.

46 *Georgia v. Russia (II)*, 125–144.

47 *Ukraine v. Russia (re Crimea)*, Application nos. 20958/14 and 38334/18.

48 *Ukraine and the Netherlands v. Russia*, Application nos. 8019/16, 43800/14, 28525/20 and 11055/22.

the situation is further complicated by Russia's withdrawal as the Member State of the Council of Europe. Thus, although the judgments may bring a limited impact on the ongoing conflict, these cases play a significant role in documenting human rights violations, shaping international legal standards, and supporting future legal and diplomatic measures.

The vast majority of the Court's cases arise from individual applications under Article 34, providing that 'The Court may receive applications from any person, non-governmental 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'.⁴⁹

The Convention thus distinguishes between three categories of applicants in individual petitions. The first category encompasses physical persons who claim that their Convention rights were violated within the jurisdiction of the State concerned, in accordance with Article 1 of the Convention,⁵⁰ regardless of nationality, place of residence, civil status, or legal capacity.⁵¹ Secondly, a legal entity may also have standing before the Court if it qualifies as a non-governmental organisation under Article 34. In determining whether a legal person falls within the autonomous concept of "non-governmental organisation", the Court takes into account its legal status, the nature of its activities, the context in which those activities are carried out, and the degree of independence from political authorities.⁵² Thirdly, an application may be lodged by a group of individuals on their behalf, if each of them is personally affected by the alleged violation. This is particularly important, as the Convention does not provide for an *actio popularis*, that is, the claims brought in the public interest to challenge a law or practice *in abstracto*. The purpose of an individual is to determine whether a violation has occurred with regard to the specific applicant(s).⁵³

Accordingly, Article 34 not only defines the scope of individual applications but also lays down the criteria for victim status. As the Court points out, "the concept of "victim" must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act."⁵⁴ The contours of victim status were significantly challenged in the context of climate change litigation, particularly in *Verein KlimaSeniorinnen and Others v. Switzerland*. In that judgment, the Court held that the criteria for individual applicants is especially high, and depends on the level and severity of the adverse consequences of governmental action or inaction, as well

49 ECHR, Article 34.

50 Article 1 of the ECHR reads as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

51 Practical Guide on Admissibility Criteria, 2025, p. 9.

52 See: *Radio France and Others v. France*, Application no. 53984/00, para. 26.

53 See: *Roman Zakharov v. Russia*, Application no. 47143/06, para. 164.

54 *Gorraiz Lizarraga and Others v. Spain*, Application no. 62543/00, para. 35.

as the need for individual protection in light of reasonable measures to reduce harm.⁵⁵ After examining the nature and scope of the complaints, the likelihood and severity of the adverse effects of climate change, their specific impact on each applicant's life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk, and the applicant's vulnerability, the Court concluded that the individual applicants did not meet the criteria to be considered victims under Article 34. By contrast, it found that the association acting on behalf of affected individuals did qualify as a victim, based on the specific feature of climate change as a common concern of humankind and the necessity of intergenerational burden-sharing.⁵⁶

Therefore, it may be concluded that the Convention sets a relatively high threshold for individual applicants, requiring a direct link between the alleged violation and the applicant submitting the claim, whether as an individual, a non-governmental organisation, or a group of individuals. However, recent jurisprudence shows that the Court may adopt a more flexible and purposive approach to victim status in specific contexts, such as climate change.

In addition to inter-State and individual applications, the Court has competence to deliver advisory opinions under Article 47. Under the original Protocol 2, advisory opinions could be requested by the Committee of Ministers on legal questions concerning the interpretation of the Convention and the Protocols. These opinions could not concern the content or scope of the rights and freedoms defined in the Convention or the Protocols, nor any questions that the Commission, the Court or the Committee of Ministers might have to consider in contentious proceedings.⁵⁷ The advisory jurisdiction significantly changed with the adoption of Protocol 16, which enabled the highest courts or tribunals of States Parties to request advisory opinions on questions of principle relating to the interpretation or application of the Convention. Protocol 16, adopted in 2013 and entering into force in 2018 for States that ratified it, aims to enhance interaction between the Court and national authorities, thus reinforcing the implementation of the Convention. However, given its recent entry into force and the limited number of ratifications, the potential of this procedure remains largely unexplored.

3.2. Overview of the Proceedings before the ECtHR

The procedural framework of the Court reflects a careful balance between accessibility for hundreds of millions of potential applicants and the effective functioning of the Convention system. Central to this framework is the principle of subsidiarity, which underpins the entire system by affirming that primary responsibility for protecting human rights rests with national authorities. This can also be deduced from Article 1 of the ECHR, which imposes on the High Contracting Parties, i.e. the States, the

55 Verein KlimaSeniorinnen and Others Schweiz v. Switzerland, Application no. 53600/20, para. 487.

56 Verein KlimaSeniorinnen, paras. 521–526. See also: Dzehtsiarou, 2024, p. 423; Sefkow-Werner, 2025, p. 814.

57 Protocol No. 2, Strasbourg, 6 May 1963, Article 1.

obligation to respect human rights. The explicit formulation of subsidiarity principle was later incorporated in the Preamble of the Convention by means of an additional protocol.

Proceedings before the Court begin with an assessment of the admissibility criteria, which operate as an essential filter. Once a case passes this initial stage, it may proceed through different procedural avenues, including the pilot judgment procedure designed to address structural or systemic violations. Finally, the Court's judgments are subject to supervision by the Committee of Ministers, which ensures their effective implementation at the domestic level. This section, therefore, provides an overview of the key elements and specific features of the proceedings before the ECtHR.

3.2.1. Admissibility Criteria

The admissibility criteria are set out in Article 35 of the Convention, and may be divided into three categories: (a) procedural grounds for inadmissibility, (b) grounds for inadmissibility relating to the Court's jurisdiction, and (c) inadmissibility based on the merits.⁵⁸

With respect to procedural grounds, the Convention first establishes the exhaustion of domestic remedies as a key requirement under customary international law. This requirement reflects the principle of subsidiarity, one of the fundamental principles governing the ECHR's control mechanism, as also reflected in the Preamble.⁵⁹ Within the framework of the ECtHR, subsidiarity means that responsibility for ensuring respect for the Convention lies, first and foremost, with domestic authorities, and the Court intervenes only where the domestic authorities fail in this task. Although subsidiarity was explicitly introduced in the Preamble after the entry into force of Protocol 15 in 2021, the subsidiary nature of the Court's machinery had long been expressed in the judgments. For instance, in the abovementioned *Belgian linguistic case*, the Court pronounced that: 'it [the Court] cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention.'⁶⁰

Similarly, in *Scordino v. Italy*, the Court held that 'the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights'.⁶¹

58 See: ECHR, Article 35. See also: Practical Guide on Admissibility Criteria, pp. 29–97.

59 The abovementioned Article 1 of Protocol No. 15 provides that the following recital shall be added at the end of the preamble to the Convention: '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'.

60 *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, para. 10.

61 *Scordino v. Italy* (No. 1), Application no. 36813/97, para. 140.

In addition to the requirement that domestic remedies be appropriate, available, and effective, applicants must comply with a four-month time-limit. Application must be submitted to the Court within a period of four months from the date of the final decision of the case. This time-limit was introduced by Protocol 15, with the aim of maintaining legal certainty, ensuring that cases are examined within a reasonable period and preventing authorities and other persons concerned from being kept in a state of uncertainty for extended periods.⁶²

Regarding individual applications under Article 34, the Court set further admissibility restrictions. Anonymous applications, those that do not disclose the applicant's identity, are inadmissible. For instance, in *"Blondje" v. the Netherlands*, the case file did not mention the applicant's name or date of birth, and the applicant failed to provide a valid identity document, which resulted in the case to be found anonymous, and thus, inadmissible.⁶³ The Court also excludes applications that are substantially the same as those already examined either by the Court or by another international procedure.⁶⁴ Finally, the abuse of the right of application includes conduct that is manifestly contrary to the purpose of the right of individual petition and that impedes the proper functioning of the Court or the proper conduct of the proceedings. Examples include misleading the Court, using offensive language, breaching the confidentiality of friendly-settlement proceedings, submitting manifestly vexatious applications or the misuse of domestic remedies in a manner designed to obstruct the process.⁶⁵

The second category of grounds for inadmissibility concerns the Court's jurisdiction. These criteria include incompatibility *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae*. According to the Court's jurisprudence, applications are incompatible *ratione personae* with the Convention where, for instance, the applicant lacks standing under Article 34; is unable to show that he or she is a victim of the alleged violation; brings an application against an individual or an international organisation that has not acceded to the Convention; or complains of a breach of a Protocol that the Respondent State has not ratified.⁶⁶

Compatibility *ratione loci* with the Convention is primarily examined on the basis of Article 1 of the ECHR, providing that Contracting Parties "shall secure everyone within their jurisdiction the right and freedoms defined in [...] this Convention".⁶⁷ While jurisdiction is primarily territorial, a State may exceptionally be held responsible for acts performed outside its territory where it exercises effective control over the relevant territory.⁶⁸

62 *Mocanu and Others v. Romania*, Application nos. 10865/09, 45886/07 and 32431/08, para. 258.

63 *"Blondje" v. the Netherlands*, Decision of 15 September 2009.

64 *OAO Neftyanaya Kompaniya Yukos v. Russia*, Application no. 14902/04, para. 521.

65 *Mamić and Others v. Croatia*, Application no. 21714/22, paras. 116–119.

66 Practical Guide on Admissibility Criteria, pp. 64–65.

67 ECHR, Article 1.

68 See, for instance, *Catan and Others v. the Republic of Moldova and Russia*, Application nos. 43370/04, 8252/05 and 18454/06, paras. 106–107; *Al-Skeini and Others v. the United Kingdom*, Application no. 25579/05, paras. 138–140.

Incompatibility *ratione temporis* reflects the principle of non-retroactivity of the Convention. Thus, jurisdiction *ratione temporis* covers only the period after the respondent State has ratified the Convention or the relevant Protocols. However, under specific circumstances, the Court may extend its temporal jurisdiction to continuing violations that originated before the entry into force of the Convention but persisted thereafter.⁶⁹

Finally, compatibility *ratione materiae* derives from the Court's substantive jurisdiction. The right relied on by the applicant must be protected by the Convention or its Protocols. The Court has no competence to examine alleged violations of rights guaranteed exclusively by other international human rights instruments, although it may take such instruments into consideration as part of the relevant international legal framework.

The third category of grounds for inadmissibility encompasses inadmissibility based on the merits. An application is found inadmissible if it is manifestly ill-founded or the applicant has not suffered a significant disadvantage. One specific category of manifestly ill-founded applications is the so-called “fourth-instance complaints”, whereby applicants seek to have the Court act as an appellate body reviewing the facts, interpretation of domestic law, assessment of evidence, the substantive fairness of civil proceedings or the guilt or innocence of an accused person. The Court may also find application manifestly ill-founded where it discloses no appearance of a violation of Convention rights. In addition, an application may be inadmissible if the applicant cannot demonstrate a significant disadvantage resulting from the alleged violation. This criterion, introduced to the Convention with Protocol 14, allows the Court to dismiss applications where the level of disadvantage is sufficient to justify examination on the merits.⁷⁰

In sum, the admissibility criteria in Article 35 acts as a crucial procedural filter, ensuring that the Court remains a subsidiary mechanism of human rights protection rather than a fourth instance body. By requiring exhaustion of domestic remedies, compliance with the four-month time-limit and the exclusion of cases falling under *a de minimis* threshold, these criteria maintain the Court's capacity to address serious and systemic human rights violations.

4. The Role of the Court in the Interpretation of the ECHR: Key Doctrines

The European Court of Human Rights does not limit itself to settling individual or inter-State disputes. Each decision and judgment forms part of a broader and dynamic jurisprudential corpus through which the Court interprets and clarifies the human rights standards of the Convention. In this respect, the Court operates as an authoritative interpreter by progressively developing the normative content of the

69 See, for instance, *Hutten-Czapska v. Poland*, Application no. 35014/97, paras. 152–153.

70 Practical Guide on Admissibility Criteria, pp. 81–97.

rights enshrined in the ECHR. This section therefore provides an overview of the key interpretative methods employed by the Court.

Since its establishment in 1959, the Court has developed distinctive methods of interpretation. These methods, elaborated below, fit within the general interpretative techniques applicable to international treaties, such as textual, teleological, systemic, and, to some extent, historical interpretation.⁷¹ However, the evolving social, political, and technological circumstances confronting the expanding circle of Contracting Parties have necessitated an interpretation responsive to such developments. The doctrines of the Convention as a “living instrument” and evolutive interpretation emerged as functional responses to this teleological necessity, enabling the Court to ensure the effectiveness and relevance of the Convention amidst contemporary human rights challenges. The margin of appreciation doctrine complements this dynamic interpretative approach by balancing the need for uniform protection of Convention rights with respect for national discretion in their implementation.

4.1. The Concept of the “Living Instrument Doctrine”

Against this backdrop, the “living instrument doctrine” constitutes the cornerstone of the Court’s interpretative approach, it reflects the idea that the Convention must be read in light of present-day conditions rather than being confined to the original intention of its drafters in the 1940s and 1950s. This principle was first articulated in *Tyrer v. the United Kingdom* in the 1970s, concerning the corporal punishment of a minor in the Isle of Man. Assessing whether birching constituted degrading punishment contrary to Article 3 of the Convention (prohibition of degrading treatment), the Court recalled that ‘the Convention is a living instrument which, [...] 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’.⁷²

In light of the evolving standards of Contracting States, the Court pronounced that judicial corporal punishment amounted to a violation of the prohibition of degrading punishment.⁷³ Since *Tyrer*, the Court has consistently applied the “living instrument doctrine” in contexts where societal or technological developments have transformed the human rights norms. For example, in *Marckx v. Belgium*, the Court recognised the legal bond between an unmarried mother and her child, departing from earlier understanding prevalent at the time of the Convention’s adoption in 1950, when distinctions between “illegitimate” and “legitimate” children were permissible. By 1979, such distinctions no longer reflected contemporary standards.⁷⁴ Similarly, in *Dudgeon v. the United Kingdom*, the Court took note of increased tolerance of homosexual conduct in the great majority of Council of Europe Member States, compared with

71 Ammann, 2020, p. 191. See also: McBride, 2021, p. 34.

72 *Tyrer v. the United Kingdom*, Application no. 5856/72, para. 31.

73 Hilliard and Duranti, 2024, p. 343.

74 *Marckx v. Belgium*, Application no. 6833/74, para 41.

the situation thirty years earlier, and found that criminalisation of homosexual acts violated Article 8 (the right to respect for private and family life).⁷⁵

4.2. *The Concept of Margin of Appreciation*

In these early cases in which the Court invoked the “living instrument” doctrine, it relied on the prevailing consensus among the great majority of Contracting States to justify departures from the interpretation prevalent at the time of the Convention’s adoption.⁷⁶ However, in situations where no such European consensus exists, the Court acknowledges that States retain a certain degree of discretion in implementing Convention rights. The margin of appreciation doctrine was established in *Handyside v. the United Kingdom* (1976) in the context of freedom of expression and was gradually incorporated into the Court’s jurisprudence. In that case, the Court assessed whether the confiscation of a book deemed obscene violated the applicant’s freedom of expression under Article 10. The Court noted that ‘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’.⁷⁷

In light of the State’s aim of protecting minors, the Court found the confiscation necessary in a democratic society, and found no violation of Article 10.

The margin of appreciation may be wide or narrow, depending on the degree of European consensus on the matter. As noted in *Dickson v. the United Kingdom*, the margin is wider where there is no consensus among Contracting States, either as to the relative importance of the interest at stake or as to how best to protect it. This is particularly evident in cases raising complex issues or choices of social strategy,⁷⁸ for instance, in cases concerning abortion,⁷⁹ reproductive rights,⁸⁰ and end-of-life decisions.⁸¹ By contrast, the Court tends to apply a narrow margin where there is a strong European consensus on the scope of a right, particularly in areas concerning the core aspects of private life and human dignity. The Court allowed a narrow margin for the

⁷⁵ *Dudgeon v. the United Kingdom*, Application no. 7525/76, para. 60.

⁷⁶ *Letsas*, 2013, p. 112.

⁷⁷ *Handyside v. the United Kingdom*, Application no. 5493/72, para. 48.

⁷⁸ *Dickson v. the United Kingdom*, Application no. 44362/04, para. 78.

⁷⁹ See, for instance, *Vo v. France*, Application no. 53924/00, para. 82; *A, B and C v. Ireland*, Application No. 25579/05, para. 185.

⁸⁰ *Evans v. the United Kingdom*, Application no. 6339/05, para. 59.

⁸¹ *Dániel Karsai v. Hungary*, Application no. 32312/23, paras. 139–146.

State in the context of the protection of biometric data,⁸² secret surveillance,⁸³ and the exercise of political rights.⁸⁴

The application of the margin of appreciation doctrine is a defining characteristic of the European human rights doctrine and distinguishes the ECtHR from other regional or universal human rights jurisdictions. The Inter-American Court of Human Rights (IACtHR), the ECtHR's Latin American counterpart, has been cautious in adopting the doctrine, primarily because many of its cases involve non-derogable rights and because domestic systems do not always offer strong protection.⁸⁵ In *Artavia Murillo et al. v. Costa Rica*, which concerned a prohibition on in vitro fertilisation, the IACtHR noted the ECtHR's case law and use of the doctrine, but did not accept Costa Rica's argument that it enjoyed a margin of appreciation to impose such restrictions.⁸⁶

Similarly, the doctrine has not been incorporated into the jurisprudence of United Nations human rights treaty bodies, such as the Human Rights Committee (HRC), explained by the large number of States Parties to the International Covenant on Civil and Political Rights (ICCPR), and their geographical, political and cultural diversity.⁸⁷ The deferential approach inherent in the margin of appreciation may, on occasion, lead to divergent outcomes between the ECtHR and the HRC, as seen in differing conclusions on restrictions concerning the wearing of full-face veils. Whereas the ECtHR in *S.A.S. v. France*⁸⁸ upheld the French ban as falling within the margin of appreciation under Article 9, the HRC in *Sonia Yaker v. France*⁸⁹ and *Miriana Hebbadj v. France*⁹⁰ (HRC) found a violation of freedom of religion under Article 18 of the ICCPR. Such divergences can be attributed to the differing historical and geopolitical contexts in which the two bodies operate. As Yuval Shany, former HRC Member points out,

‘the ECtHR forms part of a European agenda of regional integration and democratisation, which has no direct parallel at the global level, and that the said agenda influences the legal tools the Court applies and its self-role perception. At the same time, [the HRC], like other UN treaty bodies, derive their legitimacy from other sources – especially from the notion of universality of international human rights – a notion with powerful symbolic value, which exerts on some states considerable compliance pull’.⁹¹

82 *S. and Marper v. the United Kingdom*, Application nos. 30562/04 and 30566/04, para. 112.

83 *Big Brother Watch and Others v. the United Kingdom*, Application nos. 58170/13, 62322/14 and 24960/15, para. 347.

84 *United Communist Party of Turkey and Others v. Turkey*, Application no. 19392/92, para. 46.

85 Cançado Trindade, 1998, pp. 582–583.

86 *Artavia Murillo et al. v. Costa Rica*, para. 316. See also: Raisz, 2018.

87 Joseph and Casten, 2013, p. 625. See also: Shany, 2018.

88 *S.A.S. v. France*, J Application no. 43835/11.

89 *Sonia Yaker v. France*, Views adopted on 7 December 2018.

90 *Miriana Hebbadj v. France*, Views adopted on 12 December 2022.

91 Shany, 2021, p. 71.

Accordingly, the logic of the margin of appreciation presupposes a community of States bound by shared values, historical backgrounds, and cultural tradition, which cannot be transposed to the universal level. As shown above, the interpretation of the ECHR has evolved considerably since its adoption in 1950, through the Court's use of evolutive interpretation, enabling it to take account of societal developments across Europe. However, the evolutive interpretation has limits, as it is constrained by the principles of subsidiarity and the margin of appreciation, which require the Court to respect national authorities' primary role in balancing competing interests, particularly in areas involving complex policy choices or moral sensitivities.

5. Concluding Remarks

This chapter outlined the historical development of the institutional, procedural, and jurisprudential framework of the European Court of Human Rights. It demonstrated how the Court has evolved from a reactive body primarily resolving individual complaints into a dynamic institution that actively interprets and elaborates the standards of the European Convention on Human Rights in response to contemporary challenges.

The chapter also highlighted how the subject matter of the Court's case law has evolved over time. Initially, the Court addressed "classic" human rights violations, such as arbitrary detention, torture, and restrictions on political freedoms. Its role expanded significantly following the enlargement of the Council of Europe in the 1990s and 2000s, which brought numerous post-communist States with diverse legal traditions and emerging human rights challenges. This expansion increased the Court's caseload, necessitating institutional and procedural reform, and diversified the range of issues brought before it. Over the decades, the Court's jurisprudence has expanded to encompass emerging issues reflecting societal, technological, and environmental developments, often intertwined with moral and political considerations. Through its interpretative doctrines – including the "living instrument" approach, evolutive interpretation, reliance on European consensus and the margin of appreciation – the Court is often faced with the sensitive task of reconciling competing interests, such as individual rights, public policy, and national traditions. Its task is to ensure that the essence of the human rights enshrined in the Convention is preserved and that human rights protection remains practical and effective across the diverse legal and societal contexts of contemporary Europe.

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Right to Life and Abolition of Death Penalty

Ushangi BAKHTADZE

ABSTRACT

This chapter debates the right to life versus the abolition of the death penalty in light of the European Convention of Human Rights (ECHR) and other international legal instruments. It places the right to life within the broader spectrum of fundamental human rights, weighing against a criminal justice response-capital punishment-which, worldwide, remains one of the most polemical issues. Historically, the universally practiced state-sanctioned execution was a part of human history until the death penalty was polarised in the last several centuries regarding human rights issues intermingled with ethical, philosophical, and social issues. This chapter now undertakes an in-depth review of Article 2 of the ECHR, considering what bearing it may have on state-sanctioned killings, and outlines the development of the right to life under international law. It further compares the stance of the ECHR with other key human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), underlining common approaches towards protection of life and the abolitionist trend. This chapter gives an overview of how the case law of the European Court of Human Rights (ECtHR) has set standards for an evolving understanding of human dignity through landmark decisions in cases involving the death penalty. It further focuses on the case law of the ECtHR concerning 16 Central and Eastern European countries and evaluates the impact of those judgments on national legal reforms in light of European standards. The chapter therefore concludes by integrating these findings, underlining the importance of the right to life and the leading role of the ECtHR in the universal move towards the abolition of capital punishment.

KEYWORDS

Right to Life, Death Penalty, Abolition, European Convention on Human Rights, European Court of Human Rights, Capital Punishment

1. Introduction

It is an admitted fact that the right to life is a quintessential attribute of fundamental human rights as represented in various international conventions, treaties, and constitutions; however, it does face some formidable challenges when weighed against capital punishment, which, in fact, is an act in contravention on the part of the state. The abolition or upholding of capital punishment is not confined to a legal debate

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between human rights proponents and agencies but is a very ethical, philosophical, and social problem in nature across disciplines such as politics, sociology, theology, and philosophy.¹ But it was not always the case, while state mandated executions existed throughout human history, it has only been several hundred years that death penalty is considered as a problematic social phenomenon.²

Capital punishment, state-authorised killing, or so it is normally referred to, has been a very controversial debate all over the world. This calls for its abolition on the wider canvas of human rights, particularly the right not to be subjected to inhuman or degrading treatment and the right to freedom from cruel and unusual punishments, under the Universal Declaration of Human Rights³ (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).⁴ These rights underline the dignity in every human being and challenge the moral and legal justifications put forward to support death penalty.⁵

Discussing right to life, which has also been described and in fact is “the supreme right” or “the foundation and cornerstone of all other rights”⁶ cannot be done fully without also discussing the permissibility of the death penalty and abolitionist position. The testimony of the abolitionist position is that no state should have, as concomitant with the basic ethos classically expressed, the right to life and that no person should suffer the ultimate and irretrievable sanction of death. Nowadays, there are softer terms used, such as “termination” or “liquidation”, to mask the reality of state-approved killing. This kind of change indicates the evolution against governments and policymakers trying to redefine what the general populace is supposed to believe; a thinly veiled attempt to distort the moral values of such an act with regularity. Despite each of these rebranding efforts, the semantic core has remained the same: the death penalty is the intentional deprivation of life by the state. This view is also further strengthened by the global trend wherein more than two-thirds of countries in the world, including all member states of Council of Europe, have relinquished the death penalty in either law or practice-acting like a passing signal towards making the right to life the most important one.

Basically, the abolition of the death penalty does not get regarded as an independent issue; instead, it pertains to the wider debate regarding protection of human rights and the sanctity of life. The issue must be viewed in a multi-disciplinary manner, encompassing not only legal experts but also politicians, sociologists, theologians, and the general public. Therefore, analysis throughout this chapter will also be holistic.

This chapter attempts to provide a profile of the right to life under the abolitionist framework of the death penalty in accordance with the European Convention on

1 McCloskey, 2012, pp. 485–508.

2 Beccaria, 1963; Bessler, 2014.

3 United Nations, 1948.

4 International Covenant on Civil and Political Rights, 1966.

5 Amnesty International, 2022. p. 6.

6 Schabas, 2002, pp. 8–9.

Human Rights (ECHR). It then puts into context the purview of Article 2 of the ECHR in relation to the right to life and its addressing of state-sanctioned killing, such as the death penalty. A brief history will then follow the development of this right, pointing to some identifying features in the development of international law, together with the trend towards global abolition.

It also compares the protection offered by the ECHR to that deriving from other international and regional human rights instruments, namely the ICCPR and American Convention on Human Rights (ACHR), by underlining similarities in respective approaches toward the right to life and, conversely, the death penalty. It will closely scrutinise the case law developed through the ECtHR, showing how lead cases have set legal parameters to the death penalty and underlining the contribution of the Court to the development of human rights protection.

Afterwards, the chapter will proceed with the case law analysis of the ECtHR concerning the 16 Central and Eastern European countries, assessing the impact of those judgments on national legal reforms and conformance with European standards. At the end of the chapter, the summary will present those observations in an integrated way in order to show the importance of the right to life and the central role of the ECtHR, including, with respect to the abolition of the death penalty.

2. Historical Overview of the Development of Right to life/Abolition of Death Penalty

No discourse on the right to life can be fully undertaken without a detailed scrutiny of the death penalty. Therefore, throughout this chapter, this important right will be analysed in conjunction with the issue of the abolition of the death penalty. The analysis of this issue will begin with a historical overview of the right itself.

The sanctity of human life has always been one of the basic values of laws, tracing back to centuries. This is deeply imbued in the legal tradition and reflects the moral and ethical foundational basis on which the modern legal system has been founded. This idea found expression in the writings of one of the most authoritative English jurists, Sir William Blackstone, who, writing in the seventeenth century, characterised life as ‘the immediate gift of God, a right inherent by nature in every individual’.⁷ This position put a value on life as such and epitomised it in a way that life was not just a legal right, but a natural right, a divine right which all human beings possess by birth.

Blackstone made it quite clear that this right to life was so basic that even such usually odious things as homicide could be held not unlawful when, for example, done in self-defense.⁸ This exception highlights how the law takes the protection of life seriously by even allowing one to take another’s life when in self-defense. The fact

⁷ Blackstone, 1765, p. 125.

⁸ Blackstone, 1769, p. 180.

that self-defense is recognised as a valid exception underlines the balance the Law seeks between protection of individual rights and recognition of realistic complexities in human interactions where life may be in danger.

Not surprisingly, due to its importance, protection of the right to life has found expression in constitutions and international treaties throughout the world. Logical continuation of this recognition was to start discussions on the abolition of death penalty.⁹

2.1. The Emergence of Abolitionist Movement

Throughout history, capital punishment functioned as a principal tool of social control, often carried out through brutal public executions aimed at deterring crime and reinforcing state authority.¹⁰ Methods of execution often showed brutally creative displays, including hanging, dismemberment, and burning at the stake in colonial America; extreme tortures such as being “broken on the wheel” or “boiled to death” in Europe;¹¹ and the infamous “death by a thousand cuts” in China.¹² These practices reflected the generally held belief that maximum terror would keep social order.

The late 18th century Enlightenment saw the death penalty’s morality and utility finally turned against it, and the hallmark work of the penal abolition movement became Cesare Beccaria’s *On Crimes and Punishments* (1764). Beccaria’s thesis was twofold: state killing served no useful purpose whatsoever as a deterrent to crime, and it conflicted with the penal values of the enlightened age.¹³

Beccaria’s influence, along with broader humanitarian currents, prompted early reforms across Europe and the Americas. States such as Tuscany, Austria, and parts of the United States restricted or abolished the death penalty, especially for non-homicidal crimes.¹⁴ By the mid-19th century, the trend towards limiting capital punishment gained traction, though reversals were common, especially under authoritarian regimes such as Nazi Germany and Fascist Italy, where executions were used for political repression.¹⁵ In many countries, the end of these regimes marked a return to their commitment to abolition, based on the incompatibility of the death penalty with democratic and human rights values. As Foucault has argued, ‘It is therefore universally admitted that, by its very rigour it contradicts the state of rigour’.¹⁶

In the post-war period, abolitionist momentum resumed, with democratic transitions emphasising human dignity and the inviolability of life. Legal scholars like Marc Ancel advocated for gradualism in abolition, allowing societies to transition

9 Wheeler, 2018, p. 356.

10 Hood and Hoyle, 2008, pp. 11–13.

11 Evans, 1996.

12 Scott, 1950.

13 Beccaria, 1764, pp. 45–47.

14 Hood and Hoyle, 2008, pp. 11–13.

15 Ibid.

16 Foucault, 1977, p. 89.

through limiting capital crimes, commutation, and finally, legal prohibition.¹⁷ Despite setbacks, the normative landscape began to shift decisively in the late 20th century, as international human rights law increasingly viewed the death penalty as incompatible with the dignity of the person.

2.2. Death Penalty and Human Rights Perspective

The contemporary abolitionist movement gained strength following World War II, fueled by the horrors of totalitarian regimes and the new focus on safeguarding the dignity of mankind. Even though, talks on the abolition of the death penalty dates way back, the international movement to abolish the death penalty first gained momentum in 1948 following the introduction of the Universal Declaration of Human Rights (“Universal Declaration”), announcing the right to life and the right not to suffer cruel and inhuman punishment.¹⁸

This new wave of abolition was fed by several political movements and the growth of regard for protection of the inherent dignity of all human beings. The irreversible character of capital punishment and the vulnerability to judicial mistakes have been the main focus of concern. Investigative reporting, especially in the United States, uncovered erroneous convictions – even where all appeals had been used up. DNA evidence later exonerated defendants who were given death sentences, revealing systematic deficiencies within the system.¹⁹

For the abolitionists, even the slightest chance of putting to death an innocent individual is unacceptable. Abolitionists contend no system of justice is infallible, and the right to life should never lie at the mercy of error, political expediency, or public sentiment.²⁰ The view is well put by the former European Union Commissioner for External Relations, Chris Patten, when he described capital punishment as inherently “inhumane, unnecessary, and irreversible”.²¹

Abolitionists also reject any of the historical justification for capital punishment such as retribution, deterrence. Retribution is seen to be morally outmoded, and the empirical record on deterrence is inconclusive. Even conceding deterrence to be demonstrable, the moral cost – above all, the risk of killing the innocent – renders it indefensible.²² These risks are higher in times of political tension or public outrage, when the authorities can use shortcuts to the justice system. In Japan, for example, nearly half of the death row inmates were convicted on the basis of interrogations without the presence of lawyers, causing extensive concerns for fairness.²³

The abolitionist movement therefore has a very strong human rights and humane approach towards the protection of human dignity. It renounces the application of the

17 Morris, 1965, p. 72.

18 Hood and Hoyle, 2008, pp. 18–19.

19 Gross, et al., 2005, pp. 524–526.

20 Patten, 2001, p. 4.

21 Ibid.

22 Hood and Hoyle, 2008, pp. 18–19.

23 Yasuda, 2004, pp. 215–220.

death penalty as an applicable tool of justice because it is basically faulty, susceptible to mistake, and acts against the spirit of modern democratic societies. By re-framing capital punishment from a criminal policy issue to a basic human rights issue, the abolitionist camp attempts to safeguard individuals against the ultimate violation of state power – the taking of life.

2.3. Abolition of Death Penalty in Central and Eastern Europe

Public opposition to the death penalty in Europe is strong, every country – except Belarus – has abolished the punishment, and there are no serious calls for the restoration of the death penalty. The abolition is not a problematic issue. Nevertheless, this was not always a case and since this chapter aims to provide a historical perspective on the death penalty in conjunction with the right to life, and the main focus is on Central and Eastern European countries, the analysis would be incomplete without examining specific countries.

2.3.1. Central Europe

Abolition of the death penalty in Eastern Europe, signifies a radical turn toward human rights and adherence to democratic principles. The former German Democratic Republic initiated this process when it had abolished the death penalty back in 1987 as one more expression of its commitment to human rights within the framework of general efforts for maintaining the legitimacy of the regime.²⁴ This decision constituted a break with the long-established consensus regarding capital punishment as an instrument in defense of socialism and to curb violent crime, and also for coming to terms with the Nazi war crimes legacy.²⁵ The East German decision was among the important early steps in the wave of abolition that crossed the region and generally coincided with the dissolution of Soviet influence and the rise of democratic governance.

Democracy arriving to many of the states of the former Soviet bloc catalysed a wider rejection of capital punishment. Indeed, countries like Romania, the Czech and Slovak Republics, hastened abolition of the death penalty in the early 1990s, often embedding this decision in their new constitutions. For instance, Romania pronounced the death penalty unconstitutional in October 1990, citing its conflict with the fundamental rights of life and human dignity, while the Waiver by the Czech and Slovak Republics happened a bit later in 1990.²⁶ Another influential factor which furthered this trend was those countries striving to join the Council of Europe, an implication of what is adhered to the standards on human rights, including, among others, abolition of the death penalty.²⁷

²⁴ Evans, 1996.

²⁵ Hood and Hoyle, 2008, p. 50.

²⁶ Ibid.

²⁷ Council of Europe 1999. *The Death Penalty: Abolition in Europe*. Strasbourg: Council of Europe Publishing. Available at: <https://book.coe.int/en/human-rights-and-democracy/1685-the-death-penalty-abolition-in-europe.html>.

The breakup of Yugoslavia in 1991 further complicated matters in the Balkans, but new independent states such as Slovenia, Croatia, and Macedonia²⁸ quickly took steps toward abolition of capital punishment. Slovenia incorporated abolition into its constitution, declaring human life inviolable, and the streams of Croatia and Macedonia followed suit to similar effect. Even so, in Bosnia-Herzegovina the death penalty had been retained and then abolished in 1997 when the Human Rights Chamber of the Human Rights Commission found it could not be imposed into peacetime crimes.²⁹ The state of Serbia and Montenegro, the last remnants of the former Yugoslavian republic, finally abolished the death penalty in the early 2000s; this acts in a broader sense as an indicator of the region's move toward compliance with human rights law and alignment with European norms. In Hungary, the Constitutional Court, after hearing the proposal from the League Against Capital Punishment, declared the death penalty unconstitutional in October 1990 on the main ground that it violated the fundamental right to life and human dignity.³⁰

The abolition of the death penalty in Bulgaria and Albania was also closely related to their hopes for European integration. It had been preceded by an execution moratorium starting in 1990. Full abolition occurred in 1998. The abolition of the death penalty in Albania was also one of the requirements for membership into the Council of Europe, with the last execution occurring in 1995. In 2007, it ratified Protocol No. 13 concerning the complete abolition of capital punishment in all circumstances.³¹ The movement of Poland to abolition was slower compared to that of some of its Eastern European neighbours. In the hands of communist rule, the death penalty was applied not only for crimes, but also as a political means of obliterating opposition. The public support for abolition started to grow gradually in the 1970s, impelled partly by the Solidarity and the intellectuals' valuable contribution of influential organisations in some journals. Moreover, in 1988, Poland put the execution into practice under a moratorium in use, and in 1998, completely abolished the death penalty with its newly passing penal code conditions.³² Since that time, however, unlike many of its Eastern European peers, Poland's position on the death penalty has remained susceptible to political change.

In the early 2000s, there were political attempts to reinstate the death penalty for certain "vicious" crimes; these were finally rejected due to pressure from the European Union and the Council of Europe. In other words, since the late 20th and early 21st century, abolition of the death penalty in Eastern Europe was deeply interrelated with its transition from the authoritarian regime to democracy and a certain desire to align itself with European standards in the field of human rights. Different as the path was from country to country, some states being quicker than others, the broader

28 Now North Macedonia.

29 Hood and Hoyle, 2008, p.51.

30 Ibid. In 1990 Hungary became a member of the Council of Europe and ratified Protocol No. 6 in 1992.

31 Hood and Hoyle, 2008, p. 52.

32 Fijalkowski, 2005, pp.147-168.

trend reflected a commitment to human dignity and protection of life – a key principle enshrined in international human rights law. Additionally, separate mention shall be made to the states of former Soviet Union, that shall be discussed in next section.

2.3.2. *Former Soviet Union*

The history of capital punishment in the former Soviet Union was marked by significant turbulence and inconsistency. The death penalty was abolished and reinstated multiple times throughout the 20th century. It was abolished in 1917–18, 1920–21, and again for peacetime offenses between 1947 and 1950, but each time was reintroduced, primarily due to political motives. Lenin justified the reintroduction of the death penalty as a necessary tool for defending the revolution against “class enemies,” including those involved in counter-revolutionary activities, terrorist acts, or members of organisations that opposed the regime. This formula was broad and often used to classify common criminals and political dissidents as “enemies of the people,” particularly during Stalin’s reign when the death penalty became a tool of widespread repression.³³

In the post-Soviet era, capital punishment was gradually abolished across most of the newly independent republics, driven by internal reforms and external pressure, particularly from the Council of Europe. In Russia, capital punishment was effectively rendered obsolete in 1999 when the Constitutional Court ruled that the death penalty could only be imposed where citizens had the right to a jury trial, a right that was not universally available at the time. This ruling, in line with Article 20(2) of the Russian Constitution, laid the groundwork for a moratorium on executions. In June 1999, the President commuted all death sentences to life imprisonment or 25-year prison terms. By 2006, the Russian Parliament extended the moratorium to 2010, delaying the introduction of juries in Chechnya.³⁴

By 2003, eight of the fourteen former Soviet republics had abolished capital punishment for all crimes, with Latvia restricting its use to wartime offenses in 1999.³⁵ The drive for abolition in the European parts of the former Soviet Union was largely motivated by the desire to join the Council of Europe and, in some cases, the European Union. The new democratic governments sought to distance themselves from the totalitarian past, which had used capital punishment as a tool of political repression.³⁶

In Georgia, the abolition of the death penalty was closely tied to the country’s desire to align with European norms and values following its independence from the Soviet Union. Georgia had initially retained the death penalty, with executions continuing until the mid-1990s. However, in 1997, President Eduard Shevardnadze, under pressure from international human rights organisations and domestic advocacy

33 van den Berg, 1983, pp.154–174.

34 Hood and Hoyle, 2015, pp. 213–214.

35 Moldova 1995; Georgia 1997; Azerbaijan, Lithuania, Estonia 1998; Turkmenistan, Ukraine 1999; Armenia 2003.

36 Hood and Hoyle, 2008, p. 57.

groups, commuted all death sentences and formally abolished the death penalty. This move was influenced by Georgia's aspirations to join the Council of Europe, which it did in 1999. The Georgian Parliament later ratified Protocol No. 6 of the ECHR, abolishing the death penalty in peacetime, and Protocol No. 13, which abolished it in all circumstances, including wartime. The Georgian Orthodox Church, NGOs, and the media played significant roles in advocating for the abolition of the death penalty, framing it as a necessary step in Georgia's transition to democracy.³⁷

Similarly, Armenia's path to abolition was influenced by its desire to align with European institutions. After gaining independence, Armenia maintained the death penalty, but a moratorium was introduced in 1991, and the last execution was carried out in that year. In 2001, Armenia joined the Council of Europe, agreeing to abolish the death penalty as part of its membership obligations. In 2003, Armenia officially abolished the death penalty when it ratified Protocol No. 6 of the ECHR. The Armenian Constitutional Court had previously ruled that the death penalty violated the right to life, paving the way for legislative reforms. By 2006, Armenia had ratified Protocol No. 13, ensuring the abolition of the death penalty for all crimes.³⁸

Moldova led the way in Eastern Europe, abolishing the death penalty in 1995 as part of its accession to the Council of Europe. This abolition was formally written into the Moldovan Constitution in 2005. Estonia followed suit, ceasing executions in 1991, and officially abolishing the death penalty in 1998, five years after its accession to the Council of Europe. Latvia, which had continued executions until 1996, abolished the death penalty for ordinary crimes in 1999.³⁹

Lithuania faced a more complex situation. After its accession to the Council of Europe in 1993, Lithuanian parliamentarians referred the issue to the Constitutional Court, which declared the death penalty unconstitutional in 1998. Despite public concerns over rising crime rates, particularly a spike in murders between 1990 and 1996, Lithuania abolished the death penalty that same year, reflecting its commitment to joining the European Union and upholding human rights standards. Parliamentarians acknowledged that public support for the death penalty was contingent on the security situation, and once stability was achieved, the abolition proceeded without significant opposition.⁴⁰

Ukraine's path to abolition was slower compared to some of its Eastern European neighbours. Despite agreeing to a moratorium on executions in 1995 when it joined the Council of Europe, executions continued until 1997. Between 1996 and the imposition of the moratorium in 1997, 180 people were executed. The Ukrainian Supreme Court declared the death penalty unconstitutional in 1999, citing its inconsistency with Articles 27 and 28 of the Ukrainian Constitution. By February 2000, the

37 Svanidze, 2004, pp. 273–308.

38 Amnesty International, 2001.

39 Hood and Hoyle, 2008, p. 55.

40 Dobryninas, 2004, pp. 233–252.

Ukrainian Parliament had removed all provisions related to the death penalty from its legal codes.⁴¹

In Central Asia, the abolition of the death penalty was gradual, and largely driven by external pressure from international human rights organisations. Azerbaijan abolished the death penalty in 1998, following a moratorium established in 1993.⁴²

Belarus is the last country in the former Soviet Union to retain the death penalty. In Belarus, the death penalty remains legal and is still carried out, albeit with a reduced number of offenses punishable by death. Public opinion in Belarus remains a significant barrier to abolition, despite the country's ongoing dialogue with international human rights organisations. The President of Belarus has emphasised that the death penalty is applied only in exceptional cases of aggravated murder, but abolition remains elusive.⁴³

By the end of 2007, twenty-one states in Eastern Europe and the former Soviet Union had ratified Protocol No. 6 of the ECHR, and most had also ratified Protocol No. 13, signalling their commitment to the abolition of the death penalty. Belarus remains the last country in Europe to continue executions. The abolition of the death penalty in these countries reflect a broader trend towards human rights reform, driven by the desire for integration into European and international institutions.

2.4. Summary

This chapter traced the historical development of the right to life within the context of the abolition of the death penalty. It began with the recognition of the right to life as a basic natural right deeply rooted in legal traditions. An abolitionist movement emerged at the end of the 18th century, built on Enlightenment thinkers such as Cesare Beccaria, who used Enlightenment ideas to argue that the death penalty was both ineffective and cruel. Although early reforms in Europe and the United States managed to restrict capital punishment to grave crimes, its resurgence under most totalitarian regimes in the 20th century significantly slowed progress.

The chapter further highlighted how the rise of international human rights law immediately after the Second World War, particularly through precursors like the Universal Declaration, accelerated the global movement toward abolition. Most Eastern European, post-Soviet states, countries gradually abolished the death penalty as part of their transitions toward democracy, distancing themselves from Soviet practices and aligning with European human rights standards. The chapter concluded by noting the resistance from certain countries, such as Belarus, the last European country to carry out executions, although the broader trend across the region favored abolition.

41 Holovatiy, 1999, pp. 139–151.

42 Amnesty International, 2001.

43 Vasilevich and Sarkisova, 2006, pp. 9–17.

3. Interpreting the Right to Life Through the Lens of the European Convention on Human Rights

3.1. Council of Europe Framework

As mentioned, the international movement to abolish the death penalty gained momentum in 1948 after the introduction of the Universal Declaration, which had made capital punishment an exception to Article 3's injunction that 'every human being has an inherent right to life'.⁴⁴ At that time, this was a significant step forward. However, the policy would have lacked sufficient political impact if it had not been for the additional support provided by the Council of Europe, which gave the legitimacy to the abolitionist movement by framing the execution of citizens, whatever their crimes, as a fundamental violation of their inherent dignity and right to life, as indicated in the European Convention of Human Rights, adopted in 1950. The ECHR established one of the provisions left out of the Universal Declaration, namely that States may derogate from the right to life when imposing the death penalty following a conviction of a crime for which capital punishment is a permissible sentence.⁴⁵

Starting in the late 1970s, the Parliamentary Assembly of the Council of Europe began actively to promote the abolition of capital punishment. The advocate role in that movement, was played by Dr Christian Broda, the Austrian Minister of Justice, who framed the death penalty as "inhuman" and incompatible with European values.⁴⁶ After these debates, the Parliamentary Assembly officially requested that the Committee of Ministers bring into consideration the abolition of the death penalty, and such a proposal received very strong support from the represented member states.

It was the culmination of these efforts that, in December 1982, Protocol No. 6 to the European Convention on Human Rights was adopted, opened for signature on 28 April 1983. By Article 1 of Protocol No. 6, the death penalty was abolished in peacetime, reflecting a consensus among European nations that capital punishment was incompatible with the values of human dignity and respect for life that underpin the Convention.⁴⁷

Still, one important exception was preserved in Article 2 of the protocol, which permits the death penalty under state laws for times of war or imminent threat of war. This was to take cognisance of the complex security concerns of states in extreme situations, while making substantial strides toward the goal of abolition.⁴⁸ Nevertheless, the adoption of Protocol No. 6 was an important milestone in the movement for abolition of capital punishment to set a framework in place for its abolition in Europe.

It was further considered a milestone in the struggle for the absolute abolition of the death penalty in Europe when Protocol No. 13 to the ECHR was adopted in

44 United Nations, 1948.

45 Wheeler, 2018, p. 357.

46 Kruger, 1999, pp. 69–78.

47 Wheeler, 2018, p. 357.

48 Schabas, 2004, pp. 36–63, at p. 43.

Vilnius, Lithuania, on 3 May 2002. In contrast, while the previous protocols allowed for abolition only in peacetime, Protocol No. 13 went further to extend the abolition to all circumstances, including acts committed in times of war or during an imminent threat of war.⁴⁹ This was an important step to show that the Council of Europe was committed to the sanctity of life under any condition, and it reiterated the idea of the right to life as an inviolable and fundamental value in democratic societies.

The Committee of Ministers adopted Protocol No. 13 against the death penalty in international law with unmistakable political intent. The preamble to the protocol confirms this commitment because it declared that the member states were ‘convinced that everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.’ This statement marked a belief in the view that the ultimate punishment, in the form of capital punishment, could not be reconciled with the promotion of human dignity and the observance of human rights. By adopting Protocol No. 13, the member states of the Council of Europe once and for all drew a line in the sand against the death penalty and closed all the remaining ways providing for the use of this punishment legally.

The Protocol came into effect on 1 July 2003, less than one year after its adoption. So far, Protocol No. 13 of the ECHR – abolishing the death penalty completely – has been signed by 44 countries; Armenia and Azerbaijan are signatories. Russia, before a signatory, in 2022 stopped being a member of the Council of Europe; thus, it cannot henceforth have any say on Protocol No. 13 under the ECHR framework.⁵⁰

The adoption and extensive ratification of Protocol No. 13 are more than just a legal watershed; they represent a moral and ethical consensus of European states. Consequently, the protocol embodies a view which regards the right to life as an absolute value and holds that state-sanctioned killing, whatever the circumstances, can never be contained within the principles of respect for human dignity or within the scale of values open to contemporary democratic societies. It must in particular be regarded as significant development given the historical period in which this occurred, following centuries during which capital punishment had taken its place as an instrument of social discipline and of state authority. What is more, the adoption of Protocol No. 13 reinforces the function of international human rights law in shaping domestic policies and legal norms.

3.2. International Legal Framework on the Right to Life and Abolition of the Death Penalty

Besides Council of Europe and its convention with additional protocols, for sake of full analysis, it is important to briefly mention other international legal instruments relating to this right. The global movement for the abolition of the death penalty received great impetus with the adoption of the Universal Declaration. Being a

⁴⁹ Wheeler, 2018, p. 357.

⁵⁰ Council of Europe, 2023.

monumental instrument, it laid emphasis on the dignity and inalienable rights of the members of the human family, thus being a base instrument for subsequent human rights instruments.⁵¹ Article 3 of the UDHR categorically declares, ‘Everyone has the right to life, liberty, and security of person.’ Although the death penalty had not been prohibited in the final draft of the UDHR, its drafting history readily shows that one of the options considered had been the abolition of capital punishment. For instance, it was the Soviet Union that proposed the peacetime abolition of the death penalty be included in the Draft.⁵² One can appreciate here that from its very beginning, the debate on the death penalty and right to life were understood. Even though the proposal was rejected, it is evident that the protection of the right to life was associated with the abolition of the death penalty.

The next important step in defining the content of the right to life and its relationship with the death penalty was taken in 1966 when the International Covenant on Civil and Political Rights was adopted; it came into force in 1976. Article 6, ICCPR, is of special importance because this article has established the inherent right to life and clearly circumscribed the applicability of the death penalty.⁵³ It provides that the death penalty shall be applicable only for “the most serious crimes” and forbids its application to individuals below the age of 18 years and pregnant women. Furthermore, Article 6(6) allows the abolition of the death penalty, stating that ‘nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant’.⁵⁴ This was overtly meant to be an indication from the international community that the real intention was the universal abolition of the death penalty.

In 1989, the Second Optional Protocol to the ICCPR came into force. By this protocol, the death penalty was abolished outright, and state parties committing to its ratification undertake to not carry out executions and to take all necessary measures to abolish the death penalty within their jurisdiction.⁵⁵ To compare, this protocol, unlike Protocol No. 6 of the ECHR, does not provide for any derogations, even in times of war, and as such, represents an absolute position against capital punishment. However, despite this fact, this protocol has been ratified by less than half of the world’s nations⁵⁶, reflecting the steadfast resistance in some parts of the world to the absolute abolition of capital punishment.

Another noteworthy event regarding this right happened when UDHR was adopted in 1948. Namely, at the Ninth International Conference of American States held in Colombia, the American Declaration of the Rights and Duties of Man was promulgated. Although this declaration did not have the binding force of an international

51 Schabas, 2004, p. 36.

52 Union of Soviet Socialist Republics, 1948 in Schabas, 2013, p. 2208.

53 Hood and Hoyle, 2008, p. 21.

54 United Nations, 1966.

55 Wheeler, 2018, p. 357.

56 At the time of writing of this chapter, 91 countries have ratified or acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

treaty, it was again an important regional attempt at voicing the principles of human rights. Article 1 of the American Declaration corresponds to the UDHR, stating the right to life, liberty, and security of person. However, it was different from other declarations of human rights because it provided not just a list of rights, but also the duties that each one has in respect to another, and that is a comprehensive approach towards human rights and responsibilities.⁵⁷ Although there was no binding weight carried by the American Declaration, it nonetheless provided foundational work for a stronger and more effective regime for the protection of human rights under the American Convention on Human Rights (ACHR), created in 1969, which embodied many of the Declaration's principles while establishing binding obligations on its member states.

The ACHR gave considerable vigour to the regional apparatus in the field of human rights in the Americas. For the purpose of protection and promotion of human rights within the Organisation of American States, the convention created both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.⁵⁸ The main point of Article 4 of the ACHR is on the right to life and death penalty in quite a subtle manner. It says, 'Every person has the right to have his life respected,' and that the death penalty shall only be applied for the most serious common crimes and pursuant to a final judgment rendered by a competent court. Importantly, this bans the re-establishment of the death penalty in states that have abolished it, and excludes its application for political offenses, related common crimes, and against people under eighteen, over seventy, or pregnant women at the time the crime has been committed.⁵⁹

The scheme on the right to life, along with limitations on the death penalty, respects human dignity within a broad framework of the main features that are present in this declaration. However, these principles given under the ACHR are somewhat weakened by the lack of universal ratification within the region. For example, the United States signed the convention but never ratified it, while Trinidad and Tobago suspended its ratification in 1998 over concerns at the application of the death penalty. The ACHR nonetheless remains an important means in the global and regional effort toward limiting and eventually abolishing capital punishment.

To compare this latter and the ICCPR, they share similar spirit towards abolition, even though they do so in different contexts and various degrees of commitment. The approach taken by these documents are with its emphasis on the protection of life and restriction of the death penalty to the most serious crimes. However, the ACHR goes further by prohibiting the reinstatement of the death penalty in states that have abolished it and being more expansive in the protection accorded in respect of age and circumstances when the death penalty may not be applied. Although the Second Optional Protocol of the ICCPR took a more global lead in the complete abolition of

57 McCloskey, 2012, p. 491.

58 Ibid.

59 Ibid.

the death penalty, the influence it had on the protocol was reflected in the progressive abolition across the different regions, albeit with a number of resistant states.

As for attitudes enshrined in the international criminal law, with its practice, has further entrenched this trend against the death penalty. Notably, the statutes of the new generation of international and internationally hybrid criminal courts, such as the International Criminal Court, have excluded the death penalty in their list of applicable penalties. This is in stark contrast to the earlier international tribunals established in Nuremberg and Tokyo immediately after World War II, where the imposition of the death penalty was available. The prohibition against capital punishment in the ICC and all other tribunals indeed reflects an increasing convergence in international views that the infliction of the death penalty is repugnant to modern human rights standards.⁶⁰

Indeed, during the negotiations of the Rome Statute, representatives of those states which had ratified Second Optional Protocol to the ICCPR and other regional abolitionist treaties took the position that the inclusion of the death penalty in the statute would render cooperation with the Court impossible.⁶¹ In doing so, they acted under the protective purport of the right to life for this group of states, which entailed a commitment on their part not to reintroduce the death penalty. The Human Rights Committee has stated that countries abolishing the death penalty are under an obligation to protect the right to life 'in all circumstances' and therefore should never extradite suspects to countries where they would risk execution.⁶² The issue of extradition will be further explored in sections below.

Overall, it can be inferred that with the current status and challenges, despite this development, there are still concerns about the universal abolition of the death penalty. In the most recent data available, more than two-thirds of the world abolished the death penalty either in law or practice, yet strong resistance remains regarding certain regions of the world. Executions continue to be carried out in some countries; and there is also debate about whether or not the death penalty is an effective form of punishment that is morally accepted. The international community demands a full abolition of the death penalty, underlining that it is incompatible with the basic right to life and human dignity. Admittedly, in the case of abolition, the commitment to such steps has been mostly facilitated through the influences of international and regional legal frameworks, supplemented by the supportive work of international agencies such as the United Nations and the Council of Europe. Yet, a truly universal abolition demands continuous commitment and cooperation by every state, along

60 International Criminal Court Statute, Article 77; International Criminal Tribunal for the former Yugoslavia Statute, Article 24; International Criminal Tribunal for Rwanda Statute, Article 23; Special Court for Sierra Leone Statute, Article 19; Law on the Establishment of the Extraordinary Chambers, Articles 38 and 39, as amended on 27 October 2004; Special Tribunal for Lebanon Statute, Article 24; Statute of the Extraordinary African Chambers, Article 24.

61 Fife, 2001, p. 331.

62 Schabas, 2003, pp. 581–604, p. 583.

with sustained efforts toward eliminating the cultural, political, and legal barriers that confront progress in parts of the regions.

3.3. *Legal Interpretation of the Right to Life*

Article 2 of the ECHR has been described as a cornerstone provision and embodies in itself the most basic right, that is to say, the right to life. It prescribes not only that everybody's life shall be accorded protection by the law but also that very limited circumstances could justify the taking away of life.

Nevertheless, the article further sets conditions whereby the deprivation of life is not a violation of the Convention. Examples of such would be when the force being used is “absolutely necessary” either in self-defense, to effect a lawful arrest, to prevent the escape of a person lawfully detained, or to quell riots and insurrections. First, the importance of Article 2 lies not only in the strong protection it offers to the right to life but also in the subtle balance it achieves between the protection of this right and the realistic realities and requirements of states in practice. The provision thus falls into two main parts: the obligation to protect life by law and the lawful circumstances under which life may be taken without contravening the Convention.

3.3.1. *Protection of Life by Law*

Paragraph 1 of the Article 2 of the ECHR establishes that the right to life is a fundamental human right that the law should protect: ‘Everyone’s right to life shall be protected by law’.⁶³ This is a very basic point in the system of the ECHR and has been invariably protected by the ECtHR as the most basic and fundamental right, which forms an adequate ground for the protection of any other right. For this reason, the Court has characterised the right to life as “supreme” in its jurisprudence, since in the democratic regime it is a fundamental value for the dignity of human beings and of the rule of law. This principle was reaffirmed in *Randelović and Others v. Montenegro*,⁶⁴ where the Court found that a failure to conduct a transparent and effective investigation into the deaths of ferry passengers reflected a systemic failure to protect life through law in a meaningful way.

As such, within the context of the ECHR, Article 2 comes out as a non-derogable right – that which cannot even be suspended in times of public emergency. This is supported by Article 15(2) of the Convention, whereby it, together with Articles 3 prohibiting torture and 4(1) prohibiting slavery and 7 prohibiting punishment without law, is excluded from derogation. For instance, the ECtHR discussed in the case of *Giuliani and Gaggio v. Italy*, the right to life is in the most fundamental position since it is a Convention provision which, even in time of war or other public emergency, admits of no derogation.⁶⁵ This installs further detail on the value of human life that

63 Council of Europe, 1950, Article 2(1).

64 *Randelović and Others v. Montenegro*, 2017. ECHR.

65 *Giuliani and Gaggio v. Italy* 2011. ECHR § 174.

the Convention would wish to protect from any form of arbitrary deprivation by either a state or other actors.

In addition to this, Article 2 goes further and it not only recognises the right to life but also puts a proactive duty on states to take appropriate measures with respect to individuals within their jurisdiction to protect them from an arbitrary deprivation of life.⁶⁶ It follows, therefore, that such an obligation does not only lie in refraining from illegitimate killing but extends to proactive steps needed to be taken so as to secure lives. So far, the case jurisprudence of the ECtHR has been to confirm that the right to life necessitates the states having in place legal and administrative frameworks that credibly protect individuals from threats posed by both state and non-state actors.⁶⁷

In cases such as *McCann and Others v. the United Kingdom*, for instance, the Court has further enunciated the nature of this obligation by requiring that the use of force by state agents should be strictly necessary and proportionate to the threat posed. The Court concluded that any use of lethal force had to be absolutely necessary for the protection of life, and that the state was under an obligation to ensure its agents were adequately trained and equipped to handle any such situation in which the right to life may be put at risk.⁶⁸

3.3.2. State Obligations under Article 2

The Scope of State Obligations under Article 2 pages over the years, through its evolving case law, the European Court of Human Rights has developed a far more sophisticated approach to the state's obligation under Article 2 and provided that there is both a negative and positive obligation. The negative obligation places a duty on the state and its agents not to intentionally and unlawfully take life, while positive obligations include in itself taking appropriate steps to safeguard the lives of those within its jurisdiction.⁶⁹ To put it another way, this positive engagement has two components, namely: a) the obligation to establish a regulatory framework; and, b) the obligation to take preventive operational measures.

According to ECtHR there are different contexts that give rise to obligations of the state. One of such contexts puts burden on State actors who shall do anything in their capacity to protect persons from lethal use of force. The Court on numerous occasions has developed that Article 2 of the Convention imposes an obligation on this authority in certain well-defined circumstances to take preventive operational measures to protect an individual whose life is in threat due to the criminal acts of another individual.⁷⁰ However, having regard to the difficulties of policing modern societies, the uncertainties of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation has to be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities.

66 *Nachova and Others v. Bulgaria* [GC] 2005. ECHR, §§ 99–102.

67 *Makaratzis v. Greece* [GC] 2004. ECHR, §§ 57–59.

68 *McCann and Others v. the United Kingdom* 1995. ECHR, § 147.

69 Centre for Legal Resources on behalf of *Valentin Câmpeanu v. Romania* [GC] 2014. ECHR, § 130.

70 *Branko Tomašić and Others v. Croatia* 2009. ECHR, § 50.

Thus, not every alleged risk to life may involve for the authorities a Convention obligation to take operational measures to prevent that risk from materialising. Therefore, this positive obligation can arise only if it is proved that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁷¹ This means that where state became aware of real and immediate risk to life and acted accordingly in order to prevent risk for materialising, but failed to do so, does not necessary mean that state violated Article 2 of the Convention.⁷² On another hand, for the court it is enough if an applicant shows that the state did not take all the reasonable measures to avoid real and immediate risk to life, which the state knew or ought to have known.

For instance, this principle was very well reiterated in *Tërshana v. Albania*,⁷³ where the Court found a violation of the procedural limb of Article 2 due to the authorities' failure to investigate an acid attack on a woman effectively, highlighting systemic inaction in addressing gender-based violence. Following several investigative steps taken by the authorities, including examination of video footage and imposition of a compulsion order on the suspect, the identity of the perpetrator and the substance used in such an attack remained unknown. More importantly, no chemical and toxicological examination was carried out because the relevant authority did not have the equipment necessary for, or the competence to perform, such analyses. Such a failure to acquire an important expertise report was considered to be one of the major investigational fallacies.

Similarly, in *Enukidze and Girgvliani v. Georgia*,⁷⁴ the Court condemned the state's selective and biased investigation into a politically sensitive murder, committed by its agents. Applicants complained about the investigation into their son's death for any independence, partiality, and thoroughness because those responsible were close to the Ministry. The Court found a violation of Article 2 of the ECHR for both procedural and substantive reasons. It held that the investigation was fundamentally defective because of the manifested conflict of interest and lack of independence since the suspects were high-ranking officials themselves who oversaw the investigation. The investigation failed to take necessary steps aimed at securing essential evidence, protecting witnesses, and properly interviewing suspects. The Court pointed out that the measures adopted by the authorities showed more intent to protect the suspects. The importance of this case lies in its emphatic stand concerning the need for independence and impartiality during an investigation where state agents are concerned. This case has established an important precedent for holding states responsible to ensure that justice is served, even in cases involving high-ranking officials, underlining

71 *Mastromatteo v. Italy* [GC] 2002. ECHR, § 68.

72 *Kurt v. Austria* [GC] 2021. ECHR, § 211.

73 *Tërshana v. Albania*, 2020, Application no. 48756/14, ECHR.

74 *Enukidze and Girgvliani v. Georgia*, 2011. Application no. 25091/07, ECHR.

the principle whereby impunity for state agents cannot be tolerated in a democratic society.

In addition to this, in *Eremiášová and Pechová v. Czech Republic*,⁷⁵ the Court underscored the need for prompt investigation into deaths in police custody, finding deficiencies in the Czech authorities' duty of diligence. This case highlighted the procedural obligation under Article 2 that such investigations must be capable of leading to the identification and punishment of those responsible if necessary. In *Arskaya v. Ukraine*,⁷⁶ the Court further underlined the procedural duties of states under Article 2, in not only having to protect life but, where there are credible allegations of negligence leading to death, an obligation on the state to conduct an effective investigation. The Court stressed that state authorities needed to act with maximum expedition and thoroughness regarding such investigations, in particular in respect of a person who dies in an institution controlled by state services, such as a hospital. Similarly, in *Daraibou v. Croatia*,⁷⁷ the Court addressed the death of an immigration detainee suffering from tuberculosis, the court reinforced the state's heightened duty to protect life when individuals are in custody, particularly when their health renders them vulnerable, and reaffirms the necessity for effective, independent investigations into deaths occurring under such circumstances.

Another context where State obligations is worth mentioning is protection of persons from self-harm. This context, as a rule, is used on persons who for some reason are dependent on the state, which in turn has a duty to protect them. For instance, prison authorities, must perform their duties in a way that is compatible with the rights and freedoms of the individual concerned. There are general measures and precautions available to reduce the opportunities for self-harm, without infringing on personal autonomy. Whether more restrictive measures are needed in respect of any prisoner, and whether it is reasonable for them to be applied, is to be assessed in each case according to its peculiar circumstances.⁷⁸

This obligation becomes particularly relevant in the context of vulnerable persons placed in institutional care, as illustrated by the Grand Chamber in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*.⁷⁹ In this case, the Court found violation of Article 2 due to state's failure to provide adequate care to a young man suffering from severe mental disabilities and HIV, who died in a psychiatric hospital. The Court highlighted that states must implement effective legal and administrative measures to protect the lives of those who are especially vulnerable and who lack the capacity to advocate for themselves. Importantly, the judgment expanded standing for NGOs to act on behalf of unrepresented victims, reinforcing that Article 2 entails not only the duty to refrain from unlawful killings but also to protect the lives of

75 *Eremiášová and Pechová v. the Czech Republic*, 2012, Application no. 23944/04. ECHR.

76 *Arskaya v. Ukraine*, 2013. Application no. 45076/05. ECHR.

77 *Daraibou v. Croatia*, 2023. Application no. 84523/17. ECHR.

78 *Renolde v. France* 2008. ECHR, § 83.

79 *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], 2014. Application no. 47848/08. ECHR.

the most helpless. In the same vein, the Court emphasised in *Mučibabić v. Serbia*⁸⁰ that the failure to conduct a prompt and effective investigation into a fatal incident involving hazardous state activity – namely the death of the applicant’s son due to illegally produced rocket fuel – constituted a procedural violation of Article 2. The ruling clarified that delayed or ineffective investigations undermine the procedural safeguards of Article 2 and prolong suffering for victims’ families. Similarly, in *Olga Koceska and Others v. the Former Yugoslav Republic of Macedonia*⁸¹ the court reaffirmed the principle that positive obligations under Article 2 extend to ensuring public safety infrastructure and that states must respond adequately when failures in such infrastructure lead to loss of life.

The Court has also highlighted that, like detainees, conscripts and contractual military servicemen, whose conditions of life and service are akin to theirs, are in the exclusive custody of the authorities of the State and that those authorities are under an obligation to take care of them.⁸²

Yet another example are persons with mental disabilities, who are considered to constitute a particularly vulnerable group and need protection against self-harm.⁸³ In these types of cases, the authorities have a general operational obligation to take such preventive measures as are reasonable to avoid a person harming himself, irrespective of whether or not there have been voluntary or involuntary hospitalisations. Such specific measures will, however, depend on the specific circumstances in any given case and those specific circumstances will often differ depending on whether the patient is voluntarily or involuntarily hospitalised. But in the case of the applicants who are hospitalised on the basis of a judicial order, thus against their will, the Court, of its own motion, may apply an even harsher standard of scrutiny.⁸⁴

For a positive obligation to arise where the risk to a person derives from self-harm, such as a suicide in custody or in a psychiatric hospital, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and, if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁸⁵ The ECHR considers, amongst others, in distinguishing whether the authorities knew or ought to have known that the life of an individual was at real and imminent risk, thus engaging the duty to take appropriate preventive measures, such factors as: (i) history of mental problems; (ii) the gravity of the mental condition; (iii) past suicide or self-harm attempts; (iv) suicidal ideas or threats; and (v) physical and mental agitation.⁸⁶

80 *Mučibabić v. Serbia*, 2016. Application no. A34661/07. ECHR.

81 *Olga Koceska and Others v. the Former Yugoslav Republic of Macedonia*, 2013. Application no. 41107/07. ECHR.

82 *Mosendz v. Ukraine* 2013. ECHR, § 92.

83 *S.F. v. Switzerland* 2020. ECHR, § 78.

84 *Fernandes de Oliveira v. Portugal* [GC] 2019. ECHR, § 124.

85 *Ibid* § 110.

86 *Ibid* § 115.

There are many other contexts, where state obligation might arise, that due to our space cannot be fully discussed here, but what needs to be highlighted at this stage is that scrutiny on state are much bigger in particular contexts, e.g. in the context of detentions, where state has special duty to take basic precautionary measures to minimise the potential risk to protect well-being of persons deprived of their liberty. Failing to do so, under circumstances discussed in this section, most probably than not, is failing to adhere to the positive obligation of the state protected under article 2 of the ECHR.

3.3.3. Permissible Use of Force

Paragraph 2 of the Article 2 of the ECHR lists the very few circumstances wherein the use by state agents of force causing deprivation of life is not a violation of the right to life. This simply means that the right to life, though a fundamental right, is never absolute when an act of force is so necessary in order to achieve an end that is legitimate. This part of the article does not primarily define instances where it is permitted to kill an individual, as many think is the case, rather it describes the circumstances in which it is permissible to “use force” which may result, as an unintended consequence, in the loss of life. However, such force should necessarily constitute no more than “absolutely necessary” for the attainment of one of the purposes set forth in sub-paragraphs (a), (b) or (c).⁸⁷ It is also worth mentioning here, that “Absolutely necessary”, the phrase used in this article, shall be interpreted broader and much stricter than the necessity that normally is applicable when deciding whether State action is ‘necessary in a democratic society’ under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c).⁸⁸

3.3.3.1. Self-Defense or Defense of Others

The first exception, in this regard, is that the use of force is necessary to defend the person or others from unlawful violence. Where an individual’s life is in direct danger, this provision derogates a right of self-defense or defense of others for both individuals and state agents. But the ECtHR clarified that lethal force should be strictly necessary and proportionate to the posed threat. In *McCann and Others v. the United Kingdom*, the Court considered an application concerning the use of lethal force by British security forces in Gibraltar. Three suspected terrorists were shot who were believed to be preparing a bombing attack. The Court held that although the security forces genuinely believed that lethal force was required to protect life, the planning and control of the operation were defective, and thus a breach of Article 2. The Court reiterated that the state is under an obligation to minimise the risk to life by making a careful planning and strictly controlling the operation conducted.⁸⁹

87 *Yüksel Erdoğan and Others v. Turkey* 2007. ECHR, § 86.

88 *McCann and Others v. the United Kingdom* 1995. ECHR, § 147.

89 *Ibid* § 149.

The principle that even in self-defense, the force has to be absolutely necessary, viewed from the well-founded belief about the reality and immanency of the threat, was enunciated in the following case.

3.3.3.2. Effecting a Lawful Arrest or Preventing Escape

To enforce a lawful arrest or prevent escape Article 2, paragraph 2, subparagraph (b) permits the use of force for the purpose of such arrest or of preventing the escape of a person lawfully detained. It is intended to bolster the duty of the state to enforce the law and maintain public order. However, in this case as well, the exercise of force should be used no more than the situation indicates as being necessary for attaining a legitimate object. The ECtHR has taken the position that lethal force can only be applied when there is no other alternative and less intrusive means are to be used whenever possible. In *Nachova and Others v. Bulgaria* [GC], the Court had to review the killing of two Roma persons who were fired at by a military police officer in an attempt to detain them on suspicion of desertion from military service. The court found that the lethal force was not necessary or proportionate once the officer did not face any imminent danger. There was no actual danger posed by those individuals in order to try and escape. The Court also found that the operation was not thoroughly planned and controlled, and thus in violation of Article 2.⁹⁰ This case again reiterates and underlines the question of the proportionality and necessity of using force in attempting to effect an arrest or to prevent an escape. It indicates that lethal force is to be used only when strictly necessary and only as a last resort.

3.3.3.3. Suppressing Riot or Insurrection

The last exception under Article 2, paragraph 2 (c) is the force used to quell a riot or insurrection. The state has an obligation to maintain public order and protect its institutions and its citizens. Such use of force in that regard is duly exercised with extreme care to avoid undue loss of life. The ECtHR has emphasised, however, in the context of riot control, that the ‘principles of necessity and proportionality are strictly maintained’. In *Güleç v. Turkey* the applicant’s son was killed during a demonstration when lethal force was used by Turkish security forces; the Court examined this case. The security forces used live ammunition in order to disperse the demonstrators. The Court concluded that the authorities failed to ensure that the use of force was strictly necessary and proportionate to the situation. It further mentioned that the police patrol that accompanied them should have applied non-lethal means of crowd control before lethal force was used. The Court then held that the state failed to protect the right to life as provided by Article 2, and lethal force used in this context was unjustified.⁹¹ The Court also pronounced along similar lines in *İlhan v. Turkey*, underlining

⁹⁰ *Nachova and Others v. Bulgaria* [GC] 2005. ECHR, § 95.

⁹¹ *Güleç v. Turkey* (1998) ECHR, § 71.

that the use of force needed to be carefully controlled, and never resorted to except after all other means of controlling the situation had been tried.⁹²

To sum up, Paragraph 2 of Article 2 of the ECHR sets the frame within which the use of force by State agents is legitimate, balancing the duty of the State to protect life with maintaining public order against the right to life. Under the developed case law of the ECtHR lethal force can only be used in those cases when it is strictly necessary and proportionate, regarding the situation. Necessity and proportionality are basic safeguards against arbitrariness in the deprivation of life and ensure that the exercise of force by the State is collocated under the most heightened type of scrutiny. As was seen from the cases above, the principle of proportionality and necessity are intertwined and means that, even where the use of force is justified, it may not be more than absolutely necessary in pursuance of the legitimate objective of preventing a loss of life or preventing a serious crime. This principle acts as a check against the excessive use of force by state agents to avoid any undermining of the right to life with the State's actions.

It is also worth mentioning here, that the proportionality test developed by the ECtHR parallels that of the Court of Justice of the European Union. In *Menci*⁹³, the CJEU reaffirmed that any limitation on fundamental rights must be proportionate, necessary, and pursue legitimate aims in accordance with Article 52(1) of the EU Charter. Though dealing with the *ne bis in idem* principle, the reasoning once again highlights the shared European constitutional tradition of strict proportionality review in fundamental rights cases, including those under Article 2 of the ECHR.

3.4. Contested Areas: Abortion and Euthanasia

Although the ECtHR has taken a progressively firm position opposing the death penalty under Article 2, its case law on abortion and euthanasia demonstrates a more restrained and respectful attitude toward national discretion. These matters underscore the lack of a unified stance among Council of Europe member states and illustrate the Court's dependence on the "margin of appreciation" doctrine, especially in domains marked by deep moral, ethical, and philosophical divisions.

3.4.1. Abortion and the Beginning of Life

The ECtHR has consistently refrained from declaring when life begins for the purposes of Article 2 of the Convention. This issue lies at the heart of abortion debates, yet the Court recognises the profound moral, ethical, and religious differences among member states and has thus declined to impose a uniform standard. As a result, it affords states a wide margin of appreciation in regulating abortion and determining the legal status of the unborn.

⁹² *Ilhan v. Turkey* [GC] (2000) ECHR, §§ 91–92.

⁹³ Criminal proceedings against Luca Menci [GC] (2018), CJEU, Case C-524/15.

In *Vo v. France*,⁹⁴ the applicant had complained of a violation of Article 2 where her 20-week-old unborn child had been killed through medical error. The Grand Chamber ruled there was no consensus across Europe on the unborn's status, and consequently denied the protection of Article 2 to the unborn. The Court ruled it to be a matter for the national authorities to decide when life commences, and the Convention did not compel states to criminalise unintentional harm to the unborn. The Court exercised judicial restraint, showing respect for the Contracting States' pluralism. This has been reaffirmed in the case of *A., B. and C. v. Ireland*,⁹⁵ where three women objected against Ireland's previously strict abortion regime pursuant to Article 8 (right to respect for private life). Although the Court did recognise the laws prohibiting abortion represent an interference with Article 8 rights, it once again applied a wide margin of appreciation given the moral sensitivity of the matter. Nevertheless, the Court found for one applicant, holding Ireland had breached her rights for failing to provide an accessible and effective procedural means for establishing whether or not she met with the requirements of having a lawful abortion on grounds of risk to her health. This decision reasserted states have the right to enact limiting abortion legislation, but such legislation needs to have sufficient procedural guarantees and should not be arbitrarily disproportionate.

The Court's advancing jurisprudence set another milestone through *M.L. v. Poland*.⁹⁶ This case, though not about the breach of Article 2, came following the Polish Constitutional Court's 2020 ruling effectively prohibiting abortion on the basis of fatal abnormalities, abolishing one of the limited lawful rationales for abortion in Poland. The applicant, who had been eligible for an abortion under the existing legislation at the time, had been denied the abortion and had been compelled to seek termination abroad. She claimed violations of Articles 3, 6, and 8 of the Convention. In the historic judgment, the ECtHR held there to have been a violation of Article 8. The Court held the applicant's inability to have access to an abortion to which she was previously entitled to represent an interference with her private life that was illegal. Importantly, the Court also examined the legitimacy of the composition of the Constitutional Court, drawing attention to irregularities with the judicial selection process undermining the principle of the rule of law and the principle of legal certainty. This procedural failing served to underpin the conclusion that the interference was unforeseeable and lacked the protections mandated under Article 8. While the Court rejected the conclusion of a violation of Article 3 being reached, it did recognise the applicant's psychological distress and the cumbersome character of procuring care outside.

Collectively, *Vo*, *A., B. and C.*, and *M.L.* map out the ECtHR's strategy: although Article 2 denies the foetus the status of personhood, and national divergence is tolerated, abortion restriction is subject to the standards of legality, proportionality, and

94 *Vo v. France* [GC] (2004) ECHR, §§ 82–86.

95 *A., B. and C. v. Ireland* [GC] 2010. ECHR, §§ 214, 241, 267.

96 *M.L. v. Poland* 2023. ECHR, §§ 39–40.

procedural equity under Article 8. *M.L. v. Poland* further shows that violations of the rule of law – judicial appointments among them – can invalidate the legitimacy of abortion bans, therefore increasing the level of scrutiny the Court subjects them to.

Most recently, in *M.L. v. Poland* (2023), the Court went even further by linking reproductive rights with the rule of law. It found that the applicant's inability to access a lawful abortion, following a decision rendered by an irregularly constituted Constitutional Tribunal, violated Article 8. The judgment highlighted that abortion restrictions must respect both substantive human rights and procedural guarantees ensuring judicial independence.

3.4.2. Euthanasia and End-of-Life Decisions

In the areas of euthanasia and assisted suicide, the ECtHR has proceeded cautiously, incrementally – particularly with respect to interpreting personal autonomy and the concept of dignity under Article 8 (right to respect for private life). As has not been the case with abortion cases, the Court has never gone so far as to articulate a right to die under Article 2 or Article 8 itself. Rather, it hedges its bets: recognising personal autonomy but insisting upon robust protections being implemented by the state, especially since there has been no clear European consensus.

The Court initially addressed this point of contention in *Pretty v. the United Kingdom*.⁹⁷ The woman had terminal motor neurone disease and wished for the reassurance of the law that her husband would not be prosecuted should he assist her to end her life. The Court dismissed the contention that Article 2 encompasses the right to die, and also concluded that Article 3 did no more than guarantee the state would not assist to end life. Nevertheless, the Court did acknowledge the state would have to respect decisions taken over one's own body under Article 8. Despite this, it held the UK restrictions to be justified to safeguard vulnerable individuals from harm. In the case of *Haas v. Switzerland*,⁹⁸ the Court responded to an individual who sought access to the lethal drug but wished not to undergo psychological evaluation. Swiss authorities insisted on this precaution, and the Court upheld the decision. The Court stressed that since there is no political consensus across Europe on assisted dying, states have the right to establish protective legislative measures – to avoid people making irrevocable choices in times of psychological distress.

Access to justice took centre stage in the case of *Koch v. Germany*.⁹⁹ When the applicant's wife, who suffered from an incurable disease and was paralysed, was refused permission to receive life-ending medication, the applicant attempted to have the decision appealed – but German courts would not accept the case. The ECtHR found this to have been in breach of the procedural part of Article 8. The Court did not decide the legality of assisted dying itself, but it did emphasise the need for individuals to have the right to bring such intensely personal cases before the courts. A few

97 *Pretty v. the United Kingdom* 2002. ECHR, §§ 39–40.

98 *Haas v. Switzerland* 2011. ECHR, §§ 39–40.

99 *Koch v. Germany* 2012. ECHR, §§ 45–72.

years later, the Court examined the case of *Lambert and Others v. France*¹⁰⁰ – a case of passive euthanasia among a man who is in a vegetative state. His relatives disagreed on whether to withdraw life support. The Court affirmed France’s legal framework for permitting the withdrawal of treatment, insisting the decision-making model had been clear, transparent, and protective. It avoided taking an overly central role again, asserting national authorities were best equipped to grapple with problematic ethical and medical dilemmas – especially where there is no common standard right across Europe. In *Mortier v. Belgium*,¹⁰¹ the Court examined the Belgian case of a woman who had been enduring long-term psychological suffering. Although the Court did not find fault with the euthanasia itself, it expressed concern with the review process undertaken subsequently. Namely, it criticised the absence of independence for this review, since the physician who had been involved in the carrying out of the euthanasia had also been involved in its evaluation. This ruling emphasised the need for impartial and thorough review mechanisms in jurisdictions where there is legalised euthanasia.

Most recently, in *Daniel Karsai v. Hungary*,¹⁰² the lawyer suffering a terminal form of ALS claimed that the ban on assisted suicide under Hungarian legislation breached his rights under Articles 8 and 14 (right to protection against discrimination). The Court upheld the Hungarian legislation, repeating the assertion that there is no such right to assisted suicide under the Convention. The Court nonetheless agreed, however, that this is an evolving field of law and urged governments to review their policies on an on-going basis as the views of the public, medical practice, and ethical thought evolve.

These decisions demonstrate the ECtHR’s attempt to strike the right balance between two fundamental aims: safeguarding the right to life and honouring individual autonomy, where there is gross suffering or terminal illness at stake. Although the Court hasn’t reached the point where it has declared states have to legalise euthanasia or assisted dying, it has stated emphatically where it believes it should be done: where states decide to legalise it, the procedure needs to be well-framed, transparent, and safeguarded against exploitation. As culture changes, the Court has kept the door open to further evolution – but for the time being, the Court is maintaining the central aim of preserving both dignity and safety through end-of-life choices.

3.5. Prohibition Against Intentional Taking of Life – Death Penalty

As mentioned in the beginning of this chapter, Article 2(1) of the ECHR allowed the death penalty, stating that ‘no one shall be deprived of his life intentionally save in the execution of a sentence of a court...’. However, this wording reflected a pre-abolitionist consensus and has since been significantly transformed by the evolving interpretation of the Court and the adoption of Protocols No. 6 and No. 13. The first

100 *Lambert and Others v. France* 2015. ECHR, §§ 119–127.

101 *Mortier v. Belgium* 2022. ECHR, §§ 165–177.

102 *Karsai v. Hungary* 2024. ECHR, §§ 98–108.

one abolished the death penalty in peacetime, while the latter eliminated it in all circumstances, including wartime, thereby highlighting the position of the Council of Europe that capital punishment is incompatible with the fundamental values of human dignity. Accordingly, all member states but Azerbaijan have now ratified Protocol No. 13, and the ECtHR now considers the death penalty to be inherently against the spirit of the Convention.¹⁰³

An important case showing this development is *Öcalan v. Turkey* (2005)¹⁰⁴, where the Court recognised the use of the death penalty had become seen as contrary to Article 2 even where the original wording of the Convention had allowed for it. The Court stressed the use of the death penalty would have meant inhuman treatment and would seriously impair Turkey's democracy pledges and EU candidacy ambitions. Aside from forbidding capital punishment, the ECtHR also held that Article 2 precludes extradition or removal to states where the concerned individuals would risk being executed. The Court ruled, for instance, in the case of *Soering v. the United Kingdom* (1989) that the extradition of an individual to the U.S., where he risked facing the death penalty would infringe Article 3's prohibition of inhuman treatment.¹⁰⁵ The same principle has been reenacted in the case of *Al Nashiri v. Poland* (2014), where Poland was held accountable for the transfer of the detainee to United States custody even where there were foreseeable risks of capital punishment.¹⁰⁶

Similar protections exist in international practice. The UN Human Rights Committee has taken the same approach under the International Covenant on Civil and Political Rights ICCPR, such as, for instance, in *Chitat Ng v. Canada*¹⁰⁷ and *Roger Judge v. Canada*,¹⁰⁸ highlighting the obligations of states to avoid transfers where the death penalty is at stake. Collectively, these new developments show the ECtHR now views the death penalty as incompatible with Article 2, further bolstering the broad European and international consensus that the right to life cannot provide for the intentional causing of death at the hands of the state.

Based on all above mentioned, it can be inferred that not only is death penalty prohibited without any exceptions on the European continent as has been confirmed in numerous court decisions, but this stance of the Court also covers prohibition against extradition or deportation that places an individual at risk of execution in another country.

103 *Al-Saadoon and Mufdhi v. the United Kingdom* 2010. ECHR, § 120.

104 *Öcalan v. Turkey* (Application no. 46221/99) 2003. ECHR, Judgment of 12 March 2003, § 125.

105 *Soering v. United Kingdom*, Federal Republic of Germany intervening 1989. ECHR, § 161.

106 *Al Nashiri v. Poland* 2014. ECHR, § 577.

107 *Chitat Ng v. Canada* (Communication no. 469/1991) UN Doc. CCPR/C/49/D/469/1991, 7 January 1994.

108 *Roger Judge v. Canada* (Communication no. 829/1998) UN Doc. CCPR/C/78/D/829/1998, 20 October 2003.

3.6. Summary

The following chapter discusses how ECHR developed and interpreted the right to life in its main sphere of abolishing the death penalty. In 1948, the Universal Declaration of Human Rights adopted emphasis on inherency of life, which came to be the initial momentum for the abolitionist movement. Although the Declaration itself does not expressly connect the right to life with the abolition of the death penalty, the history of the drafting of that instrument shows that such considerations were not absent. The ideal of the right to life was further articulated with the 1966 ICCPR that placed restrictions on the death penalty and limited its application to the “most serious crimes,” while prohibiting its use against children and pregnant women. In 1989, the Second Optional Protocol to the ICCPR called for full abolition, though it remains under-signed internationally.

Article 2 of the ECHR forms one of those cornerstone provisions in establishing a right to life as a fundamental human right, protected by law. The dual duty implicit in that undertaking means not only a negative obligation for states to abstain from unlawful deprivations of life but an additional positive duty to take such measures as are needed to safeguard lives within their jurisdiction. However, Article 2(2) outlines the very limited circumstances in which it would not constitute a violation, including self-defense, when effecting a lawful arrest, or to prevent a riot. The European Court of Human Rights has emphasised that “the use of force must be “absolutely necessary” and “proportionate” in cases like *McCann and Others v. the United Kingdom*.

The chapter also explored morally and legally challenging domains where the interpretation of the right to life under Article 2 remains unsettled – particularly abortion and euthanasia. As reflected in relevant subparagraph above, in these areas, the ECtHR has adopted a cautious, deferential stance, invoking the doctrine of the margin of appreciation. In abortion-related cases such, the Court has avoided defining when life begins, instead focusing on procedural safeguards under Article 8. Similarly, in its euthanasia jurisprudence the Court has prioritised personal autonomy and dignity without recognising a right to die, highlighting instead the importance of robust legal frameworks and protections against abuse. Most recently and importantly, as was reaffirmed in Hungarian case, while no right to assisted suicide exists under the Convention, the evolving nature of societal values may invite future re-evaluation.

The chapter also surveys the larger international legal landscape, highlighting the contributions made by the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The latter established the Inter-American Court of Human Rights and prohibited the re-introduction of the death penalty in countries that abolished it. This chapter underlines the fact that these regional tools of ECHR and ACHR have considerably moved forward the cause, yet global abolition has remained asymmetrical amidst strong resistance in some regions.

4. Conclusion

The impetus of this paper was to dive into how the right to life has evolved and the movement towards the abolition of the death penalty, focusing on respective legal and historical contexts that shaped that trajectory. Historically, the death penalty was widely implemented as a form of punishment and a tool for social control, often justified by theories of deterrence and retribution. The abstraction of an effective abolitionist movement only really materialised with the arrival of the Enlightenment period, essentially inspired by the emergence of Humanism and Rationalism. With thinkers such as Cesare Beccaria, the effectiveness and morality of capital punishment were questioned on the bases that it was inhumane and also ineffective. These forerunning arguments for the abolition of capital punishment provided a framework for the gradual diminution of capital offenses concerned with providing a framework upon which the abolition of the death penalty by many European countries was based.

The paper demonstrated how the ECHR played a considerable role in crystallising the right to life and strengthened the abolitionist cause. Article 2 of the Convention enshrine the right to life itself and maintained rigid conditions whereby life could lawfully be deprived. This was a reflection of shifting basic perception whereby state-ordered executions were seen to be no longer acceptable. The approval of Protocol No. 6, which abolished the death penalty in peacetime, and Protocol No. 13, extending this abolition to all circumstances, formed important steps regarding the European abolitionist movement. Its implementation was carried out along with the European Court of Human Rights that interpreted such provisions and applied them within member states. By sifting the landmark judgments, the Court influenced the national legal systems and set a high benchmark for protection of human rights by reiterating that the death penalty was incompatible with the basic values of human dignity and right to life.

The article also touched on the implications that these legal developments for countries in Central and Eastern Europe, where the transition from authoritarian rule to democratic systems of governance, is often accompanied by far-reaching legal reforms. The case law of the ECtHR in these countries showed a complex but evolutionary approach toward an absolute abolition of the death penalty. The judgments rendered by the Court indicated the necessary standards for an adequate and effective investigation, when suspicious deaths are caused, lethal force is used by state agents, and protection against removal to a country where the applicant would be exposed to a real risk of being sentenced to death.

These judgments further clarified the legal duties of states under the ECHR and had wider regional implications for protection of the right to life and abolition of capital punishment. The article also discussed abolition as part of a world-wide movement beyond Europe by comparing the ECHR framework with another international human rights instrument, namely the International Covenant on Civil and Political

Rights and American Convention on Human Rights. While these different instruments did evidently share a common commitment with regard to the protection of the right to life, the depth of adherence to abolitionist principles varied across regions.

The article noted that even though many countries have abolished the death penalty, there remained strong resistance in parts of the world to such moves, reflecting deep-seated political, cultural, and social barriers. International criminal law further influenced this movement: modern international tribunals excluded the death penalty from their applicable punishments, thereby mirroring the development of the trend internationally against capital punishment. While these progresses existed, however, the paper modestly conceded that the road to total abolition is far from over.

The paper additionally, underlined how the European human rights framework – in particular, the contribution of the ECtHR – has had a gradually evolving impact on the movement for the abolition of the death penalty. It highlighted the tremendous strides ahead that had been taken-place in Europe, where the death penalty is now regarded as incompatible with contemporary human rights norms. Yet, it also reflected the fact that a long, hard battle for abolition still remained around the world. Precedents were developed under the ECHR and other international instruments that gave rise to important legal frameworks; however, these are yet to be universally adopted or enforced.

Each one of those political, cultural, and social barriers needs continuous effort to helve little by little until the removing of capital punishment. The European experience is already a powerful example of how regional human rights mechanisms could drive national policy and expand fundamental rights, as described in the article. The judgments of the ECtHR not only strengthened the right to life across Europe, but they inspired broader international efforts toward the abolition of the death penalty. These needed to be sustained and expanded in order to ensure protection of the right to life globally, without exception. Ultimately, the paper called for an integral approach toward the abolitionist movement, one that combined legal reforms with educational, political, and cultural initiatives. It stressed the idea that the abolition of the death penalty is not simply a matter of the law but highly moral and ethical, at the core level of respect to human dignity and life.

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Prohibition of Torture

Rebecca Lilla HASSANOVÁ

ABSTRACT

This chapter examines the prohibition of torture and other forms of ill-treatment as a foundational norm of international human rights law. The text interprets the ban on torture within its *jus cogens* character and *erga omnes* obligations, emphasising that it is non-derogable and applicable irrespective of treaty consent. The analysis clarifies the conceptual contours of torture and its differentiation from inhuman and degrading treatment, highlighting the interpretive space created by treaty language and the resulting central role of judicial and quasi-judicial bodies. The subchapters proceed through the main normative and institutional frameworks.

KEYWORDS

prohibition of torture, ill-treatment, jus cogens, inhuman treatment, degrading treatment

1. Introduction

There are historical records of torture dating from ancient times through the Middle Ages to the present, indicating that torture has been a frequent practice throughout history. In the Roman Empire, it was extensively used against slaves and Christians; meanwhile, during the Inquisition, it was imposed on heretics and those accused of witchcraft, as well as on African slaves in America. Historical accounts of medieval torture methods have become well-known. Furthermore, it is no secret that military practices are employed to extract confessions of treason or counter-terrorism. Torture was for centuries not considered illegal or immoral.¹

In the last century, with the help of various movements fighting for human rights, the international community has made remarkable progress towards the elimination of torture. The prohibition of torture or other ill-treatment has been incorporated into the text of several international and regional treaties dealing with human rights. The prohibition of torture was clearly included among rights having the character of

| 1 Ryals, Conrad and Moore, 2010, p. 460. |

Rebecca Lilla Hassanová (2026) 'Prohibition of Torture' in Paczolay, P. (ed.) *The European Convention on Human Rights A Central and Eastern European Perspective*. Miskolc–Budapest: Central European Academic Publishing, pp. 113–150. https://doi.org/10.71009/2026.pp.tecohr_5 |

jus cogens, which generally recognised and legally anchored that this right is fundamental. It is considered so fundamental that it has the character of a law of general validity *erga omnes*, which must be applicable in all situations to all persons, even without the consent of an international entity or the existence of an international treaty.² Consequently, several issues have sparked worldwide academic discussions regarding the topic, particularly among European and American scholars focusing on criminal and human rights law. These debates have raised questions regarding the definition of torture, its extent, legal standing, and societal acceptance.³

Torture is a term used in professional circles to generally describe the act of causing physical, mental pain or suffering to a person, for some purpose. However, the detailed meaning of this term from the point of view of legally binding conventions of international law is generally unclear. A very restrictive understanding of the term could thus create gaps in the law, which could have disastrous consequences in terms of the importance of the values (right to life, bodily integrity, etc.) that the prohibition of torture protects. The looser and more vague text of the articles of international treaties prohibiting torture thus gives scope for application to lawyers and especially judges.⁴

The phenomenon of torture can be analysed through three distinct lenses. The first approach is related to the criminal law. Torture is viewed as a crime tied to issues of accountability, legal jurisdiction, and principles of responsibility. Second, the notion is perceived through procedural law, where, in the context of legal proceedings, any evidence obtained through torture is rendered inadmissible. Third, the interpretation of torture is mentioned regularly in migration and refugee related matters, where it plays a significant role in cases concerning mutual recognition, extradition, and asylum law. Nonetheless, in all matters, it is necessary to differentiate between torture, inhumane treatment, and degrading treatment.⁵

The following text seeks to clarify some conceptual elements surrounding the prohibition of torture and ill-treatment. It also examines the obligations that states have in terms of safeguarding fundamental rights against such abuses. Therefore, it provides a comprehensive analysis of the international legislative framework regarding the prohibition of torture, focusing on its characteristics, scope, and role. This subject is closely linked to the protection of human rights – a principle established globally following World War II. The Universal Declaration of Human Rights (UDHR)⁶ represents a significant milestone in European human rights history. Through this document, states pledged to work with the United Nations (UN) to promote and uphold human rights and fundamental freedoms effectively. Although the UDHR was initially

2 Joint statement on the United Nations International Day in Support of Victims of Torture. 26/06/2018.

3 Langbein, 2004, p. 100.

4 Lattmann, 1990, pp. 133–149.

5 Sonnevend and Bodnár, 2021, p. 41.

6 Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948, GA resolution 217 A.

not legally enforceable, it has since gained customary law status, and its principles are now binding. The UDHR is regarded as one of the most critical documents regarding human rights and has paved the way for subsequent binding agreements, such as the European Convention on Human Rights⁷ (ECHR) and the Inter-American Convention on Human Rights.⁸ Notably, Article 5 of the UDHR states: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,’⁹ which has significantly influenced later treaties addressing torture prohibition.

Many important international human rights treaties articulate the prohibition of torture, inhumanity, degrading treatment, and punishment. At the UN, this prohibition is primarily articulated in the UDHR (Article 5), the International Covenant on Civil and Political Rights¹⁰ (ICCPR, Article 7)¹¹, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) along with its optional protocol. Firstly, the chapter will be analysing the interpretation of the prohibition stemming from these documents. Subsequently will be the text devoted to the research of regional human rights, focusing primarily on the European regional framework set by the European Convention on Human Rights.

The aforementioned treaties explicitly state the *ius cogens* rule against torture, which is absolute and non-derogable. The *ius cogens* character of the torture prohibition was first established in the Furundžija case by the International Criminal Tribunal for the former Yugoslavia.¹² Recognised as one of the most universally acknowledged human rights, this prohibition is part of general international law and creates *erga omnes* obligations. These obligations denote specific duties states owe to each other. In legal terms, *erga omnes* is a Latin phrase meaning “towards everyone”. These rules enable international courts (the ICJ, ECtHR, and ICC) to extend beyond traditional rights and duties derived from bilateral or multilateral treaties or international customs, thereby advancing international law through natural law standards. Thus, the prohibition of torture constitutes a human right that binds all states and entities under international law, regardless of any specific treaty ratification process.¹³

7 European Convention on Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, E.T.S. No. 005, entered into force 3 September 1953. More rights are granted by additional protocols to the Convention (Protocols 1 (E.T.S. No. 009), 4 (E.T.S. No. 046), 6 (E.T.S. No. 114), 7 (E.T.S. No. 117), 12 (E.T.S. No. 177), 13 (E.T.S. No. 187), 14 (C.E.T.S. No. 194), 15 (C.E.T.S. No. 213) and 16 (C.E.T.S. No. 214)).

8 American Convention on Human Rights, opened for signature 22 November 1969, 1144 U.N.T.S. 123, entered into force 18 July 1978.

9 Universal Declaration of Human Rights, 1948, Article 5.

10 International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976.

11 Article 7 of the International Covenant on Civil and Political Rights: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’

12 See *Prosecutor v. Anto Furundžija*, (ICTY Case No. IT-95-17/1-T.), Trial Judgement, 10 December 1998, para. 144.

13 Nuhija and Memeti, 2013, p. 31.

In general, individuals with restricted personal freedom and under surveillance are more susceptible to abuse. Addressing these situations is imperative due to the frequent occurrence of involuntary disappearances, where individuals face severe threats to their physical integrity. Traditionally, the concept of torture has been interpreted to suggest that the perpetrator must be a state official or someone carrying out a public duty. Since such officials may not directly engage in acts of ill-treatment in private contexts, the link between the state and the individual responsible is established if the official knew or should have known about the act and failed to intervene. States have both preventative and punitive responsibilities to avert torture and ill-treatment, which include normative measures to ensure torture prohibition is enshrined in law and procedural measures to properly investigate and penalise violations.¹⁴

The change came through progress in international humanitarian law. Considering the use of new technologies, there was a demand to amend the rules of war accordingly. Through this response to the use of improved means, the laws of war first included a prohibition of torture in their texts. The 1929 Geneva Convention, dealing with the treatment of prisoners of war, included the protection of war prisoners from torture and ill-treatment during their capture.¹⁵

Rapid change came after the second world war. It became clear for the international society that there must be powerful and swift changes when it comes to preventing vast human rights abuses. This resulted in the creation of several human rights treaties, including explicit prohibition in their texts.¹⁶

A legislative framework has been established, which should ideally be complemented by effective enforcement measures. Despite the introduction of monitoring mechanisms, significant gaps remain in oversight and enforcement. Many states continue to employ torture as a method of interrogation or punishment, disregarding binding legal obligations. This issue extends to countries regarded as democratic and modern, such as the United States, which has documented instances of torture against accused individuals. Such governments often justify their actions by citing national security concerns. Consequently, it is evident that the implications of the torture prohibition are enforced inadequately, suggesting a need for expanded measures. In the subsequent text, the author will provide an overview of the legislative framework for the prohibition of torture, taking these deficiencies into account. The selection of case law will be based on its relevance and clarity in interpreting the concept of torture within the context of the analysed conventions.

The prohibition of torture and ill-treatment constitutes a fundamental principle of the international human rights protection system and the constitutional order of democratic states. Legal frameworks provide robust protections against torture and ill-treatment at both the international and national levels. However, as will be

¹⁴ Savnidze, 2014, p. 113.

¹⁵ Bekerman, 2005, p. 747; See Rodley and Pollard, 2022.

¹⁶ Tate, 2013, p. 203.

discussed, the requirements surrounding the definition of torture have evolved alongside societal changes. Over time, legal standards and their application have become more stringent, complicating the interpretation of what constitutes torture. The following sections will outline the most significant treaties and pertinent case law that constitute the protective framework surrounding this issue.¹⁷

2. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Committee against Torture

CAT Article 1: “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 person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁸

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by the General Assembly in 1984 after extensive debate, particularly influenced by Swiss lawyer and banker Jean-Jacques Gautier, who advocated for a stronger framework to assist states in meeting their legal obligations under the Convention. These requirements were perceived as overly complicated and contentious and had been intentionally excluded from the text. The responsibility for implementing the Convention was delegated to a group of ten independent experts known as the Committee against Torture, which approved the text.¹⁹

The CAT consists of a preamble and three main parts. The first part addresses substantive law, including the definition of torture outlined in the first article and the stipulation of universal criminal jurisdiction over torture. The second part focuses on specific implementation mechanisms, establishing the Committee against Torture under Articles 17 and 24, tasked with overseeing the implementation of the CAT in ratifying states. The majority of the States in the General Assembly found it crucial that without some kind of active body the whole concept established by the Convention would be threatened. Hence, as an key aspect of the treaty, a monitoring instrument was set up to ensure that the CAT would be accepted and profoundly implemented into the legislation and further application by all State parties. The first meeting of

17 Hassanová, 2023, p. 54.

18 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, U.N.T.S. 1465, entered into force 26 June 1987, Article 1.

19 Evans and Haenni-Dale, 2004. p. 24.

this body was held after the ratification of the CAT by the 20th State party, in 1988 in Geneva. This Committee not only ensures that national laws align with the CAT's mandates but also monitors the enforcement of those provisions. It consists of ten independent experts who review state party reports and convene regularly in two sessions each year in Geneva – one in April or May and the other in November. The Committee gathers credible information regarding states' practices of ill-treatment, which may prompt confidential proceedings.²⁰ Concretely, Article 19 stipulates that each State party has to submit to the Committee reports on the measures which were taken to undertake its obligations stemming from the CAT. Indeed, the reports have to be filed periodically. As a next step, these reports are examined. If needed, representatives of the examined party may send an inquiry to accept a representative being present during the examination. The examination may result in general comments created by the Committee. The Committee also has the power to conduct an investigation on the territory of the State personally. These procedures include gathering of information or confidential inquiry procedure by a visit. This form of the Committee's work result in a summary published in its annual report. The third method is represented by inter-state complaints. However, the Committee's right to conduct investigations or act on inter-state complaints is subject to the recognition and competences in these matters and remains optional.²¹ Generally, the final observations manifest as findings, general comments, manuals, or guidelines, none of which are legally binding. Hence, the power of the Committee is still questionable. Nevertheless, it can include its findings in its annual report to the UN General Assembly, potentially leading to various actions. The third part of the treaty outlines the document's vitality, including ratification clauses, amendments, and its entry into force.²²

Under CAT, the prohibition of torture is recognised as an absolute right, imperious to the justification of other rights outlined in the Convention. Ill-treatment cannot be justified under exceptional circumstances such as war, the threat of war, or internal unrest. This is supported by the fact that none of the human rights treaties, analysed below, allow any justification when it comes to the prohibition of torture when setting the standards in their derogation clauses. The States are thus bound to protect human dignity enshrined in the right and must not violate it under any extraordinary situation. Additionally, in Article 2(1) of the Convention, CAT established the duty to prevent torture as a legal obligation.²³ Hence, deriving from this understanding, as States shall be the protectors of human rights, they have the obligation to provide necessary protection from these violations. This means that the States have a responsibility to provide protection even in horizontal relations (individual

20 Fact Sheet Combating Torture. No. 04 of the United Nations Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 2002, p. 11.

21 Fact Sheet No. 17, The Committee against Torture. 1992, p. 3.

22 Coccia, 1990, p. 316; Derckx et al, 2013. p. 8.

23 Article 2. (1) of the Convention Against Torture reads as follows: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.'

contra individual). On the other hand, it also means that following orders from a superior does not absolve the perpetrator of accountability.²⁴

Torture, as defined by the Convention, is characterised as a deliberate crime, resulting in severe pain or suffering, with the perpetrator requiring official authority. Therefore, four essential elements must be satisfied for actions to be classified as torture under the CAT. The first element involves the nature of the act, encompassing both actions and omissions that result in significant pain or suffering to the victim. According to international case law, this pain may be physical or mental.²⁵ The second element pertains to the subjective aspect, meaning the perpetrator must have inflicted the suffering intentionally, thereby excluding acts of negligence. The third element emphasises the necessity for a clear purpose behind the act, usually aimed at extracting a confession, gathering information, punishment, intimidation, coercion, or discrimination. However, as stated in Article 1 of CAT, this list is not exhaustive, enabling for the possibility of other intents.²⁶ The fourth and final element concerns the involvement of public officials; while this aspect is generally straightforward, recognising the role of a third party acting in an official capacity can lead to ambiguities. For instance, in the HMHI case,²⁷ the Committee on Civil and Political Rights acknowledged a Somali clan as a non-state actor exerting authority over a specific territory, thus functioning similarly to a public authority. Nonetheless, the Committee noted that such situations must be evaluated individually. Additionally, issues may arise when prohibited acts are executed not by an official but with their consent or tacit approval.²⁸

Although it is clear that there exists a separation between these notions even from Article 16, the text of the CAT does not explicitly define what constitutes cruel, inhuman, or degrading punishment or treatment.²⁹ According to the recollections of the drafting committee leaders, the creators of the text faced two primary challenges. First, while the definition of torture was relatively clear, the concepts of cruel, inhuman, or degrading treatment or punishment were difficult to articulate with precision.³⁰ Second, since the document imposes various legal obligations on state parties that must be reflected in their criminal laws and procedures, these obligations could not rely on vague terminology like “cruel,” “inhuman,” or “degrading treatment”. This ambiguity illustrates the Committee Against Torture’s acknowledgment

24 Hambro, 1970, pp. 360–363.

25 See Joined Greek Case: *Denmark v Greece*, (ECHR Application no. 3321/67), *Norway v Greece*, (ECHR Application no. 3322/67), *Sweden v Greece*, (ECHR Application no. 3323/67), *Netherlands v Greece*, (ECHR Application no. 3344/67), Report of the Sub-Commission, 5 November 1969.

26 Centre for Justice and International Law and Association for the Prevention of Torture. *Torture in International Law: A Guide to Jurisprudence*. 2008.

27 *H.M.H.I. v. Australia*, (Complaint no. 177/2001), Decision, 1 May 2002, para 6.4.

28 Publication of the United Nations Human Rights Office about Interpretation of Torture in the Light of the Practice and jurisprudence of International Bodies. 2011, p. 5.

29 Convention Against Torture, 1987, Article 16.

30 Burgers and Danelius, 1988, p. 149.

that the distinctions between torture and cruel, inhuman, or degrading treatment or punishment are often unclear.³¹

CAT incorporates ethical and moral principles rooted in natural law and aimed at promoting dignity, humanity, and adherence to other international human rights treaties. The preamble references Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, emphasising that one of the Convention's primary goals is to additionally enhance the effectiveness of combating torture and inhuman or degrading treatment.³²

Article 16 of CAT states that signatory states are obligated to

‘undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.’

A state's positive obligation arises when a specific threshold of severity concerning interference with fundamental rights is recognised. However, determining when a positive obligation exists regarding the prohibition against torture is more complex, as not all instances of harm to physical integrity or health carry criminal implications. An important criterion for differentiation lies in whether the actions are conducted by a public authority or a private individual. The fundamental purpose of an effective investigation in such cases is to guarantee the proper implementation of national regulations, particularly when a violation is attributable to a public authority acting within its legal mandate.³³

CAT explicitly stipulates the principle of non-refoulement in Article 3.³⁴ States have an obligation to not to expose individuals to the risk of torture or other form of ill-treatment by their expel or return (“refouler”) to the country of their origin. The person claiming protection has to provide substantial grounds for believing that he would be in danger. The principle has recognised by the international jurisprudence regularly and led to the widening of the scope of application by each regional human rights system.³⁵

The Committee's work and its interpretations through general comments and case law enrich the understanding of CAT. Similarly, in national courts, the prohibition of

31 General Comment of the Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment no. 2, 2007, 10.

32 Convention against Torture, 1987, Preamble.

33 Čentéš and Belež, 2021, p. 4.

34 Convention against Torture, 1987, Article 3.

35 Bantekas and Oette, L, 2020, p. 376; Katsoni, 2025, p. 8.

torture is often interpreted concerning the principle of non-refoulement. In its General Comment no. 1, the Committee Against Torture specified that risks of torture must be assessed based on evidence that exceeds mere theory or suspicion.³⁶ Although the risk does not need to meet the standard of being definitively possible, it must be both personal and actual. This interpretation was later expanded in the *Dadar v. Canada case*, emphasising foreseeability and real risk.³⁷ It should also be noted that the facts considered by the Committee are provided by the relevant state party; however, the Committee has the authority to freely evaluate this evidence based on the circumstances in each case, as indicated in the *NTW v. Switzerland case*.³⁸

In conclusion, despite the relatively good quality of CAT and its global ratification, it cannot be deemed a success.³⁹ This is due to factors such as the lack of enforcement by states, insufficient UN enforcement bodies, or the unwillingness of certain ratifying states to comply with its provisions genuinely. Nonetheless, CAT holds fundamental significance, as its definition of torture has served as a reference point in the case law of international courts, particularly ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.⁴⁰ In the early periods of these tribunals, CAT's definition was often adopted without criticism. However, subsequent rulings reflect a growing independence of international courts from the definitions established in the Convention, highlighting the different natures of international humanitarian law and human rights law.⁴¹

3. European Convention on Human Rights

Article 3 of the ECHR states, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

The European human rights system is the most established international framework for safeguarding human rights, particularly concerning the prohibition of torture. This system was developed within the Council of Europe (CoE), an inter-governmental organisation founded in 1949 by several Western European nations dedicated to safeguarding individual freedoms, democracy, and the rule of law. In 1950, CoE member states adopted the ECHR, which took effect in 1953.⁴² This was followed by the adoption of the European Convention for the Prevention of Torture and the creation of the European Committee for the Prevention of Torture.

36 General Comment of the Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment no. 2, 1997, 6.

37 *Mostafa Dadar v. Canada*, (Complaint no. 258/2004), Decision, 5 December 2005, para. 4.11.

38 *N.T.W. v. Switzerland*, (Communication no. 424/2010), Decision, 6 July 2012, para. 7.3.

39 Convention against Torture, 1987, signatories: 83, parties: 173.

40 See *Prosecutor v. Delalić, Mucić, Delić and Landžo*; *Prosecutor v. Anto Furundžija*; *Prosecutor v. Kunarac, Kovac a Vuković*.

41 Burchard, 2008, p. 162.

42 Buergethal, 2001, p. 89.

The ECHR is based on the centrality of individuals and protects numerous values such as human dignity. The roots of the right in natural law can also be seen in the travaux préparatoires of the ECHR.⁴³ The drafters, when forming Article 3, discussed that some actions that are deemed inconsistent with civilized society, incompatible with civilization, offenses against heaven and humanity, or those that are wholly evil must be abolished. Through the creation of Article 3, the drafters stipulated a clear stop to these acts by protecting the value of human dignity. Hence, the prohibition of torture was positioned as one of the most significant provisions of the Convention and underscoring its importance within the CoE's framework.⁴⁴ The fundamental element of this prohibition is the severe nature of pain and suffering involved. Jurisprudential precedents indicate that certain actions qualify as torture, where the offense's conduct requires the infliction of severe pain or suffering, thus enabling the prosecution to prove the conduct alone.⁴⁵

As evidenced by the rulings of Central European constitutional courts, interpretations and implementations of this provision vary widely. For instance, one approach involves an illustrative enumeration of what constitutes torture, exemplified by the Czech Constitutional Court's decisions. This court has identified serious repercussions of police actions that amplify the severity of interventions – such as police action resulting in amputations, gunshot wounds, severe fractures, extensive bruising, the knocking out of three teeth, an ear injury, and bruises on a larger part of the body – deciding these acts qualify as torture.⁴⁶ Conversely, the Hungarian Constitutional Court emphasises that torture consists of behaviour that inflicts severe suffering on the victim, aimed at coercing information or intimidating the subject.⁴⁷ The Slovak Constitutional Court declared that an immanent part of every punishment is the obligation of the affected person to submit to interference with his rights, in accordance with the requirements of the penal system; this is done under circumstances that, among other things, should also express the social condemnation of the committed crime. Therefore, it is understandable that in most, if not all, cases of court-ordered punishment, the person punished may experience feelings of humiliation or mental or physical discomfort, which they may perceive as “hardship” or “suffering.” For the purposes of Article 3 of the Convention, however, it must be treatment or punishment causing mental or physical suffering that reaches a certain degree of severity in order to be qualified as torture or inhumane treatment or punishment.⁴⁸

43 European Commission on Human Rights. Preparatory Work on Article 3 of the European Convention of Human Rights. DH.56, 1956.

44 Gnatovskyy, 2022, p. 297.

45 Kovács and Sánta, 2010, p. 23.

46 Czech Constitutional Court. Decision. No. Sp. Zn. III. ÚS 2012/18. [43].

47 Hungarian Constitutional Court. Decision no. 32/2014. (XI.3.) [137]; Decision no. 6/1996; (VII. 12.) [34].

48 Slovak Constitutional Court. Decision No. PL. ÚS 6/09. Overview of the Constitutional Court Decisions, 2012, p. 4.

The prohibition of torture would be a mere formal assertion without substantive meaning if it did not obligate states to codify in criminal law the illegality of actions that bear a resemblance to torture, inhumane treatment, or punishment. Furthermore, states must create a robust legal framework for criminal proceedings to address these offenses and ensure this legislation is effectively applied.⁴⁹ However, merely enacting legislation that aligns with the ECHR is insufficient; contracting states are also responsible for the practical implementation of these guaranteed rights. Implicitly, in the article addressing the prohibition of torture, we may find a positive obligation for ECHR parties to investigate allegations of mistreatment; failing to do so renders the prohibition theoretical and illusory, allowing offenders to act without consequence.⁵⁰ This obligation aligns with the absolute nature of the prohibition, requiring a well-structured legislative framework and enforcement mechanisms to reliably address credible torture claims. If these mechanisms neglect their investigative duties, states must find other ways to combat impunity. This issue also touches on the upholding of the rule of law within a state's judicial structure. Nevertheless, states may struggle to meet this positive obligation, resulting in the activation of the European human rights system, specifically the CoE's human rights mechanisms; thus allowing victims to apply their claim in the European Court of Human Rights (ECtHR). Consequently, the ECtHR's jurisprudence serves as a primary reference for enforcing and penalising the prohibition against torture. The case law of the Court interprets the prohibition according to the current view and understanding of the Member states; however, vice versa, it also influences the interpretation on domestic levels. The interpretation of the rights from the common-consensus perspective was confirmed in several judgments of the Court, which stipulated that the emergence of a common approach by the majority of Member States of the ECHR can contribute to the evolution of the framework at hand.⁵¹

Therefore, the ECtHR's case law is rooted in its interpretation of Article 3's scope and significance. The Court first detailed the concept of torture in the case of *Ireland v. the United Kingdom*, indicating that for any act to qualify as torture, it must meet a minimum standard of severity that cannot be deemed unjustifiable; this indicates a more severe form of treatment. Such treatment may constitute degrading or humiliating actions or actions that coerce the victim against their will or conscience. However, the ECtHR does not clearly define how this minimum threshold should be interpreted or applied.⁵² Nonetheless, the critical takeaway from the pertinent Ireland case is that there exists a differentiation between torture and inhuman or degrading treatment, with the ECtHR framing this distinction based on the intensity of suffering inflicted.

49 Guide on Article 3 of the European Convention on Human Rights, Prohibition of torture, 2025, p. 6.

50 Čentéš and Beleš, 2021, p. 4.

51 See *Dudgeon v United Kingdom*, N. 7525/76. 1981; *Bayatyan v. Armenia*. N. 23459/03, 2011.

52 Savnidze. 2014. p. 9.

Torture is characterised as a purposeful act causing significant and cruel agony to the victim.⁵³

In the relevant case, the ECtHR has determined that actions categorised as such fulfil all of Article 3's requirements, with the intent of extracting confessions, identifying other offenders, and gathering information. These actions were executed systematically with a clear purpose, thus excluding negligence on the part of the perpetrators. Moreover, these acts were carried out by officials from Northern Ireland's security forces.⁵⁴

In this context, the ECtHR has asserted that the only aspect preventing these actions from being classified as torture is the lack of extreme intensity in pain and suffering. The Court has afforded national authorities a wide margin of appreciation, arguing that they are better positioned than international judges to ascertain what constitutes extreme pain and suffering. Nevertheless, this interpretation is narrow and lacks clarity due to the ambiguous language used by the ECtHR.⁵⁵ It should be noted that while the Court has made efforts to articulate the distinction, it has not precisely defined its specific aspects. However, the ECtHR has repeatedly reaffirmed this distinction, referencing previous conclusions in *Ireland v. the United Kingdom*.⁵⁶

The contemporary understanding of torture and its aspects in ECtHR case law diverges significantly from earlier interpretations. The current perspective on the prohibition has expanded, encompassing actions that seem as less severe while still recognising the requirement for significant victim harm. Many actions previously overlooked as torture have been elevated through this evolving lens. The earlier interpretation exemplified in *Ireland v. the United Kingdom* illustrates how the case law of international courts has evolved over time. Some claim that these changes in the legal practice are based on the changes present in the sensitivity of the society. Socio-cultural sensitivity shifted by understanding some punishments as too harsh demanding sensible and legitimate punishments. We may likely derive the creation of the alternative sanctions in the criminal procedural law likewise from these aspects.⁵⁷

The vaguely interpreted distinctions arising from the phrasing of pertinent legal articles have been the subject of numerous significant ECtHR rulings. This interpretation is structured vertically, representing three distinct concepts: torture, inhuman treatment, and degrading treatment. Varying approaches have emerged based on the thresholds defining these terms. The differentiation relies on the severity of pain or suffering, with torture indicative of the most severe conduct, whereas degrading treatment represents the least severe.⁵⁸ In the *Selmouni v. France* case, the ECtHR remarked

53 *Ireland v The United Kingdom*, (ECHR Application no. 5310/71), Judgement, 13 December 1977, para. 167.

54 *Ibid.*, 166.

55 Cullen, 2003, p. 39.

56 *Atkas v. Turkey*, 313.

57 See Silverman, 2001.

58 Evans, 2002, p. 370.

that the high standards for human rights protection necessitate a more stringent approach to violations concerning fundamental values such as physical and mental well-being.⁵⁹ Thus, this case illustrates that the ECtHR should, with the passage of time, reassess its previous interpretations of Article 3 and differentiate these concepts according to the intensity of the resulting harm.

The case of *Keenan v. The United Kingdom* is notable regarding threshold concepts. In this instance, Mark Keenan, the applicant's son, died by suicide in prison due to the negligence of the prison authorities, which stemmed from inadequate monitoring and psychiatric care amidst segregation. In 2001, the ECtHR stated that the severity of pain or suffering constituted only one factor within a complex framework. This acknowledgment points to the inherent difficulty in establishing thresholds across these concepts, allowing the Court significant leeway to assess cases individually.⁶⁰

Lastly, the ECtHR's interpretation in the *Gäfgen* case likely contributes to the broader conception of torture and its determinant factors.⁶¹ This case involved Mr. Gäfgen, who kidnapped the 11-year-old son of a German banker and was later apprehended after police interrogation aimed at uncovering the child's location. During the interrogation, an officer threatened the child with considerable pain to elicit information and potentially save the child's life. Sadly, the interrogation had no point, since Mr. Gäfgen has suffocated the child prior to his arrest. The police officer investigating, however, considered the child to be alive; hence, utilised such methods as a threat. The ECtHR ruled that Gäfgen experienced inhumane treatment, given the immediacy and authenticity of the threat from the policeman, leading to mental distress and possible long-term mental impacts. The victim was in a precarious situation, suffering abuse from interrogators who positioned their methods as life-saving. The ECtHR determined that the threat of physical pain met the minimum severity required by Article 3; however, it did not qualify as torture but as inhuman treatment. The rationale underscored the need to protect not only physical integrity but also human dignity as laid out in Article 3.⁶²

The *Gäfgen* case raises pertinent considerations regarding the ECtHR's balancing act, despite Article 3 forbidding such a balancing of rights. The case prompted a dialogue on the tension between preserving a child's life and upholding basic human rights grounded in natural law and peremptory norms. The ECtHR firmly asserted that even in extreme circumstances where innocent lives are at stake, the prohibition on ill-treatment cannot be compromised. Several justifications support this stance: Article 3's and Article 15's provisions affirm that derogation clauses do not apply to absolute rights. The ECtHR reiterated that even during national emergencies, the prohibition of torture cannot be overridden. Secondly, safeguarding against violations of Article 3 protects the foundational principles of democratic societies in tandem with

59 *Selmouni v France*, (ECHR Application no. 25803/94), Judgement, 28 July 1999, para. 101.

60 *Keenan v the United Kingdom*, (ECHR Application no. 27229/95), Judgement, 3 April 2001, para 112.

61 *Gäfgen v. Germany*, (ECHR Application no. 22978/05) Judgement, 1 June 2010.

62 *Selmouni v. France*, (ECHR Application no. 25803/94), Judgement, 28 July 1999, para. 101.

the torture prohibition. Finally, an unwavering stance against torture reflects societal consensus, emphasising its absolute rejection by public authorities.⁶³

One of the most crucial questions that have come to the fore already in the Gäfgen case is the issue of admissibility of the evidence that was obtained by ill-treatment. The Court found that there must be a distinction of the real evidence (physical objects as a body or a weapon) and the evidence gathered by coercive methods. In the pertinent case, the Court even contemplated that excluding all evidence obtained by the breach of Article 3 may be an appropriate redress.⁶⁴ Later on, in case of *Ćwik v Poland* the ECtHR reaffirmed this position. The case went even further, as it contemplated the admissibility of a video that was used as evidence during Polish investigation. The video was presenting the defendant as being a victim of coercive interrogation perpetrated and filmed by a drug cartel member. ECtHR declared that although the application raised issues under Article 6 of the Convention, the principle stemming in Article 3 must be highly relevant when examining the issue.⁶⁵ Additionally, the admission of this evidence would, apart from breaching Article 3, render a trial unfair. In the *Ćwik* case, the Court declared that this applies not only where the victim of the treatment was also the defendant against whom the resulting evidence would be used, but also where the evidence would be used against third parties.⁶⁶ Through this decision, the jurisprudence reinforced the absolute nature of the prohibition by clearly banning all evidence obtained through torture or ill-treatment. Through this, the ECtHR attempts not only to prevent authorities from manipulating the trial but also to eliminate any temptation to use coercive methods.⁶⁷

In concluding remarks about the Gäfgen case, the author offers certain critiques of the ECtHR's broad interpretation of Article 3. The author contends that the Court mistakenly addressed the issue of weighing the right to life against the prohibition of torture in this instance. The ECtHR maintained that the threat of torture should be construed as torture itself; however, these notions must be evaluated separately concerning the given context. Firstly, while exploring the mental repercussions of such threats is vital, proving them is inherently challenging. Secondly, various negative mental consequences arise from detention, interrogation, and procedural tactics, none of which pursue confessions or information. However, as Article 3 specifies, the rationale for depriving individuals of liberty does not absolve these actions from scrutiny.⁶⁸ Lastly, the assumption asserting that the threat of torture outweighs national survival merits reconsideration. If an investigator suggests that the threat of torture carries greater worth than the life of a nation, they will likely face scrutiny and possibly even criminal accountability.

63 Yiallourou, 2019.

64 *Gäfgen v. Germany*, (ECHR Application no. 22978/05) Judgement, 1 June 2010, para 173–178.

65 *Ćwik v. Poland*, (ECHR Application no. 31454/10) Judgement, 5 November 2020, para 59–65.

66 *Ibid*, para 77.

67 See Thienel, 2006.

68 The Convention against Torture in its Article 1 also does not include exhaustive list of the element of purpose.

Additionally, scrutinising the ECtHR's case law concerning the prohibition of torture necessitates mentioning a pivotal case presenting a close relationship with torture and death penalty: case of *Soering v. the United Kingdom*.⁶⁹ The *Soering* case is primarily recognised for its effect on asylum law. This case involved the extradition of an applicant to the United States, where they faced charges potentially leading to capital punishment or life imprisonment in Virginia. However, following thorough analysis, the ECtHR determined that such extradition would violate Article 3. This ruling set a significant precedent for future cases concerning CoE member states and extradition policies.⁷⁰ Beyond criminal matters and Article 3's scope, this case broadly influenced state responsibility and human rights law. The principle which was established in the *Soering* case is rooted in the understanding, that States have the duty to prohibit actions of torture on their territories as well as abstain from facilitating these activities abroad. In many Central and Eastern European nations, numerous cases related to the torture prohibition often intersect with asylum law, mainly considering the safety of returning applicants to their home countries.⁷¹

Finally, the ECtHR's determination in *Aydin v. Turkey* marked a notable advancement in defining torture, as it recognised rape as an act that can be classified as torture for the first time. In this ruling, the ECtHR remarked that rape constituted especially severe ill-treatment with lasting psychological trauma that exceeded and outlasted physical injuries. The act of rape is characterised by a series of horrifyingly humiliating experiences, particularly given the context of the victim's deprivation of liberty. The act was also committed with specific intent, particularly to elicit information.⁷² This decision is essential in broadening the definition of torture. It underscores how previous rulings often disregarded rape as a form of torture, as demonstrated by *Cyprus v. Turkey*, where evidence of mass rape by security forces was not acknowledged under Article 3.⁷³ The ECtHR noted in the *Aydin v. Turkey* case that most instances of rape by private individuals against others do not typically meet the criteria for torture, lacking the requisite intent, involvement of public authority, or the condition of detention.⁷⁴

3.1. European Convention for the Prevention of Torture and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

1989 marked a significant step in the combat against torture, when the European Convention for the Prevention of Torture (ECPT) created an innovative framework requiring state parties to establish national preventive mechanisms, including an instrument – an international body – that has a mandate to conclude visits in the

69 *Soering v. the United Kingdom*, (ECHR Application no. 14038/88) Judgement, 7 July 1989.

70 Lillich, 1992, p. 128.

71 Jackson, 2016. p. 830; See *Z.A. and Others v Russia* (ECHR Application no. 61411/15), Judgment, 28 March 2017.

72 *Aydin v. Turkey*, (ECHR Application no. 23178/94) Judgement, 25 September 1997, para. 83.

73 See *Cyprus v. Turkey*, (ECHR Application no. 25781/94) Judgement, 10 May 2001.

74 McGlynn, 2009, p. 2.

jurisdiction of the ratifying countries. The Convention created the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, with a duty to manage periodic visits to places of detention in each of the member states. At the time of drafting, the European Convention for the Prevention of Torture was a sole project establishing a world-wide treaty-based mechanism aiming to control and regularly observe the domestic application of the human rights obligations. Hence, with the optional protocol to the CAT convention in 2006, the Committee Against Torture became the second body responsible for internal checks in countries concerning the prohibition of torture.⁷⁵

The first president of the Committee, Antonio Cassese claimed that: “The Committee has shown that by now, even the innermost recesses of state practices are open to international scrutiny. The barrier of state sovereignty has been torn down, at least in this area.”⁷⁶ The creation and work of the Committee is certainly one of the triggers in the noteworthy growth in the density and complexness of the ECtHR’s case law in the recent 35 years. The widening of the notions under the lens of the ECtHR have become reality, which we may observe also on the proportional growth of the numerous soft law instruments in the field. Some of these instruments, such as the European Prison Rules⁷⁷ or the UN Standard Minimum Rules for the Treatment of Prisoners,⁷⁸ certainly have some impact on the drafting of binding agreements as well as on the work of international courts.

The Committee is composed multidisciplinary, i.e. out of people coming from various fields. The majority of the members are professionals from the legal field; however, a notable number of members are medical doctors or experts from different scientific field relevant to the investigated context. Additionally, even the legal experts are generally dealing with different fields of law – from constitutional lawyers to human rights defenders. These candidates are chosen by the member states from among their experts and then elected by the Committee of Ministers of the Council of Europe.⁷⁹

The demands arising from the Convention created in each member country concern some level of national preventative mechanism, representing a remarkable force in the combat against torture. The proper application of these mechanisms is regularly checked by the Committee. Under the current framework, it has the ability to access information related to number of detainees, locations of detention, and the circumstances and conditions of the treatment of prisoners. If states fail to provide this information, the Committee may be alarmed and may critically access the facilities where persons are deprived of their liberty through *ad hoc* visits apart from periodic

75 Bicknell, 2018, p. 10.

76 Cassese, 1994, p.115.

77 Recommendation Rec 2 of the Committee of Ministers to member states on the European Prison Rules. 2006.

78 The United Nations Standard Minimum Rules for the Treatment of Prisoners. The Nelson Mandela Rules. General Assembly Resolution 70/175. Annex. Adopted 17 December 2015.

79 See Wrońska, 2016.

control. The periodicity of the controls in situ fluctuates between three and eight years. The employees have the additional liberty to interview the detainees in private and get accurate and relevant information.⁸⁰ The places that are visited are police stations, detention facilities, prisons, correctional institutions, along with social care homes, psychiatric hospitals, or detention for foreigners, such as migrant camps.⁸¹

According to Article 11 of the ECPT, the main principle during the work of the Committee is the principle of confidentiality. The information gathered is confidential. The only exception to this rule is the report, which can be made public should the state concerned so request. The Committee can also make public statements if the state fails to cooperate or fails to improve the circumstances as per the Committee's recommendations.⁸² Nevertheless, we may observe that majority of reports are published and the Committee's work is presented freely.

Although the rigidity of the interpretation of what constitutes torture was shaken after the terrorist attacks in 2001 and the emergence of the "war on terror," the work of the Committee has been, since its establishment, continuous and necessary. The pressure incoming mainly from the United States of America created demands from countries to reopen the interpretation of the notion of torture. The work of the Committee is thus a part of a very complex institutional, normative, and political cast. However, there is no doubt that the mere creation of such institution, not to mention its periodic work, plays a major role in shaping and influencing the application of obligations stemming from Article 3 of the ECHR.⁸³

4. Protection provided by the European Union

The European Union (EU) underscores its commitment to human rights protection in its foundational document, the Treaty on European Union (TEU).⁸⁴ Article 2 of the TEU establishes that the EU is built on values such as human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, highlighting the significance of these principles for EU institutions.⁸⁵ Another key document is the Charter of Fundamental Rights of the European Union,⁸⁶ also known as the Nice Charter, which holds the same legal status as the EU Treaties, as stated in Article 6

80 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Treaty Series. N. 126. 28. September 1983. Article 20.

81 Gnatovskyy, 2022, p. 301; See *J.B. and Others v. Malta*, (ECHR Application no. 1766/23) Judgment, 22 January 2025.

82 European Convention for the Prevention of Torture, 1989, Article 11.

83 See 34th General Annual Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2024.

84 Treaty on European Union, Official Journal of the European Union no. C326/13, entered into force 26.12.2012.

85 Treaty on the European Union, 2012, Article 2.

86 Charter of Fundamental Rights of the European Union, Official Journal of the European Union no. C364/1, entered into force 18.12.2000.

of the TEU. Article 4 of the Nice Charter prohibits torture and inhuman or degrading treatment or punishment, binding all EU Member States to these principles.⁸⁷ The author begins by discussing the EU's efforts to combat torture, followed by an analysis of how the Court of Justice of the European Union (CJEU) interprets this prohibition.

The EU's approach to addressing torture is divided into internal and external actions. Internally, the focus is on judicial cooperation in criminal matters and asylum law, including the rights of refugees. This cooperation aims to harmonise and align member states' regulations concerning the prohibition of torture. As the Justice and Home Affairs of the EU has been regularly broadening its competencies, it has an important impact on the lives of the EU citizens.⁸⁸ Hence, EU institutions must establish minimum legislative standards regarding the definition and punishment of torture, requiring member states to incorporate these standards into their laws, in line with obligations under the European Convention on Human Rights and the Convention against Torture.⁸⁹

Despite the EU's European Arrest Warrant allowing for the suspension of the warrant in cases of serious and persistent breaches by a member state, it does not explicitly allow for refusal to extradite an individual to a member state where there is a serious risk of ill-treatment. Articles 3 and 4 of the framework decision outline mandatory and optional grounds for non-execution of the warrant; however, they do not mention torture or ill-treatment.⁹⁰ Nonetheless, the application of this decision must always align with the EU's primary legal sources, which assert that fundamental rights and principles cannot be altered or bypassed by either the framework decision or judicial rulings. Consequently, when executing an extradition, the ECHR and the Nice Charter, particularly Article 3 of the ECHR and Article 4 of the Nice Charter, must be adhered to.⁹¹

Regarding Articles 18 and 19 of the Charter, the right to asylum imposes restrictions on removal, expulsion, or extradition, particularly in cases where there is a serious risk of the individual facing the death penalty or ill-treatment. The focus is on the procedures in member states for assessing the conditions in the destination country. These procedures include criteria aimed at preventing the misuse of asylum claims for protected status. However, these mechanisms are also influenced by the Dublin II Regulation⁹² and relevant CJEU case law, which will be discussed further.⁹³

87 Article 4 of the Charter of Fundamental Right of the European Union reads as follows: '*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*'

88 See Nowak, Charbord and Gil-Bazo, 2021, pp. 59–92.

89 Kotzur, 2015, p. 448.

90 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002, Article 3–4.

91 See Reports from the Commission on the European arrest warrant and the surrender procedures between Member States, 2005 and 2006.

92 See Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2003.

93 Morgade-Gil, 2015, p. 437.

Externally, in 2001, the General Affairs Council established Guidelines for EU policy towards third countries on torture and other cruel, inhuman, or degrading treatment or punishment, complementing the EU's 1998 Guidelines on the death penalty.⁹⁴ These guidelines offer instructions to EU institutions and member states for addressing ill-treatment in non-EU countries, aiming to protect human rights internationally. The guidelines also cover the work of groups that report on and analyse instances of torture outside the EU, seeking to identify and apply preventive measures. The goal is to implement effective actions to enforce the prohibition of torture and ensure victims have access to rehabilitation services and legal support. The tools outlined in the guidelines include political and financial measures, such as dialogue, monitoring, assessment, reporting, demarches, statements, visits, trial observations, cooperation with multilateral bodies, and financial support. Additionally, a 2016 Council Regulation⁹⁵ allows for the possibility of trade sanctions as a tool to prevent and combat ill-treatment in specific countries.⁹⁶

It is worth mentioning the Regulation from 2005 concerning trade in goods that could be used for capital punishment, torture, or other cruel, inhuman, or degrading treatment, which is the first multilateral instrument in this area. It has a binding force and, as a regulation, direct application in all Member States as well. The aim of the regulation is to somehow control the business of human rights. It presents a trade control on equipment that are regularly tools for violations.⁹⁷

In practice, the attempt to avoid illicit treatment of third country nationals by EU actions stems from providing protection to asylum seekers or migrants who qualify for subsidiary protection.⁹⁸ The requirement is the existence of a real risk of suffering a serious harm in the country of origin. This allows for protection from torture, death penalty and execution, and other serious individual threats to life. The CJEU held that the directive enabling such protection has to be read similarly as the protection provided in the ECHR, i.e. the non-refoulment principle applies accordingly.⁹⁹ The case-law of the CJEU plays a crucial role in interpreting the EU's prohibition of torture, aligning closely with the case-law of the ECtHR. The CJEU has emphasised that while all member states are presumed to respect fundamental rights, this

94 Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2019, Revision of the Guidelines.

95 See Regulation of the European Parliament and of the Council concerning trade in certain goods which could be used for capital punishment, torture or other cruel inhuman or degrading treatment or punishment, 2016.

96 Picchi, 2017, p. 753.

97 2016/2134 of the European Parliament and of the Council concerning trade in certain goods which could be used for capital punishment, torture or other cruel inhuman or degrading treatment or punishment. 23.11.2016.

98 Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. N. 2004/38/EC.

99 Greer, Gerards, Slowe, 2018, p. 329.

presumption is rebuttable and can be overturned by contrary evidence.¹⁰⁰ This principle applies to the transfer of asylum seekers between member states, particularly when there are clear issues with asylum procedures in the receiving country. Under the influence of the ECtHR,¹⁰¹ it is understood that a person should not be transferred to a country where they would likely face ill-treatment, requiring the current state to consider the asylum application to avoid violating human rights. The CJEU has ruled that asylum applicants may challenge the decision only in the country of first entry into the EU, especially if there are systemic deficiencies in that country.¹⁰² Regarding subsidiary protection, it is not necessary to prove that an individual is specifically targeted in a country where there are known threats to life, such as in dictatorships, war zones, or regions controlled by terrorist groups. The mere existence of such threats fulfils the requirement for a high risk to life for civilians returning to that country.¹⁰³

In recent case law, the CJEU has broadened provisions for the protection of asylum seekers under the mentioned principle of non-refoulement. In the 2018 case of *NS v. UK and Ireland*, involving a Sri Lankan national who claimed he had been tortured and faced the risk of further ill-treatment if he returned, the CJEU ruled that individuals who have been tortured in their home country are eligible for subsidiary protection if they face a real risk of being deliberately deprived of adequate physical and psychological healthcare upon return.¹⁰⁴

The right to subsidiary protection due to the fear of ill-treatment was a significant issue in many other cases before the CJEU. In the 2014 cases of *M'Bodj* and *Abdida*, the CJEU held that asylum seekers with serious health conditions could not claim asylum or subsidiary protection under qualification directives, even though these protections were designed to prevent acts of ill-treatment in the country of return. The Court, however, clarified that this protection was intended to guard against harm caused by humans, and inadequate medical treatment alone did not meet this standard.¹⁰⁵

As previously discussed, when issuing a European Arrest Warrant, authorities must consider the circumstances of its execution. The concept of torture in relation to the arrest warrant was explored in the cases of *Aranyosi* and *Caldararu*, where the CJEU addressed the limits of mutual trust and the duty of the executing authority to conduct due diligence. These cases concerned prison conditions in Hungary and Romania, which were deemed as insufficient. The Court ruled that if there is a risk of rights violations, the executing authority must seek additional information and

100 See *N. S. v. Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*.

101 See *MSS v. Belgium and Greece*, (ECHR Application No. 30696/09), Judgement, 21 January 2011.

102 See *Shamso Abdullahi v. Bundesasylamt*, (CJEU Case C-394/12), Judgement, 10 December 2013.

103 See *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, (CJEU Case C-465/07), Judgement 17 February 2009.

104 See *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, (CJEU Joined Cases C-411/10 and C- 493/10), Judgement, 21 December 2011.

105 See *Mohamed M'Bodj v État belge*; *Case of Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida*, (CJEU Case C-542/13), Judgement, 18 December 2014.

postpone the execution of the warrant. Indeed, the Court also highlighted the absolute nature of the prohibition of torture under Article 4 of the Charter.¹⁰⁶ However, other mutual recognition instruments, as the principle of mutual recognition of judicial decisions and the transfer of prisoners within and between EU member states, are also influenced by the conditions of treating individuals in vulnerable positions.¹⁰⁷

5. Torture in the Framework of Other Regional Human Rights Systems

5.1. *American Convention on Human Rights*

Article 5. Right to Humane Treatment

- ‘1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialised tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.’

The scope of rights intended to represent the fundamental rights of the Organisation of American States was adopted in 1948 in Bogotá with the acceptance of the American Declaration of the Rights and Duties of Man. This first non-binding document refers to natural law and is thus rooted in the morals and ethics of the humanity. It includes a preamble and two chapters that outline civil, political, economic, social and cultural rights, and freedoms. The Declaration prominently emphasises the principles of human equality and human dignity. It is clear that this Declaration laid the groundwork for the later American Convention on Human Rights.¹⁰⁸

The Inter-American Commission on Human Rights has, on several occasions, emphasised the necessity of creating a universally accepted instrument in the American system in order to ensure respect for human rights in the territory of its member

106 *Pál Aranyosi and Robert Caldaru v Generalstaatsanwaltschaft Bremen*, (CJEU Joined Cases C-404/15 and C-659/15), Judgement, 5 April 2016.

107 Nowak, Charbord and Gil-Bazo, 2021, pp. 59–92.

108 American Declaration of the Rights and Duties of Man. Organisation of American States resolution XXX. 2. 5. 1948.

states.¹⁰⁹ In 1967 in San José, the Inter-American Commission, through its adoption of the Inter-American Charter, asserted that one of its responsibilities is to protect the rights enshrined in the Charter. This led to the American Convention on Human Rights (referred to as the “Pact of San José”), which subsequently became binding and enforceable as part of the Charter documents.¹¹⁰

Article 5 of the Pact of San José outlines the prohibition of torture, although referring to it as the right to humane treatment. Its first subparagraph emphasises the protection of the physical, mental, and moral integrity of every individual.¹¹¹ The article itself provides for an autonomous right to personal integrity. The text of the provision differentiates between the conditions of a victim’s deprivation of liberty and the concepts of torture, cruel, inhuman, or degrading punishment and treatment.¹¹² Although these terms are often viewed as interchangeable, questions arise regarding the appropriateness of categorising all these actions under one *ius cogens* right. Some distinctions are made by the jurisprudence of Inter-American Court of Human Rights, which clarify these differences in concrete situations. This case law can serve as precedent for future applications.¹¹³

The third subsection of the article states that punishment may only be imposed on individuals who have been convicted. Thus, pre-trial detention of an unconvicted person should not be seen as a punishment. Instead, detention as a procedural measure must be justified as a preventive action, based on evidence that the accused may engage in further criminal activity, influence witnesses or victims, or evade prosecution.¹¹⁴ The subsequent subsection ties closely to this by explicitly stating that accused and detained individuals must be separated from convicted persons, leading to the understanding that their treatment should differ and be appropriate to their legal status.¹¹⁵ Both provisions are grounded in the principle of the presumption of innocence.¹¹⁶

The fifth subsection focuses on the enhanced protection of minors, who require special consideration and a higher level of protection reflected in procedures that pertain to them. Their cases are to be heard before specialised tribunals and processed as swiftly as feasible. The treatment of minors during these proceedings must

109 Here we mean the 35 states of the Organisation of American States: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, United States of America, Uruguay, Venezuela, Barbados, Trinidad and Tobago; Jamaica; Grenada; Suriname; Dominica, Saint Lucia; Antigua and Barbuda, Saint Vincent and the Grenadines; The Bahamas; St. Kitts & Nevis; Canada; Belize and Guyana.

110 Considerations related to the universal ratification of the American Convention and other Inter-American human rights treaties (2014), p. 9.

111 American Convention on Human Rights, 1969, Article 5. (1).

112 Ibid. Article 5 (2).

113 Antkowiak, and Gonza, 2017, p.106.

114 American Convention on Human Rights. 1969, Article 5. (3).

115 Ibid. Article 5. (4).

116 *J. v Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment IACtHR. Ser. C. NO. 275, Nov. 27, 2013, 380.

meet additional criteria due to their age.¹¹⁷ In all cases, the imprisonment of a child can be used only as a measure of last resort. Their deprivation must be performed as separated from adults, unless it is considered to be in the child's best interest not to do so.¹¹⁸ However, this raises the question of whether it would also be prudent to extend heightened protections to elderly or ill individuals within human rights conventions such as the Pact of San José. Additionally, one might consider whether emphasising youth in Article 5 establishes a precedence that could undermine the significance of protections for other vulnerable groups.

The final subsection addresses the intent behind depriving a person of liberty as a form of punishment. It asserts that the primary goal of such punishment is the reform and social reintegration of the prisoner.¹¹⁹ This provision leads to the conclusion that imprisonment should not merely serve as a punitive measure but also as a means of societal reintegration. The principle of "*punitur, quia peccatum est*," or that punishment is justified simply because a crime has occurred, should not be the primary focus of the justice system. In relation to the prohibition of torture, this section underscores that punishment is not intended to inflict suffering on offenders but rather to transform their behaviour and reintegrate them into society. Hence, including such provisions in human rights conventions is both logical and vital. Furthermore, scholars often highlight the benefits of a restorative justice system.¹²⁰

The text of the article's subsections governs various rights and principles associated with individual inviolability. The affirming language regarding physical, mental, and moral integrity is complemented by the prohibition of torture and cruel, inhuman, or degrading treatment or punishment. The right to humane treatment as articulated in the Pact of San José mirrors the principles developed by the Inter-American Commission on Human Rights. This articulation is more comprehensive than the brief statements found in Article 5 of the Universal Declaration of Human Rights¹²¹ or the lengthier formulation in Article 7 of the International Covenant on Civil and Political Rights.¹²²

However, as previously noted in this chapter, there are additional aspects of Article 5 of the Pact of San José that could raise concerns, all linked to its numerous subsections. These subsections allow for special treatments based on certain statuses, which can lead to ambiguous interpretations. Thus, considering the *ius cogens* nature of the torture prohibition, the author believes it is unnecessary and potentially

117 American Convention on Human Rights, 1969, Article 5. (5).

118 Convention on the Rights of the Child, 1989, Article 37.

119 American Convention on Human Rights, 1969, Article 5. (6).

120 Strémy, Kurilovská, and Vráblová, 2015, p. 22.

121 Universal Declaration of Human Rights. 1948. Article 5: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

122 International Covenant on Civil and Political Rights. 1996. Article 7: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'

inappropriate to include detailed subsections that explicitly define the scope of this prohibition in the context of Inter-American human rights law.

5.1.2. *Inter-American Convention to Prevent and Punish Torture*

The Inter-American Convention on the Prevention and Punishment of Torture, also known as the American Convention against Torture (ACAT), was adopted on December 9, 1985, and took effect in 1987. To date, it has been ratified by 18 member states of the Organisation of American States (OAS).

A primary objective of the ACAT was to establish a definition of torture within the American context, following the Commission's earlier determinations regarding the prohibition of torture as per the provisions of the Pact of San José. The Inter-American Juridical Committee was tasked with drafting the convention's text.¹²³ Although there was an intention to define the crime of torture as an international crime, all references to this term were ultimately removed from the final version of the ACAT. Hence, the definition of torture as outlined in Article 2 of the ACAT is as follows:

'For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to encompass methods used against a person that are intended to obliterate the personality of the victim or to diminish their physical or mental capacities, even if such methods do not result in physical pain or mental anguish.'¹²⁴

According to the definition above, certain elements must be satisfied for an act to be categorised as torture. The key components indicate that the action must be intentional and must cause physical or mental pain or suffering. Furthermore, these acts must serve a specific purpose. The examples provided – such as criminal investigation, intimidation, punishment, preventive measures, or penalties – are illustrative and not exhaustive, as indicated by the phrase “or for any other purpose.” This allows for the inclusion of other motives behind acts of torture. Notably, the definition does not address cruel, inhuman, or degrading treatment or punishment, unlike many other conventions that tackle the prohibition of torture.

The second part of the article clarifies that physical or mental pain or suffering that results from lawful measures does not fall under the definition of torture. Thus, it can be implicitly inferred that police actions are deemed legal if they are grounded in law, officially executed, and proportionate to the intended objective. The coercive

123 Rodley, 1987, p. 49.

124 Inter-American Convention to Prevent and Punish Torture, 1985, Article 2.

measures employed by police and detention facilities are typically explicitly outlined in the national laws of the state.¹²⁵

Article 10 prohibits the use of evidence obtained through acts of torture.¹²⁶ Compared to Article 8(3) of the Pact of San José, which refers to evidence obtained by coercion of any kind, the ACAT provides a narrower interpretation, potentially allowing for broader application.¹²⁷ This distinction addresses actions that might be classified as cruel, inhuman, or degrading treatment.

Additionally, further obligations are imposed directly on national criminal law, primarily requiring the alignment of criminal procedure rules for investigating torture crimes. Both torture and attempted torture must be designated as offenses subject to severe penalties.¹²⁸ Legal provisions should be established to govern cases where torture occurs on the territory of the respective state, when it is perpetrated by a citizen of the state, or when the victim is a citizen of the state, making it reasonable.¹²⁹ This is determined through territorial as well as active and passive personal jurisdiction. Moreover, the defence that an individual acted under the orders of a superior is not acceptable for acts of torture, and the individual remains accountable.¹³⁰ Article 8 of the convention mandates ensuring the right to an impartial investigation into torture cases. If there is a suspicion of torture, the state must initiate action *ex officio*, without waiting for a complaint from the victim.¹³¹

It is also important to note that the Inter-American system recognises the principle of non-refoulement. Article 13 of the ACAT stipulates that an individual shall not be extradited or returned to a country if there are sufficient grounds to believe that such extradition would pose a threat to their life or subject them to torture or cruel, inhuman, or degrading treatment, or lead to a special trial in the requested state. Although this provision appears to take a standard approach, its last clause raises questions due to the inclusion of ‘he will be tried by special or ad hoc courts’. The specific meaning of “special or ad hoc courts” can be clarified through case law from the Inter-American Court of Human Rights (IACHR) or the Commission. This narrowing of the non-refoulement definition in relation to the ACAT is crucial, as it could pose barriers to extradition requests if the individual were to face a legally permissible trial conducted by a special court. In this context, it raises the question of whether tribunals such as the International Criminal Tribunal for the former Yugoslavia or the International Tribunal for Rwanda would be classified as special tribunals. Consequently, further interpretation is needed to establish what qualifies as a special or ad hoc court or tribunal.¹³²

125 Hašanová, 2019. p. 68.

126 Inter-American Convention to Prevent and Punish Torture, 1985, Article 10.

127 American Convention on Human Rights. Article 8(3).

128 Inter-American Convention to Prevent and Punish Torture, 1985, Article 6.

129 Inter-American Convention to Prevent and Punish Torture, 1985, Article 12.

130 Inter-American Convention to Prevent and Punish Torture, 1985, Article 4.

131 Inter-American Convention to Prevent and Punish Torture, 1985, Article 8.

132 Rodríguez Pinzón and Martín, 2006, p. 136

The Inter-American Court of Human Rights (IACHR) is the sole judicial body within the American human rights system, responsible for applying and interpreting the rights enshrined in the Pact of San José, as well as other human rights conventions in the Americas. Comprised of seven judges who serve in their individual capacities, the Court's jurisdiction can be categorised into contentious and advisory. While advisory jurisdiction is important, contentious jurisdiction is more relevant for a nuanced analysis of the Court's work. According to Article 61 of the Pact of San José, only the Commission and states party to the Pact can refer cases to the Court.¹³³ Currently, the Commission has submitted only those cases that have resulted in court proceedings. This contrasts significantly with the European system, where individual applicants can file cases directly with the European Court of Human Rights. However, this does not completely preclude victims and their families from participating in the IACHR's processes; they are allowed to independently submit requests, arguments, and evidence during proceedings.¹³⁴

Many decisions from the IACHR demonstrate a clear influence from the jurisprudence of European courts. For example, in the *Ceaser* case, the IACHR referenced the *Celebici* case from the International Criminal Tribunal for the Former Yugoslavia, which established a definition of inhuman treatment as an intentional act or omission that objectively causes severe physical or mental suffering or significantly undermines human dignity. In this context, both the Tribunal and the IACHR have distinguished between torture and inhuman treatment. However, the Court is required to evaluate each case based on the intensity of suffering and context, considering factors such as the duration of treatment, physical, and mental repercussions, along with the victim's sex, age, and health.¹³⁵ In the *Ceaser* case, the victim was convicted of attempted rape and sentenced to 20 years in prison (with mandatory hard labour) and 15 lashes with a cat-o'-nine-tails.¹³⁶ The IACHR ruled that such punishment is prohibited and constitutes torture, further stating that corporal punishment is inherently cruel, inhuman, and degrading, rendering it incompatible with Article 5 of the Pact of San José.¹³⁷

This was not the only instance where the American human rights jurisprudence cited the *Celebici* case. In the *González Pérez* case, the Commission determined that the sexual violence inflicted by security forces on three indigenous women constituted a serious violation of Articles 5 and 11 of the Pact of San José. Similar to the Tribunal's conclusions in the *Celebici* case, the Commission classified rape and other forms of sexual assault as acts of torture. Additionally, the report of the UN Special Rapporteur was referenced, highlighting research that demonstrates the mentally and physically

133 American Convention on Human Rights. Article 61. (1): 'Only the States Parties and the Commission shall have the right to submit a case to the Court.'

134 Buergenthal, Shelton and Stewarr, 1988, p. 155.

135 Inter-American Court of Human Rights. Case of *Ceaser v Trinidad and Tobago*, Judgment of March 11, 2005. No. 123. Para. 68.

136 Type of multi-tailed whip.

137 Inter-American Court of Human Rights. Case of *Ana, Beatriz and Celia González Pérez v Mexico*. Report n. 53/01. Annual Report 2000. Ibid. Para. 70.

devastating effects of sexual violence on victims. Rape was thus regarded by the Court as a method of punishment, intimidation, and humiliation.¹³⁸

In the *Tibi* case, the Court found that the conditions of the victim's detention did not meet the necessary requirements to uphold the dignity of the individual deprived of their freedom. In this particular case, the detainee was held in an overcrowded facility for 45 days, where there was no adequate space for eating or sleeping comfortably, and the ventilation and lighting were substandard.¹³⁹ The Court also noted that even the mere threat of a real risk of torture could result in mental harm and could be considered as torture in itself.¹⁴⁰

The *Moiwana Village* case focused on the *Moiwana* community, founded in the 19th century by the *N'djuka* people, who are descendants of enslaved individuals brought to Suriname for forced labour. Some of these slaves successfully escaped and established autonomous communities, including that of the *N'djuka* people. However, peace in the area was short-lived, as civilian uprisings led to internal armed conflict, during which these communities became targets of military operations. The military actions resulted in numerous civilian deaths and the destruction of many community structures. Consequently, many residents were forced to flee without the chance for proper traditional burials for their deceased. Upon their return, the state refused to investigate or hold those responsible for these atrocities accountable. The IACHR determined that the state's failure to investigate and sanction the perpetrators must be considered a violation of the rights of the remaining members of the community. Furthermore, it asserted that the necessity for these individuals to flee for their safety constituted a violation of Article 5 of the Pact of San José, which pertains to the right to physical and mental integrity.¹⁴¹

5.2. African Charter on Human and Peoples' Rights

Article 5: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

In the late 1960s, the Organisation of the African Unity (OAU) held discussions regarding the drafting of a common African human rights instrument, which resulted in the adoption of the African Charter on Human and Peoples' Rights (ACHPR) in 1981. The adoption of the ACHPR included the creation of a body acting on behalf of the goals of the Union regarding human rights, the Africa Commission on Human and Peoples' Rights. When the OAU was succeeded by the African Union, the organisation

138 Para. 45–54.

139 Inter-American Court of Human Rights. *Case of Tibi v Ecuador*. Judgment of September 7, 2004, No. 114, para. 152.

140 *Ibid.* para. 147.

141 Inter-American Court of Human Rights. *Case of Moiwana Village v Suriname*. Judgment of June 15, 2005. No. 124. Para. 11–101.

felt it necessary to establish a stronger judicial protection of human rights in the region by creating the African Court on Human and Peoples' Rights (ACtHPR).¹⁴²

The African Commission was established in 1987 with several functions. First, its work involves collecting documents and conducting research on African problems; organising seminars and conferences and encouraging partners to present their issues and recommendations to Governments. Second, the Commission establishes principles that could solve legal problems related to human rights protection in Africa. Third, it ensures cooperation with other African or international institutions. Hence, the main aim of the Commission is to improve the African human rights framework by various peaceful means.¹⁴³

The African Charter sets a prohibition on torture in Article 5. It prohibits all forms of exploitation, in which it includes the prohibition of illicit treatment from both State as well as non-state actors. The demands stemming from the provision were elaborated on more in the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, also known as Robben Island Guidelines.¹⁴⁴ The document emphasizes that it is necessary for the States to ratify the regional and international human rights treaties, which set the framework for the prohibition itself.¹⁴⁵ The provisions also expect the Member States to promote and support cooperation with human rights mechanisms, including the African Commission.¹⁴⁶ It stipulates that there attention needs to be paid especially when the acts concern a young person or the act is gender-related.¹⁴⁷ Illicit treatment can be understood as reason for extradition, and States have to refrain from the production or trading with equipment which can be used for torturous acts.¹⁴⁸ The guideline declares the absolute nature of the prohibition by explicitly enumerating that no necessity, national emergency or public may be used as an exemption from the rule.¹⁴⁹ Additionally, the guideline n. 15 stipulates the non-refoulment principle. The document of guidelines besides establishing more precise rules was setting up a Committee for the Prevention of Torture in Africa, which was established in order to follow up on the implementation of the document's guidelines.¹⁵⁰

As the work of the African Commission is more widely acknowledged, the basic principles and rules can be derived easily through an analysis of its methods. When analysing the Commissions' work, the African Charter establishes the legal

142 Protocol to the ACHPR on the Establishment of an ACtHPR, 1998.

143 Mute, 2020, p. 234.

144 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, Adopted by the African Commission on the 32nd Ordinary Session, 17–23 October 2002.

145 Ibid, Guideline 1.

146 Ibid, Guideline 2–3.

147 Ibid, Guideline 5.

148 Ibid, Guideline 7, 14.

149 Ibid, Guideline 13. Interestingly, the African Charter does not enhance derogation clause in its text, leaving no space for derogating from obligations stemming from the treaty.

150 See Long, and Munitngh, 2010.

background for two methods of communications – interstate communications or communications when the claim comes from an individual or an organisation. Interstate communications are based on one state presenting a belief that another state violated the African Charter. The criteria from individual claims are more complicated and are similar to those we observe in the ECtHR (applicant cannot be anonymised, application is compatible with the Charter, has valid background, the applicant exhausted local remedies etc.).¹⁵¹

The Commission openly acknowledges that its understanding of torture is based on Article 1 of the CAT Convention. In the communications against Nigeria, the Commission declared that both actions that cause severe physical or mental suffering and those that humiliate an individual or force him to act against his will should be considered as violations of Article 5. The practice proves that the Commission makes distinctions between forms of ill-treatment when some elements constituting torture remain unproved. In their interpretation, cruel, inhuman, or degrading treatment or punishment is to be interpreted to the widest possible extent in order to provide protection against physical or mental abuse. In the communications against Sudan or communications against Nigeria, the Commission declared that prolonged refusal of contact with family for detainees and blocking any information about their whereabouts may be understood as inhuman treatment of both the detainees and their relatives.¹⁵² Further methods that were proven to be violations of Article 5 by the Commission include abusive conditions during detention – such as chaining, use of electric shocks, simulated drowning, denial of food, or denial of medical care.¹⁵³

We may observe that the human rights framework in the African Commission has been established quite late in comparison to the European one. Prior to the adoption of the ACHPR, the African region used either the Universal Declaration of Human Rights or two treaties – the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Some of the scholars however claim that the used system was not effective, as Cold war politics pressured the African States to align themselves in bipolar formations of either civil and political right or economic, social and cultural rights.¹⁵⁴ Nevertheless, its effectiveness may be questioned even nowadays, as even though the African Commission has

151 African Charter, 1981, Article 56.

152 Communication nos. 48/90, 50/91, 52/91 and 89/93, Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan, para 54; also see Communication no 151/96, Civil Liberties Organisation v. Nigeria, para 27.

153 Communication nos. 48/90, 50/91, 52/91 and 89/93, Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan, para 54; also see Communication no 151/96, Civil Liberties Organisation v. Nigeria, para 27.

154 See Mutua, *The African Human Rights System: A Critical Evaluation*. In *Humna Development Occasional Papers*. Human Development Report Office. UNDP.

developed over years by creating several protocols, its work results in reports and recommendations.¹⁵⁵

5.3. Arab Charter on Human Rights

As there are obvious reasons stemming from the (in)effectivity of the Arab human rights system, it is not necessary to perform an in-depth analysis of the prohibition of torture in the framework at hand. However, we may present Article 13 a):

‘The State parties shall protect every person in their territory from physical or psychological torture, or from cruel, inhuman, degrading treatment. [The State parties] shall take effective measures to prevent such acts; performing or participating in them shall be considered a crime punished by law.’

6. Conclusion

Ultimately, we can derive four elements setting up the notion of torture from the international treaties analysed. The first element is that the act is certainly an *intentional* conduct. Second, the consequences of such behaviour cause severe suffering, either physical or mental. Third, in terms of international law, there is always an involvement of a public authority; nonetheless, this involvement may be direct or indirect. The last and fourth element is the element of purpose, as the act has to be perpetrated with a reason.

The right is absolute; therefore, it applies to all persons without distinction, regardless of whether they have committed or are committing any serious criminal activity and the danger they pose to the country in which they reside. The prohibition of torture and subjection to inhuman and degrading treatment and punishment is, although not explicitly, unconditionally connected with the impossibility of the state extraditing foreigners into its country of origin. The fact that this applies to all people, regardless of whether they are citizens of European countries, is a breakthrough in the human rights protection system. Consequently, most cases concerning provisions prohibiting torture deal with the non-refoulment principle.

European human rights treaties regulate the prohibition of torture and ill-treatment as human rights to be ensured and protected by the state, similar to the provisions of the Universal UN Convention – CAT. The documents issued by international bodies monitor compliance with human rights conventions and therefore provide guidelines for interpreting these fundamental rights, including the prohibition of torture and ill-treatment and the determination and fulfilment of the state’s fundamental rights protection obligations. Today, as a result of the activities of international bodies, we

155 African Charter, 1981, Article 46 and Rules of Procedure of the African Commission, Article 80.

have at our disposal a very rich body of European case-law on the conceptual aspects of torture and ill-treatment, the definition of perpetrators, the criteria for the classification and delimitation of behaviours falling within the scope of the prohibition, and the recognition of the state's obligations to protect fundamental rights. As we may observe, the same is not fully true for other regional systems of human rights.

The notion of the prohibition, enhanced variety of ambiguities resulting in debates concerning the applicability issues. The scholarly discussion related to the interpretation of torture were intensively present mainly after 11 September 2001 terrorist attacks in the USA. The campaign of the “war on terror” enhanced the right of public authorities to perform surveillance of acts inside their jurisdiction. One may ask, what are the practical limits of the state authorities to oversee any act of a private person? Additionally, lawyers, politicians, and even society as a whole were openly discussing the possibility of using coercive interrogation techniques.¹⁵⁶ The discussion opened the topic of a “reasonable” torture in certain extraordinary situations. These gained the name “*ticking bomb* situations,” where torture would not be seen as generally forbidden. The reasoning for these acts rested upon the hypothesis, that since it is necessary, some level of illicit treatment is legal and accepted in order to protect the lives of people.¹⁵⁷ Indeed, the question of a non-derogatory and absolute nature in practice comes logically into the fora.

Finally, we may state that the European system is strongly influential, however not all measures can be universally applied to other regions of the world. Sadly, this is true also for the prohibition of torture, having *ius cogens* nature.

156 Alter, Time to Think About Torture, NEWSWEEK, Nov. 2001, [Online] Available at: <https://www.newsweek.com/time-think-about-torture-149445>.

157 Žižek, 2002, p. 104.

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Prohibition of Slavery and Forced Labour

Grega STRBAN – Katarina KOGEJ

ABSTRACT

The chapter emphasises the continued relevance of Art. 4 of the European Convention on Human Rights (ECHR), which prohibits slavery, servitude and forced or compulsory labour. Despite formal abolition, modern forms of these practices, such as domestic servitude, debt bondage and human trafficking, persist in Europe. Art. 4 is structured around two central prohibitions: the absolute right not to be subjected to slavery or servitude and the prohibition of forced labour, with delimitations regarding work during detention or conditional release, military service, service required during an emergency or calamity and civic obligations. Furthermore, the ECHR imposes positive obligations on states, requiring them to implement effective legislative and administrative frameworks, take operational measures to protect victims and conduct effective and independent investigations.

The historical overview traces slavery and forced labour from ancient times to their formal abolition and highlights the first international efforts, such as the 1926 Slavery Convention and ILO Convention No. 29 on Forced Labour. A comparison with other universal and regional human rights instruments underlines their scope of protection and enforcement mechanisms, emphasising the ECHR's advantage in providing individuals direct access to the European Court of Human Rights (ECtHR), which issues legally binding decisions. The case law analysis examines key cases, such as *Siliadin v. France*, where the Court first condemned domestic servitude, and *Rantsev v. Cyprus and Russia*, which broadened Art. 4 to include human trafficking. It explores cases from Central and Eastern Europe, such as *S. M. v. Croatia*, *M. and Others v. Italy and Bulgaria* and *Krachunova v. Bulgaria*, shaping the Court's jurisprudence in these regions. Art. 4 provides a strong framework to combat slavery and forced labour, with the ECtHR acknowledging the evolving nature of such violations in modern society and interpreting the Convention as a living instrument.

KEYWORDS

ECHR, slavery, forced labour, human trafficking, case law

1. Introduction

Slavery and forced labour are often perceived as relics of the past or as issues confined to developing countries. While Mediterranean and Transoceanic slavery and forced-labour camps are viewed as historical events, the fight against these injustices

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continues in their modern forms.¹ To illustrate: ‘As the Parliamentary Assembly of the Council of Europe has Pointed out, although slavery was officially abolished more than 150 years ago, ‘domestic slavery’ persists in Europe and concerns thousands of people, the majority of whom are women’.² Furthermore, ‘The Court notes that trafficking in human beings as a global phenomenon has increased significantly in recent years’.³

Numerous international instruments prohibit slavery, servitude and forced or compulsory labour, as these practices violate the right to freedom and represent a denial of human dignity by reducing individuals to mere commodities or objects.⁴ This paper centres on the protection provided by the European Convention on Human Rights (ECHR), prohibiting slavery and forced labour in Art. 4. A key part of the analysis is the case law of the European Court of Human Rights (ECtHR), which holds that ‘together with Arts. 2 and 3, Art. 4 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe’.⁵

The analysis begins with a contextual assessment of Art. 4, outlining its rights and the state obligations (Chapter 2). This is further developed in the next two chapters (Chapters 3 and 4), starting with an overview of the evolution of these rights, followed by a comparison with other universal and regional human rights instruments. A deeper understanding is achieved through an in-depth analysis of ECtHR case law on Art. 4 in Chapter 5, focusing on cases from 16 Central and Eastern European countries in Chapter 6. Chapter 7 outlines the key findings of this paper.

2. Contextual Analysis of the Prohibition of Slavery and Forced Labour in Accordance With the ECHR

This chapter outlines the rights guaranteed in Art. 4 based on the textual analysis of the ECHR and the ECtHR’s interpretation. While Chapter 5 delves into these rights through case law, this section emphasises the states’ obligations, focusing on their positive obligations. Additionally, the connection with Art. 14 of the ECHR is briefly explored.

Para. 1 of Art. 4 declares that no one shall be held in slavery or servitude, while Para. 2 states that ‘No one shall be required to perform forced or compulsory labour’. Para. 3 clarifies that the term ‘forced or compulsory labour’ does not include:

1 Moerman, 2010, pp. 86–87; Mantouvalou, 2006, p. 395. For the historical aspects of slavery and forced labour, see Drescher, 2009.

2 ECtHR, *Siliadin v. France*, App. no. 73316/01, 26 July 2005, Para. 111.

3 ECtHR, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, 7 January 2010, para. 278.

4 *Siliadin v. France*, paras. 111, 112; Díaz Morgado, 2021, p. 76.

5 *Siliadin v. France*, para. 82.

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Art. 5 of this Convention 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.⁶

The Art. outlines two distinct prohibitions from which universally recognised subjective rights are derived. First, the right to not be subjected to slavery or servitude, which is absolute. It does not allow for exceptions or limitations, nor can states derogate from it, even in situations involving special risks to the state.⁷ This is because the prohibition on slavery is widely accepted as a *jus cogens* (peremptory) norm and an obligation *erga omnes*, meaning that all states have a legal interest in its protection. This reflects the global commitment to preventing and addressing slavery.⁸ Stemming from Para. 2 is the right not to be compelled to carry out forced labour. In Para. 3, the listed cases are not exceptions intended to limit the exercise of the right, ‘but to ‘delimit’ the very content of this right’.⁹ Therefore, the listed obligations do not fall within the definition of forced or compulsory labour.¹⁰ Instead, it ‘serves as an aid to the interpretation’ of Para. 2.¹¹ However, in the right stemming from Para. 2, exemptions, limitations or derogations could apply during war or other public emergency threatening the nation.¹²

Notably, the ECHR does not define slavery, servitude or forced labour. Therefore, it was essential for the ECtHR to refer to international treaties widely ratified by the States Parties to define the categories.¹³ While the detailed definitions will be examined in Chapter 5, one key Point must be emphasised here. The scope of Art. 4 has been significantly expanded through the ECtHR’s evolutive interpretation, treating the Convention as a living instrument.¹⁴ In response to the evolving slavery-like practices in modern society, the Court broadened the prohibition to cover human trafficking, which is now included *ratione materiae* in Art. 4. The Court considered the ECHR’s context, objective and purpose, along with the international conventions against human trafficking. It emphasised:

⁶ Para. 3 Art. 4 ECHR.

⁷ Para. 2 Art. 15 ECHR.

⁸ Díaz Morgado, 2021, pp. 76–77; Kirchner and Frese, 2015, pp. 132–133; Shaw, 2017, pp. 92–93.

⁹ ECtHR, *Van der Mussele v. Belgium*, Application no. 8919/80, 23 November 1983, para. 38.

¹⁰ Rainey, McCormick and Ovey, 2021, p. 223.

¹¹ *Van der Mussele v. Belgium*, para. 38.

¹² Para. 1 Art. 15 ECHR.

¹³ Díaz Morgado, 2021, p. 77.

¹⁴ ECtHR, *Tyrer v. the United Kingdom*, Application no. 5856/72, 25 April 1978, para. 31; *Rantsev v. Cyprus and Russia*, para. 282.

The context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.¹⁵

The ECtHR concluded that there ‘can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention.’¹⁶

As Schabas wrote, ‘perhaps more than any other provision of the Convention, Art. 4 is essentially about positive, rather than negative, obligations. The Court interpreted the nature and scope of this obligation similar to Arts. 2 and 3 ECHR. However, in modern times, regarding slavery and servitude, the perpetrators are typically individuals rather than the State.’¹⁷ The State’s positive obligations have been outlined by the Court primarily in relation to human trafficking; however, they extend to all forms of conduct covered by Art. 4. Three specific obligations have been identified: two substantive and one procedural.¹⁸

States must penalise and prosecute any act aimed at keeping a person in slavery, servitude or forced or compulsory labour. Hence, they must establish an effective ‘legislative and administrative framework’.¹⁹ Additionally, the obligation entails adopting adequate measures to regulate businesses commonly used as a cover for human trafficking. Immigration rules must ‘address relevant concerns relating to encouragement, facilitation or toleration of trafficking’.²⁰ Furthermore, law enforcement and immigration officials should receive proper training on the issue.²¹ This was highlighted in Cyprus, where ‘*artiste visas*’ were exploited for trafficking women into prostitution; even the country acknowledged that the number of young women migrating to work in nightclubs was disproportionately high relative to its population.²²

The second substantive obligation requires States to take operational measures to protect victims or potential victims of violations under Art. 4.²³ This duty arises when ‘the State authorities were aware, or ought to have been aware that an identified individual had been, or was at real and immediate risk of being subjected to such treatment’. In such cases, the State must take appropriate actions to address the victim’s situation. The Court reiterates in its case-law:

15 *Rantsev v. Cyprus and Russia*, para. 274.

16 *Ibid.*, para. 282; Díaz Morgado, 2021, pp. 86–87.

17 Schabas, 2017, p. 206.

18 Harris et al., 2023, p. 292.

19 *Rantsev v. Cyprus and Russia*, para. 285.

20 *Ibid.*, para. 284.

21 *Ibid.*, para. 287.

22 *Ibid.*, paras. 94, 290–293; Schabas, 2017, pp. 206–207.

23 *Rantsev v. Cyprus and Russia*, para. 286.

Bearing in mind the difficulties involved in policing modern societies and the operational choices which must be made in terms of priorities and resources, the obligation to take operational measures must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.²⁴

The Court has linked ‘operational measures’ to the preventive and protective actions outlined in the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings (Anti-Trafficking Convention).²⁵ For example, in *Chowdury and Others v. Greece*, the State was found to have violated this obligation by failing to protect illegal migrant agricultural workers who were being grossly exploited, despite the authorities’ awareness of the situation.²⁶ In contrast, in *T.I. and Others v. Greece*, no violation was found because the applicants, who had been sexually exploited, were promptly recognised as victims of human trafficking and their expulsion orders were suspended.²⁷ The procedural obligation requires States to ensure that when there is a ‘credible suspicion’ of a violation of Art. 4 rights, a prompt, effective and independent investigation is conducted, regardless of whether the victim or next-of-kin made a complaint. Typically, ‘credible suspicion’ arises from a complaint by the victim, and in the absence of such a complaint, the Court may be less likely to find the State in breach of its obligations.²⁸ The investigation must be independent and:

capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. (...) The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.²⁹

Art. 4 violations frequently involve a transnational element. In trafficking, offences may occur in the country of origin, transit and destination, with evidence and witnesses spread across multiple jurisdictions. The ECtHR emphasised that in cross-border trafficking cases, States are obliged ‘to cooperate effectively with the relevant

24 ECtHR, *C.N. v. The United Kingdom*, Application no. 4239/08, 13 November 2012, para. 68; *Rantsev v. Cyprus and Russia*, para. 287.

25 Adopted by the Committee of Ministers of the CoE on 3 May 2005, entered into force on 1 February 2008: ‘The preventive measures include measures to strengthen coordination at national level between the various anti-trafficking bodies and to discourage the demand, which promotes all forms of exploitation of persons, including border controls to detect trafficking. Protection measures include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery.’ ECtHR, *Chowdury and Others v. Greece*, Application no. 21884/15, 30 March 2017, para. 110.

26 ECtHR, *Chowdury and Others v. Greece*.

27 ECtHR, *T.I. and Others v. Greece*, Application no. 40311/10, 18 July 2019; Harris et al., 2023, pp. 292–293.

28 Schabas, 2017, p. 206; *Rantsev v. Cyprus and Russia*, para. 286; ECtHR, *V.F. v. France*, Application no. 7196/10, 29 November 2011.

29 *C.N. v. The United Kingdom*, para. 69.

authorities of other States concerned in the investigation of events which occurred outside their territories.³⁰ Nevertheless, Art. 4 does not mandate that States establish ‘universal jurisdiction over trafficking offences committed abroad’.³¹

It is common for allegations of Art. 4 violations to be accompanied by claims of breaches of other Convention provisions.³² Art. 14 ECHR is important in this context, since it requires it to be read in conjunction with another right. Regarding Art. 4, specific challenges emerge due to its distinctive structure. The key issue is whether the matters outlined in Para. 3, which fall outside Art. 4’s scope, can serve as grounds for claiming discrimination in the way a State regulates the activity.³³ Although the ECtHR determined in *Van der Mussele v. Belgium* that the requirement for a pupil advocate to perform *pro bono* work did not amount to forced labour under Para. 2 of Art. 4, it considered whether there was any discrimination between the groups obligated to perform such legal work. In this case no discrimination was found.³⁴ In *Karlheinz Schmidt v. Germany* the Court determined that compulsory fire service fell under the category of civic obligations, as outlined in Point (d) of Para. 3 of Art. 4. However, it examined whether this obligation was discriminatory, as it applied only to men. Despite Para. 3, considering the matters included within its terms, the ECtHR found a violation of Art. 14 in connection with Point (d) of Para. 3.³⁵

3. A Historical Overview of the Prohibition of Slavery and Forced Labour

Slavery and forced labour have existed since ancient times and were often embedded in national legal systems. The British Parliament banned the slave trade in 1807, although the practice continued in most of the Empire until 1833. France abolished slavery and the slave trade at the time of the Revolution; however, it was reinstated and only fully abolished in 1848. Russia maintained serfdom until 1861, while the United States formally ended slavery a few years later.³⁶ International law thoroughly addressed the matter in the 1926 Slavery Convention, which briefly touched upon the issue of forced or compulsory labour.³⁷ In 1930, the International Labour Organisation (ILO) adopted Convention 29 on Forced Labour, which required ratifying states to

30 *Rantsev v. Cyprus and Russia*, para. 289; Schabas, 2017, p. 207.

31 ECtHR, *J. and Others v. Austria*, Application no. 58216/12, 17 January 2017, para. 14; Harris et al., 2023, p. 294.

32 Rainey, McCormick and Ovey, 2021, pp. 223–224.

33 Ibid., pp. 233–234.

34 Ibid., pp. 233–234.

35 ECtHR, *Karlheinz Schmidt v. Germany*, Application no. 13580/88, 18 July 1994; More on the subject: Rainey, McCormick and Ovey, 2021, pp. 233–234; Mowbray, 2007, p. 238. The ECtHR argued similarly in the case *Zarb Adami v. Malta*, Application no. 17209/02, 20 June 2006, para. 90.

36 Schabas, 2017, pp. 201–202. For the historical aspects of slavery and forced labour, see Drescher, 2009.

37 Art. 5 of the Slavery Convention, adopted on 25 September 1926, entered into force on 9 March 1927.

suppress the use of forced or compulsory labour in all its forms within the shortest possible period. Art. 2 of the Convention defines forced or compulsory labour and excludes certain types of work from this definition, a concept reflected in the ECHR.³⁸

Despite these efforts, slavery and forced labour resurfaced in Europe in the 1940s under the Nazi regime during World War II. The International Military Tribunal noted that the Nazi government aimed ‘to exploit the inhabitants of the occupied countries for slave labour on the very greatest scale’. The regime viewed slave labour ‘as an integral part of the war economy, and planned and organized this particular War Crime down to the last elaborate detail’.³⁹ Key figures were prosecuted for the crime against humanity of enslavement under Art. 6(c) of the Charter of the International Military Tribunal and Art. II(1)(c) of Control Council Law No. 10.⁴⁰ In response to the atrocities of the two World Wars and the accompanying economic and social crises, two important instruments were adopted. The Universal Declaration of Human Rights (UDHR)⁴¹ includes explicit prohibitions of slavery, the slave trade and servitude.⁴² The ECHR prohibits slavery, servitude and forced or compulsory labour.⁴³

While slavery in the ‘traditional’ form is widely viewed as a barbaric relic of the past, the fight against various forms of slavery is far from over. Contemporary slavery manifests in various ways, including human trafficking, debt bondage, forced prostitution and domestic servitude.⁴⁴ For instance, the decision in *Siliadin v. France*, which addressed domestic servitude, exposed one of the darkest aspects of labour and human rights protection in Europe.⁴⁵ Additionally, the ruling in *Rantsev v. Cyprus and Russia* recognised human trafficking as falling under the protection of Art. 4, expanding the scope and significance of this provision.

4. Comparison with Other Universal and Regional Human Rights Instruments Containing the Prohibition of Slavery and Forced Labour

To broaden the understanding of the prohibition of slavery and forced labour, it is essential to compare it with other universal and regional human rights instruments. The comparison is focused primarily on the scope of protection and enforcement mechanisms of different frameworks. Among universal instruments, this section considers the UDHR, the International Covenant on Civil and Political Rights (ICCPR),⁴⁶

38 See Schabas, 2017, p. 202.

39 International Military Tribunal, *France v. Goering et al*, (1948), p. 450; Schabas, 2017, p. 202.

40 US Military Tribunal, *United States v. Krupp et al*, (1950), pp. 1396–1435; Schabas, 2017, p. 202.

41 Resolution of the General Assembly 217 A (III) of 10 December 1948.

42 Art. 4 UDHR.

43 Art. 4 ECHR. Regarding the drafting of the provision, see Schabas, 2017, pp. 203–205.

44 For more on the historical overview, see Allain, 2013, pp. 9–104, 109–117, 212–254, 257–272.

45 Mantouvalou, 2006, pp. 395–414.

46 Adopted by the General Assembly resolution 2200A (XXI), on 16 December 1966, entered into force on 23 March 1976.

the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴⁷ the ILO Conventions Nos. 29 and 105, the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (the Supplementary Convention),⁴⁸ the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (the Palermo Protocol)⁴⁹ and the International Convention on the Elimination of Racial Discrimination.⁵⁰ It focuses on regional instruments pertinent to Europe, specifically examining the CoE Anti-Trafficking Convention, the European Social Charter (ESC)⁵¹ and the EU Charter of Fundamental Rights (EU Charter).⁵²

These instruments share the commitment to prohibiting slavery and forced labour. Similar to Para. 1 of Art. 4, Art. 4 UDHR declares that ‘no one shall be held in slavery or servitude’. However, it adds that ‘slavery and the slave trade shall be prohibited in all their forms’. Similar prohibitions can be found in Art. 8 ICCPR and Para. 1 of Art. 5 EU Charter. When defining slavery, the human rights bodies, including the ECtHR, refer to the Slavery Convention, stating that it means ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.⁵³ However, as the definition requires a genuine right of legal ownership to be exercised over a person, it is restrictive. Therefore, the ECtHR found a violation of the prohibition of servitude, and not slavery, in *Siliadin v. France* (Chapter 5.1).⁵⁴ The ECHR’s prohibition is broadened to include servitude and forced and compulsory labour. The Supplementary Convention extends the prohibition by considering ‘practices similar to slavery’, including debt bondage, serfdom, forced marriages and institutions where a child or a person under 18 years of age is delivered by parents or guardians to another person for exploitation.⁵⁵

Art. 5 of the Slavery Convention does not prohibit forced and compulsory labour; however, it requires states to take ‘all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery’. It states that compulsory or forced labour may only be exacted for public purposes, adding that

47 Adopted by the General Assembly resolution 2200A (XXI), on 16 December 1966, entered into force on 3 January 1976.

48 Adopted on 7 September 1956 by Conference of Plenipotentiaries, convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 at Geneva, entered into force on 30 April 1957.

49 Adopted by the UN General Assembly resolution 55/25, on 15 November 2000.

50 Adopted by the UN General Assembly resolution 2106 (XX), on 21 December 1965, entered into force on 4 January 1969.

51 CoE, adopted on 18 October 1961. In this paper, the term European Social Charter is used to represent a set of instruments: the original 1961 European Social Charter, the 1988 Additional Protocol, the 1991 Protocol, the 1995 Additional Protocol providing for a system of collective complaints and the Revised European Social Charter (1996).

52 OJ C 326, 26.10.2012, pp. 391–407.

53 Art. 1 of the Slavery Convention.

54 Guide on Art. 4 of the ECHR, 2024, p. 8; Buckley, Kamber and McCormick, 2022, p. 83; Harris et al., 2023, pp. 286–287.

55 Art. 1 of the Supplementary Convention; Allain, 2013, p. 159–193.

where such labour exists, other than for public purposes, the states should ‘put an end to the practice’ as soon as possible. The ILO Convention 29 requires states ‘to suppress the use of forced or compulsory labour in all its forms within the shortest possible period’.⁵⁶ In 1998, the ILO Commission of Inquiry established that the provision should no longer be interpreted as permitting forced labour while working towards its elimination. Instead, it is an obligation of immediate effect. The ILO views the prohibition of forced labour as a fundamental right that all Member States must uphold, regardless of their participation in relevant ILO conventions.⁵⁷ In response to evolving forms of forced labour, including its punitive use in the Soviet Union, ILO Convention 105 further outlines forms of unlawful forced or compulsory labour in Art. 1.⁵⁸

Art. 2 of the ILO Convention 29 defines forced or compulsory labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.’ Para. 2 sets out the delimitations, which influenced the drafting of Para. 3 of Art. 4 ECHR and Para. 3 of Art. 8 ICCPR. However, there are some differences in the respective instruments. In contrast to Point (a) of Convention 29, which excludes from forced labour work or service exacted in virtue of compulsory military service, the ICCPR and the ECHR extend it to ‘any service of a military character’. Consequently, under these instruments, an individual who voluntarily enlists in the military for a specific term and later seeks to resign early is not considered to be subjected to forced labour.⁵⁹ Furthermore, ILO Convention 29 restricts the delimitation considering prison labour to ‘work or service exacted from any person as a consequence of a conviction in a court of law’. However, the ICCPR and ECHR are not confined to imprisonment following a criminal conviction and extend to detainees, including situations where vagrants are compelled to work in vagrancy centres.⁶⁰ The EU Charter does not provide for delimitations and only states that ‘no one shall be required to perform forced or compulsory labour’.⁶¹

The prohibition of forced or compulsory labour is protected by the ICESCR. Although Art. 6 ICESCR does not explicitly include the prohibition, the CESCR interpreted the right to freely choose or accept work to imply the right not to be forced in any way to exercise or engage in employment.⁶² Similarly, Para. 2 of Art. 1 of the ESC, based on which the European Committee of Social Rights (ECSR) developed important

56 Para. 1 Art. 1 of the ILO Convention 29.

57 Saul, Kinley and Mowbray, 2016, pp. 345–346.

58 Ibid., p. 327.

59 Ibid., pp. 333–335.

60 ECtHR, *De Wilde, Ooms and Veryp v. Belgium*, Application nos. 2832/66, 2835/66, 2899/66, 18 June 1971; Saul, Kinley and Mowbray, 2016, p. 336.

61 Para. 2 Art. 5 of the EU Charter.

62 Saul, Kinley and Mowbray, 2016, p. 322; CESCR, General Comment no. 18 on Art. 6 of the ICESCR, E/C.12/GC/18.

practice, states the same prohibition.⁶³ While several factors suggest that the prohibition of forced labour requires immediate effect, the CESCR has not officially recognised it as such. Nonetheless, one could argue that it should not be subject to states' progressive realisation, since the prohibition in the ICCPR, as a civil right, has immediate effect. Therefore, the ICESCR should be interpreted in harmony with its counterpart Covenant.⁶⁴

While delimitations are not explicitly regulated, Art. 6 ICESCR can encompass the various public interests on which work may be mandated according to ILO standards and the provisions of Paras. 3 of Art. 4 ECHR and Art. 8 ICCPR. Specifically, the ICESCR permits states to limit a right by law, as long as it aligns with the nature of the right and serves to promote the general welfare in a democratic society.⁶⁵ The CESCR has regularly invoked ILO standards; however, it took a more restrictive approach to prison labour, opposing forced prison labour and calling for the prisoner's consent.⁶⁶ Furthermore, contrary to the ECHR, the CESCR and the ILO have criticised states for compulsory labour of detainees for private actors.⁶⁷ The prohibition of forced labour as a form of discrimination is strengthened by Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, which ensures the right to freely choose employment without discrimination.⁶⁸

In contrast to the EU Charter, which expressly prohibits human trafficking, the prohibition of human trafficking is not included in the ECHR directly. However, the ECtHR interpreted the Convention as a living instrument and defined the scope of Art. 4 to extend to human trafficking.⁶⁹ In *S.M. v. Croatia*, the Court referred to the Anti-Trafficking Convention and the Palermo Protocol, which defined human trafficking.⁷⁰ The Anti-Trafficking Convention primarily protects trafficking victims and ensures their rights, while seeking to prevent trafficking and prosecute those responsible. Regarding enforcement mechanisms, the ECHR offers an effective judicial mechanism through the ECtHR, allowing individuals and states to bring cases against states for violations of their rights. This direct recourse is a notable strength compared to other instruments. Additionally, the ECtHR's decisions are legally binding on the state parties to the ECHR. When the Court identifies a violation, the state must provide appropriate remedies, which may include compensation and, if necessary, amendments to national laws or practices.⁷¹

63 *International Federation of Human Rights v. Greece*, ECSR Complaint no. 7/2000, 15 December 2000; Saul, Kinley and Mowbray, 2016, p. 335. For an overview of the relevant ECSR practice, see Digest of the Case Law of the European Committee of Social Rights, 2022, pp. 50–57.

64 Saul, Kinley and Mowbray, 2016, p. 345.

65 *Ibid.*, p. 333.

66 *Ibid.*, p. 337.

67 *Ibid.*, p. 338.

68 *Ibid.*, pp. 328–329.

69 See Chapter 2.

70 Art. 4 of the Anti-Trafficking Convention and Art. 3 of the Palermo Protocol. See Chapter 5.4.

71 Mišić and Strban, 2021, p. 529.

However, the ICCPR and the ICESCR rely primarily on state reporting, with the possibility of individual communications added with the Optional Protocols.⁷² Nonetheless, the decisions of the Human Rights Committee and the CESCR, while influential, are not legally binding. The same can be concluded regarding the ESCR's decisions, which assess state compliance with the ESC based on periodic reports and collective complaints introduced with the Additional Protocol.⁷³ Similarly, the supervisory system of the ILO extends beyond the examination of periodic reports and includes the procedures for representations, complaints and complaints regarding freedom of association. However, the adopted recommendations are not legally binding, although they carry significant moral and political weight.⁷⁴

While a more passive enforcement can be observed in the Slavery Convention and the Supplementary Convention, which depend on state cooperation and commitment without direct oversight, the Anti-Trafficking Convention introduced the Group of Experts on Action Against Trafficking in Human Beings (GRETA) to monitor the implementation by carrying out visits and publishing country reports.⁷⁵ GRETA members are nationals of States Parties to the Anti-Trafficking Convention and are selected based on their competence, ensuring geographical and gender balance. All 15 members are independent and impartial and serve a term of four years, renewable once. State parties are evaluated periodically (every 4 to 5 years), and the results are published as evaluation reports, which include a list of conclusions and proposals for action.⁷⁶

While the decisions of the Court of Justice of the European Union (CJEU) are legally binding and provide an enforcement mechanism for cases brought to national courts of law by individuals, companies or Member States alleging violations of the EU Charter, the application of the Charter is limited. Its applicability is restricted to 'the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'.⁷⁷ In summary, Art. 4 ECHR and various universal and regional instruments collectively affirm the prohibition of slavery and forced labour; however, they differ in their definitions, scope of protection and enforcement mechanisms. The ECHR's strong judicial framework contrasts with the more report-based approaches of other instruments. Moreover, these instruments are interconnected through their

72 Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the UN General Assembly resolution 2200A (XXI), on 17 December 1966, entered into force on 23 March 1976; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly resolution A/RES/63/117, on 10 December 2008, entered into force on 5 May 2013.

73 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg 9 November 1995.

74 ILO, ILO Supervisory System.

75 Art. 36 of the Anti-Trafficking Convention.

76 Action Against Trafficking in Human Beings, GRETA.

77 Art. 51 of the EU Charter.

enforcement mechanisms, as the supervisory bodies often reference each other's practices.⁷⁸

Notably, international criminal law establishes individual criminal liability for specific forms of forced labour under certain circumstances. Art. 7(1) of the Rome Statute of the International Criminal Court⁷⁹ defines crimes against humanity to include enslavement, sexual slavery, enforced prostitution, persecution and other inhumane acts that cause great suffering. These acts must be committed as part of a widespread or systematic attack against a civilian population or a segment of it.⁸⁰ Furthermore, international humanitarian law, which applies during armed conflicts, prohibits forced labour in specific contexts. In international conflicts, prisoners of war cannot be forcibly conscripted to fight for the enemy or compelled to work on military preparations or operations, although they may be required to perform non-military tasks. Similarly, the conscription of civilians into the occupying power's military is prohibited, though they can be compelled to work in certain circumstances. The provisions of international humanitarian law that allow forced labour in non-military contexts can be viewed as *lex specialis* concerning human rights instruments. However, the relationship between the two sets of norms can be understood as follows: the prohibition on forced labour, as outlined in Art. 4 ECHR, does not encompass emergency services, which include wartime situations. In accordance with this argumentation, international humanitarian law provides specific regulations concerning forced labour during armed conflict.⁸¹

Business enterprises (companies) have an important role in protection of human rights as well, recognised internationally and regionally. The Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights in its Resolution of 16 June 2011, emphasising the responsibility of transnational corporations and other business enterprises to respect human rights.⁸² This refers to internationally recognised human rights, including, at a minimum, rights in the International Bill of Human Rights (UDHR, ICCPR and ICESCR) and the ILO Declaration on Fundamental Principles and Rights at Work, covering the respect of prohibition of slavery and forced labour.⁸³ Moreover, the CoE's Committee of Ministers adopted a Recommendation to Member States on Human Rights and Business, setting out comprehensive standards and guidance to promote the effective implementation of the UN Guiding Principles.⁸⁴ Additionally, the EU Directive on corporate sustain-

78 See Saul, Kinley and Mowbray, 2016, pp. 322–349.

79 Adopted on 17 July 1998, entered into force on 1 July 2002.

80 Saul, Kinley and Mowbray, 2016, pp. 346–347.

81 Ibid., pp. 347–349.

82 resolution of the Human Rights Council No. 17/4 of 16 June 2011.

83 Para. 2 of the ILO Declaration on Fundamental Principles and Rights at Work, adopted at the 86th Session of the International Labour Conference (1998); Guiding Principles on Business and Human Rights, p. 13.

84 Recommendation of the Committee of Ministers of the Council of Europe No. CM/Rec(2016)3 on human rights and business.

ability due diligence⁸⁵ includes the duty to identify and address potential and actual adverse human rights and environmental impacts within a company's operations, its subsidiaries and, where connected to its value chain, the activities of its business partners. An adverse human rights impact means an impact resulting from an abuse of a human right listed in the Annexe to the Directive.⁸⁶ This includes the prohibition of forced labour and slavery, including human trafficking, which is defined in connection with relevant international instruments.⁸⁷

5. A Case-Law Analysis of the ECtHR Respecting the Prohibition of Slavery and Forced Labour

As Díaz Morgado wrote, although the prohibitions outlined in Art. 4 ECHR and the rights stemming from them are undeniably important, the ECtHR had not been particularly active in its rulings until recently. It was with the landmark case of *Siliadin v. France*, where the ECtHR condemned a European country for the first time for violating Art. 4, that the Court began to engage in a comprehensive analysis of the Art.'s scope and implications in real and potential terms.⁸⁸ The case-law analysis in this chapter is structured around the key issues of Art. 4 ECHR, specifically the prohibitions on slavery, servitude, forced or compulsory labour and human trafficking. Since certain cases fall under more than one section, the facts are summarised at their initial mention, while the relevant aspects are discussed in each corresponding section.

5.1. Slavery

Para. 1 of Art. 4 prohibits slavery, yet it does not provide a definition. Consequently, in *Siliadin v. France*, the ECtHR referred to the Slavery Convention, 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'.⁸⁹ The Court noted that this definition 'corresponds to the 'classic' meaning of slavery as it was practised for centuries'.⁹⁰ According to this interpretation, slavery requires a 'genuine right of legal ownership' over an individual, reducing them to an 'object'.⁹¹ To date, the Court has not confirmed the existence of slavery in cases under Art. 4; however, two cases where this issue was considered are discussed.

85 EU Directive 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. OJ L 1760, 5.7.2024, p. 1.

86 Point (i) of Point (c) of para 1 Art. 3 of the Directive no. 2024/1760.

87 Paras. 11 and 12 of Part I, Section I of the Annex to the Directive no. 2024/1760.

88 Díaz Morgado, 2021, p. 77.

89 Art. 1 of the Slavery Convention.

90 *Siliadin v. France*, para. 122.

91 *Ibid.*

In *Siliadin v. France*, the applicant, a 15-year-old girl from Togo, was brought to France in 1994 with a passport and a tourist visa. Her father had agreed that she would work for Mrs D. to repay the cost of her airfare, while Mrs D. was expected to regularise her immigration status and enrol her in a school. Instead, her passport was taken from her and shortly after she was ‘lent’ to Mr and Mrs B. to assist with childcare. For several years, she was forced to work 15 hours a day without pay or a day off, sleeping on a mattress on the floor in the baby’s room. She managed to retrieve her passport and alert the authorities with the help of a neighbour in 1998. In her application, she complained of being subjected to domestic slavery. The Court determined that she had been deprived of her personal autonomy; however, this alone was insufficient to classify the treatment as ‘slavery’ since no ‘genuine right of legal ownership’ had been exercised over her.⁹² A potential violation of the prohibition of slavery was examined but not established in *M. and Others v. Italy and Bulgaria*⁹³ as well, analysed in Chapter 6. The relevance of the ‘classic’ definition of slavery, accepted in the ECtHR’s case-law, is questionable today concerning legal ownership. As *Buckley, Kamber and McCormick* suggest, it might be more appropriate to emphasise the intensity of compulsion and abuse exerted over the individual.⁹⁴

5.2. Servitude

When determining the scope of servitude, institutions considered the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. The prohibition of servitude entails a ‘particularly serious form of denial of freedom’ and 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’.⁹⁵ This ‘means an obligation to provide one’s services that is imposed by the use of coercion’.⁹⁶ Servitude can be described as a form of abuse and exploitation somewhere between slavery and forced or compulsory labour. Even if a situation does not constitute slavery, it may amount to servitude.⁹⁷ However, the ECtHR regards servitude as an ‘aggravated’ form of forced or compulsory labour.⁹⁸

As a matter of fact, the fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of Art. 4 of the Convention lies in the victim’s feeling that their condition is permanent and that the

92 Guide on Art. 4 ECHR, 2024, p. 8; Buckley, Kamber and McCormick, 2022, p. 83; Harris et al., 2023, pp. 286–287.

93 ECtHR, Application no. 40020/03, 31 July 2012.

94 Buckley, Kamber and McCormick, 2022, p. 83.

95 *Siliadin v. France*, para. 123.

96 *Siliadin v. France*, para. 124.

97 *Siliadin v. France*, paras. 122–123.

98 ECtHR, *C.N. and V. v. France*, Application no. 67724/09, 11 October 2012, paras. 89–91; Buckley, Kamber and McCormick, 2022, pp. 83–84; Allain, 2013, pp. 160–162.

situation is unlikely to change. It is sufficient that this feeling be based on the abovementioned objective criteria or brought about or kept alive by those responsible for the situation.⁹⁹

In *Siliadin v. France*, the ECtHR determined that the applicant was held in servitude based on several factors. She was required to perform forced labour for nearly 15 hours every day, was a minor and was vulnerable and isolated. She lacked a passport, had no regularised immigration status, no means of supporting herself, restricted freedom of movement, no free time, no access to education and was entirely dependent on those with whom she lived.¹⁰⁰

Similarly, *C.N. and V. v. France* involved two sisters from Burundi who moved to France to live with relatives. The Court examined their circumstances and determined that only one had been subjected to servitude and forced labour. The ECtHR highlighted that this sister believed that her legal status in France was tied to her staying in the household and she had neither attended school nor received any training that could have offered her prospects for paid work. Additionally, she had no days off or leisure activities and felt that her situation was permanent, given its duration of four years. In contrast, the second sister had not been subjected to servitude, noting that she attended school and engaged in activities outside the household.¹⁰¹

C.N. v. the United Kingdom concerned a woman from Uganda who fled to the United Kingdom (UK) to escape sexual and physical abuse. A relative, P.S., assisted her in reaching the UK; however, confiscated her passport and travel documents. C.N. started working for an elderly couple, being on call around the clock, with only one afternoon off each month. Her wages were paid to P.S., who kept most of the money and gave C.N. a small portion. After three and a half years, she collapsed during a bank visit and was subsequently hospitalised and housed by local authorities. The ECtHR found a violation of Art. 4 ECHR and emphasised that domestic servitude was a distinct offense, separate from trafficking and exploitation. It encompassed a complex set of dynamics, including overt and subtle forms of coercion, designed to force compliance. Therefore, domestic law must include a specific offense that explicitly prohibits domestic servitude.¹⁰²

5.3. Forced or Compulsory Labour

Para. 2 of Art. 4 ECHR prohibits forced or compulsory labour; however, it does not provide a definition 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’.¹⁰³ When interpreting the provision, the ECtHR looked at ILO Convention 29 on forced

99 *C.N. and V. v. France*, para. 91.

100 See Buckley, Kamber and McCormick, 2022, p. 84; Mowbray, 2007, p. 237.

101 See Buckley, Kamber and McCormick, 2022, p. 84.

102 *C.N. v. the United Kingdom*, paras. 80-81. See Buckley, Kamber and McCormick, 2022, p. 91.

103 *Van der Mussele v. Belgium*, para. 32.

labour,¹⁰⁴ where Art. 2 reads that ‘the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. It applies to work exacted by the state or privately. The Court took this definition as a ‘starting Point’ for its interpretation,¹⁰⁵ focusing on three elements: (1) the performance of labour, (2) exacted from a person ‘under the menace of any penalty’ and (3) for which the person ‘has not offered himself voluntarily’.¹⁰⁶ The ECtHR underlined that ‘sight should not be lost of that Convention’s special features or of the fact that it is a living instrument to be read ‘in the light of the notions currently prevailing in democratic States’’. Consequently, the modern interpretation of the ILO concepts¹⁰⁷ or other pertinent (international) sources¹⁰⁸ guides the Court in defining the scope of the provision.¹⁰⁹

Regarding the performance of labour, the ECtHR adopted a broad interpretation of the concept of labour, referring to the French term *travail* and clarifying that it encompasses ‘all’ or ‘any’ work or service. This is supported by the definition provided in ILO Convention 29, Point (d) of Para. 3 of Art. 4 ECHR and the name of the ILO, whose activities extend beyond manual labour.¹¹⁰ Additionally, the labour does not need to be formally recognised as an ‘economic activity’. Consequently, domestic work in someone else’s household¹¹¹ and the provision of sexual services under coercion¹¹² are deemed as labour.

Concerning labour exacted from a person ‘under the menace of any penalty’, the term ‘forced’ relates to physical or mental coercion, while ‘compulsory’ refers to work that a person has undertaken unwillingly.¹¹³ Here, ‘penalty’ needs to be understood broadly, encompassing formal punishments and any equivalent measures that carry a similar level of perceived threat.¹¹⁴ In *C.N. and V. v. France*, the Court noted that ILO practice established that ‘penalty’ may ‘go as far as physical violence or restraint, but it can also take subtler forms, of a psychological nature, such as threats to denounce victims to the police or immigration authorities when their employment status is illegal’.¹¹⁵ However, in *Adigüzel v. Turkey*,¹¹⁶ the ECtHR underlined that the risk of having one’s salary deducted or being dismissed for refusing to work outside working

104 Ibid.

105 Ibid.

106 Buckley, Kamber and McCormick, 2022, p. 85; Harris et al., 2023, pp. 287–288.

107 ECtHR, *S.M. v. Croatia*, Application no. 60561/14, 25 June 2020, para. 301.

108 ECtHR, *Stummer v. Austria*, Application no. 37452/02, 7 July 2011, paras. 130–131, where the ECtHR referred to the European Prison Rules.

109 Buckley, Kamber and McCormick, 2022, p. 85.

110 *Van der Mussele v. Belgium*, para. 33.

111 *Siliadin v. France*.

112 *S.M. v. Croatia*.

113 *Van der Mussele v. Belgium*, para. 34.

114 Ibid., paras. 34–35.

115 *C.N. and V. v. France*, para. 77; see also *Siliadin v. France*, para. 118; Buckley, Kamber and McCormick, 2022, p. 86.

116 ECtHR, App. no. 7442/08, 6 February 2018.

hours was insufficient to conclude that the work was required under the threat of a penalty.

Regarding labour for which the person ‘has not offered himself voluntarily’, whether labour was ‘offered voluntarily’ was addressed in *Van der Mussele v. Belgium*. The applicant was a pupil advocate who was required to provide free legal services to assist indigent defendants. Although the first two criteria were satisfied, since the work constituted labour and the risk of being struck off the list of pupils was considered ‘the menace of a penalty’, the Court did not find this to be forced labour. It underlined that ‘the applicant’s prior consent, without more, does not therefore warrant the conclusion that the obligations incumbent on him in regard to legal aid did not constitute compulsory labour’.¹¹⁷ Additional factors were taken into account: the services provided were within the scope of the normal activities of an advocate, the profession offered certain benefits, such as the exclusive right of audience and representation, and the services contributed to professional training. Hence, the Court determined that the ‘burden imposed on the applicant was not disproportionate’, as he was appointed to approximately 50 cases during his pupillage while having sufficient time to handle his paid work, which included around 200 cases.¹¹⁸

The proportionality test was not passed in *Chitos v. Greece*,¹¹⁹ which concerned an army medical officer forced to pay a fee to the State to resign before the end of his period of service. His medical training was provided by the State and was free. The ECtHR acknowledged that it was the legitimate and integral duty of a military medical officer to continue serving for a certain period after completing training and the terms of early release fell within the State’s margin of appreciation. Nevertheless, the Court found that the fee amount and the requirement for immediate payment for early release placed a ‘disproportionate burden’ on the applicant, negating his consent and resulting in ‘forced or compulsory labour’.¹²⁰

Chowdury and Others v. Greece considered 42 applicants, who were Bangladeshi nationals recruited in Greece to work at the main strawberry farm in Manolada without a Greek work permit. Their employers failed to pay the wages and obliged them to work in difficult physical conditions under the supervision of armed guards, who shot at them when they protested non-payment of wages. The ECtHR emphasised that the ‘prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour’. Whether an individual voluntarily offers themselves for work is a question that must be examined in light of all the relevant circumstances. Consequently, the Court concluded that if an employer abused their power or took advantage of the workers’ vulnerability to exploit them, the workers could not be considered to have offered themselves for work voluntarily.¹²¹

117 *Van der Mussele v. Belgium*, para. 36.

118 *Ibid.*, para. 39.

119 ECtHR, *Chitos v. Greece*, Application no. 51637/12, 4 June 2015.

120 Harris et al., 2023, p. 288.

121 *Chowdury and Others v. Greece*, Para. 96; Harris et al., 2023, pp. 288–289.

*Four Companies v. Austria*¹²² determined that an employer deducting social security payments or income tax from an employee's salary did not constitute forced or compulsory labour. Similarly, in *Schuitmaker v. Netherlands*,¹²³ the requirements set by the Social Assistance Act to obtain and accept any kind of labour, irrespective of its suitability, by reducing benefits if she refused to do the work, was not considered a violation of Art. 4 ECHR. In *X v. Germany*,¹²⁴ there was no violation when the notary received reduced fees when acting for non-profit organisations. Additionally, in *Antonov v. Russia*,¹²⁵ no violation was found regarding the employee transferring to another job.¹²⁶

5.3.1. Delimitations

As the ECtHR wrote in *Van der Mussele v. Belgium*, the four sub-Paras. of Para. 3 of Art. 4 ECHR, 'notwithstanding their diversity, are grounded on the governing ideas of the general interest, social solidarity and what is in the normal or ordinary course of affairs'. Considering the fundamental significance of the protection under Art. 4, the delimitation clause must be strictly construed.¹²⁷

(a) Work during detention or conditional release: Forced or compulsory labour does not include work done in the 'ordinary course of detention' imposed according to Art. 5 ECHR or during conditional release from such detention. The provision applies to work during detention following a court conviction and work required of detained minors¹²⁸ or vagrants.¹²⁹ The wording 'work required to be done in the ordinary course of detention' pertains to the purpose nature and scope of the work,¹³⁰ with the ECtHR considering the standards prevailing in the Member States.¹³¹

In the *Vagrancy cases*,¹³² the applicants were deemed vagrants and detained in vagrancy centres, where they were required to work in exchange for a low wage. They complained about being forced to work for an unreasonably low payment and under the threat of disciplinary sanctions. However, no violation of Art. 4 was found because the work did not exceed the permissible limits under the ECHR, as intended for the rehabilitation of vagrants, and was similar to practices in several other CoE Member States. Furthermore, the ECtHR determined that Art. 4 did not address the

122 Application no. 7427/76, Judgement 27 September 1976.

123 Application no. 15906/08, Judgement 4 May 2010.

124 Commission decision, 1979. See Guide on Art. 4 ECHR, 2024.

125 Application no. 38020/03, 3 November 2005.

126 See Harris et al., 2023, p. 289.

127 *Chitos v. Greece*, para. 83; Buckley, Kamber and McCormick, 2022, p. 87.

128 *X v. Switzerland*, Application no. 8500/79, 14 December 1979.

129 *X v. Germany*, Application no. 770/60, 1960. Harris et al., 2023, p. 289.

130 *Ibid.*, 2023, p. 289.

131 *Stummer v. Austria*, para. 128.

132 ECtHR, *De Wilde, Ooms and Veryp v. Belgium*, Application nos. 2832/66, 2835/66, 2899/66, 18 June 1971.

issue of remuneration for prisoners' work. The matter was considered in *Zhelyazkov v. Bulgaria*¹³³ and *Floroiu v. Romania*,¹³⁴ discussed in Chapter 6.

The applicant in *Stummer v. Austria* had spent 28 years in prison. He argued that European standards had evolved to the Point where 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'. The ECtHR observed that although an absolute majority of Member States affiliated prisoners to their national social security systems or offered them specific insurance schemes, only a small majority affiliated working prisoners to the old-age pension system. Therefore, Austrian law aligned with the development of European law, as all prisoners received health and accident care and working prisoners were included in the unemployment insurance scheme, although not in the old-age pension system. It stated that while Rule 26.17 of the European Prison Rules encouraged the inclusion of working prisoners in the national social security systems where possible, it reflected an evolving trend and did not impose an obligation under Art. 4 ECHR. Therefore, there was insufficient consensus regarding the affiliation of working prisoners to the old-age pension system.¹³⁵

In *Meier v. Switzerland*,¹³⁶ the applicant, a prisoner, was required to work after the retirement age. The Court found that there had been no violation, as there was a lack of sufficient consensus among CoE Member States concerning compulsory work for prisoners beyond retirement age. Therefore, it highlighted that the Swiss authorities had a significant margin of appreciation and no absolute prohibition could be derived from Art. 4 ECHR.

(b) Military service or substitute civilian service: Subpara. (b) of Para. 3 of Art. 4 ECHR determines that forced or compulsory labour does not include service of a military character or in countries where conscientious objectors are recognised as service exacted instead of compulsory military service. As confirmed in *Chitos v. Greece*, 'service of a military character' did not include voluntary enlistment in the armed forces; therefore, it did not apply to career servicemen.¹³⁷

*Johansen v. Norway*¹³⁸ explained that if a state mandated compulsory civilian work as an alternative to military service, it could implement measures to ensure that this work was completed or impose sanctions for non-compliance. In *Bayatyan v. Armenia*,¹³⁹ the ECtHR indicated that a conscientious objector who declined to perform civilian work may be detained for the length of their military service.¹⁴⁰ The case *W., X., Y. and Z. v. the United Kingdom*¹⁴¹ contributed to the distinction between

133 Application no. 11332/04, 9 October 2012.

134 Application no. 15303/10, 12 March 2013.

135 See Guide on Art. 4 ECHR, 2024; Grabenwarter, 2014, pp. 56–57.

136 Application no. 10109/14, 9 February 2016.

137 *Chitos v. Greece*, para. 87.

138 Application no. 10600/83, 14 October 1985.

139 Application no. 23459/03, 7 July 2011.

140 Harris et al., 2023, p. 290.

141 Application nos. 3435/67, 3436/67, 3437/67, 3438/67, 19 July 1968.

forced or compulsory labour and slavery and servitude. The applicants, four minors aged 15 and 16 years, enlisted in the British navy for nine years. They sought to be discharged for different personal reasons; however, the national authorities denied their requests. It was held that any claims asserting that their service constituted forced or compulsory labour had to be dismissed under Subpara. (b) of Para. 3 of Art. 4. However, this provision does not entirely preclude such service from being assessed under the prohibition of slavery or servitude. Hence, it was concluded that the young age of the applicants, who had enlisted with their parents' consent, did not warrant classifying their normal military condition as 'servitude'.¹⁴²

(c) Service required during an emergency or calamity: Forced or compulsory labour does not include 'service exacted in case of an emergency or calamity threatening the life or well-being of the community'. In *I. v. Norway*,¹⁴³ which dealt with the applicant serving a year in the public dental service in northern Norway, two members of the European Commission of Human Rights (Commission)¹⁴⁴ which decided on the admissibility of applications before Protocol No. 11 to the ECHR entered into force on 1 November 1998) were of the view that this service was reasonably demanded of the applicant to address an emergency that threatened the well-being of the community and did not amount to forced or compulsory labour.

In *S. v. Germany*,¹⁴⁵ the Commission determined that the obligation for a holder of shooting rights to assist in the gassing of foxholes during an epidemic was justified, even if considered compulsory labour. This justification was based on Subpara. (c), which permitted the imposition of services in situations where an emergency or calamity threatened the life or well-being of the community, and Subpara. (d), which allowed for services that were part of normal civic duties.¹⁴⁶

(d) Normal civic obligations: 'Any work or service which forms part of normal civic obligations' is not included under forced or compulsory labour. In *Steindl v. Germany*,¹⁴⁷ the ECtHR found that a physician's participation in emergency medical service did not constitute compulsory or forced labour and concluded that part of the application was inadmissible as it was ill-founded. The Court considered:

(I) that the services to be rendered were remunerated and did not fall outside the ambit of a physician's normal professional activities; (II) the obligation in issue was founded on a concept of professional and civil solidarity and was aimed at averting emergencies; and (III) the burden imposed on the applicant was not disproportionate.¹⁴⁸

142 See Guide on Art. 4 of the ECHR, 2024, pp. 13–14.

143 Application no. 1468/62, 1963.

144 The Commission decided on the admissibility of applications before Protocol No 11 to the ECHR entered into force on 1 November 1998.

145 Application no. 9686/82, 4 October 1984.

146 See Guide on Art. 4 of the ECHR, 2024, p. 14; Grabenwarter, 2014, p. 57.

147 Application no. 29878/07, 14 September 2010.

148 Guide on Art. 4 of the ECHR, 2024, p. 15.

In other cases, the Court and Commission concluded that normal civic obligations encompassed compulsory jury duty,¹⁴⁹ obligatory fire service or a financial contribution payable instead of the service,¹⁵⁰ obligation to conduct free medical examinations¹⁵¹ and the requirement for companies, as employers, to calculate and withhold taxes, social security contributions and similar deductions from their employees' salaries and wages.¹⁵²

5.4. Human Trafficking

The ECtHR first held that human trafficking fell within the scope of Art. 4 in *Rantsev v. Cyprus and Russia*. The applicant was the father of Oxana Rantseva, a 21-year-old Russian woman who died in Cyprus, where she had gone to work in March 2001. She was granted a temporary residence and work permit under the 'artiste' visa. She started work in a cabaret on 16 March; however, she left the employment after three days. On 28 March 2001, at around 4 a.m., Rantseva was seen at a discotheque in Limassol, Cyprus. Her former employer was notified and, with the help of a security guard, he took her to a police station where she was briefly detained. The police, having determined that she was not in Cyprus illegally, instructed the employer to collect her or she would be released. He retrieved Rantseva, along with her passport and documents, and brought her to an apartment at around 5:45 am, where she was placed in a bedroom against her will. At 6:30 am, Rantseva was found dead on the street below.

Interpreting the ECHR as a living instrument, the Court broadened the scope of prohibition of Art. 4 ECHR to include human trafficking, as it is not compatible with a democratic society and the Convention's values (Chapter 2). The Court observed that, like slavery, human trafficking was inherently based on the exercise of powers akin to ownership for exploitation. It treated individuals as commodities to be bought, sold and subjected to forced labour. It often involved strict surveillance of victims' activities, restrictions on their movements and the use of violence and threats. The Court concluded that Cyprus had violated its positive obligations under Art. 4 ECHR on two grounds: first, by failing to establish an adequate legal and administrative framework to combat trafficking, particularly due to the existing 'artiste' visa regime, and second, by failing to take operational measures to protect the applicant's daughter from trafficking, despite credible suspicions that she might have been a victim. Additionally, it found that Russia had violated Art. 4 ECHR by failing to investigate how and where the applicant's daughter was recruited, particularly by not taking steps to identify those involved in her recruitment or the methods used.

This key ruling was confirmed and further developed in *S.M. v. Croatia*. In September 2012, the applicant filed a criminal complaint against T.M., alleging that during

149 *Zarb Adami v. Malta*, Application no. 17209/02, 20 June 2006.

150 *Karlheinz Schmidt v. Germany*, Application. no. 13580/88, 18 July 1994.

151 *Reitmayr v. Austria*, Application. no. 23866/94, 28 June 1995.

152 *Four Companies v. Austria*; Guide on Art. 4 of the ECHR, 2024, p. 15.

the summer of 2011, he had coerced her into prostitution. T.M. had initially contacted her on Facebook, posing as a family friend and offering to help her find a job. After meeting in person, T.M. pressured her into providing sexual services, claiming it was temporary until he could secure her proper employment. T.M. controlled her actions, driving her to meet clients and later renting a flat to keep her under constant surveillance, threatening to install cameras. The applicant feared T.M., who had physically punished her when she resisted. In September 2011, she escaped and sought refuge with a friend; however, T.M. continued to threaten her through messages. She reported having around 30 clients, earning approximately HRK 13,000, half of which she gave to T.M.

The ECtHR determined that Art. 4 ECHR was violated due to the inadequacies in the Croatian authorities' investigation into the applicant's claim of forced prostitution. The Court found that Art. 4 was applicable because elements of trafficking and forced prostitution were arguably present, such as coercion, deception and the abuse of power over a vulnerable person. Specifically, the alleged abuser was a policeman, the victim had been in public care from the age of 10 years and she was certain that the abuser would help her find a job. The Court criticised the authorities for failing to thoroughly investigate the allegations, including neglecting to interview key witnesses, which left the case to hinge on the applicant's testimony against that of her alleged abuser. These failures significantly hindered the authorities' ability to accurately assess the nature of the applicant's exploitation.

The ECtHR underlined:

The notion of 'forced or compulsory labour' under Art. 4 of the Convention aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they are related to the specific human-trafficking context. Moreover, any such conduct may have elements qualifying it as 'servitude' or 'slavery' under Art. 4.¹⁵³

The Court contextualised the issue of human trafficking within the broader framework of the ECHR. It specifically highlighted that while trafficking was covered under Art. 4 ECHR, this, 'however, does not exclude the possibility that, in the particular circumstances of a case, a particular form of conduct related to human trafficking may also raise an issue under another provision of the Convention', such as Arts. 8 and 3.¹⁵⁴ It further clarified that an issue of human trafficking under Art. 4 may only arise if all three elements of the international definition, as outlined in the Anti-Trafficking Convention and the Palermo Protocol, are present: (1) an action, such as recruitment, transportation, transfer, harbouring or receipt of persons, (2) the means, including threats, the use of force, coercion, abduction, fraud, deception, abuse of power or

153 *S.M. v. Croatia*, para. 300.

154 *Ibid.*, para. 297.

vulnerability or the giving or receiving of payments to secure control over another person and (3) an exploitative purpose, such as exploiting the prostitution of others, forced labour, slavery or similar practices. The Court noted that under Art. 4, human trafficking encompassed national and transnational trafficking, regardless of any connection to organised crime.¹⁵⁵

Other human trafficking cases, which have been decided on their merits, concerned domestic service (*J. and Others v. Greece*),¹⁵⁶ agricultural work (*Chowdury and others v. Greece*),¹⁵⁷ construction work (*Zoletić and Others v. Azerbaijan*)¹⁵⁸ and forced marriage (*M. and others v. Italy and Bulgaria*).¹⁵⁹ *J. and Others v. Austria* concerned the Austrian authorities' investigation into allegations of human trafficking made by two Filipino nationals who had worked as maids or *au pairs* in the United Arab Emirates. The applicants claimed that their employers had confiscated their passports and exploited them, a situation that continued during a brief stay in Vienna, where they eventually escaped. After filing a criminal complaint in Austria, the authorities determined that they lacked jurisdiction over the offences committed abroad and chose to discontinue the investigation regarding the events in Austria. The applicants argued that they had been subjected to forced labour and human trafficking and the Austrian authorities had failed to conduct a thorough and effective investigation. The Court determined that the authorities had taken all the steps that could reasonably be expected under the circumstances; therefore, no violation of Art. 4 was found. The ECtHR emphasised that Art. 4 ECHR did not obligate States to establish universal jurisdiction over trafficking offences committed abroad.

Zoletić and Others v. Azerbaijan dealt with 33 applicants, who had been recruited from Bosnia and Herzegovina to work as temporary construction workers in Azerbaijan. Their passports were taken away and they lived in dormitories without drinking water, running hot water, gas or heating. They were not provided with medical care, had to follow strict rules and were not allowed to leave their accommodation without written permission. The Court found a breach of the prohibition of forced or compulsory labour in the procedural aspect, concluding that the Azerbaijani authorities had not fulfilled their obligation to initiate and carry out an effective investigation into the applicants' allegations of forced labour and human trafficking.

When examining the ECtHR's case law on human trafficking, the recent decision in *Krachunova v. Bulgaria*¹⁶⁰ is particularly significant, as the Court upheld the victim's right to seek compensation for pecuniary damage from her trafficker under Art. 4 ECHR (detailed analysis in Chapter 6).

155 Ibid., paras. 290, 296, 303; Guide on Art. 4 of the ECHR, 2024, pp. 6–7.

156 Also: *C.N. and V. v. France*, *C.N. v. the United Kingdom*. See Chapter 5.2.

157 See Chapter 2 and the first part of Chapter 5.

158 App. no. 20116/12, 7 October 2021.

159 See Chapter 5.1.

160 Application no. 18269/18, 28 November 2023.

6. An Analysis of the ECtHR Case Law Regarding 16 Central and Eastern European Countries

Not many cases have been decided on the merits regarding Art. 4 ECHR from the 16 Central and Eastern European countries; however, a few significant cases have emerged. One notable example is *S.M. v. Croatia*, discussed in Chapter 5.4. Here, the ECtHR made important advancements in its stance on human trafficking. *M. and Others v. Italy and Bulgaria*, *Zhelyazkov v. Bulgaria*, *Floroiu v. Romania* and *Krachunova v. Bulgaria* were briefly mentioned in Chapter 5. They are further analysed here. Furthermore, *Bucha v. Slovakia* and *Mihal v. Slovakia* are addressed in the chapter, though the ECtHR's involvement was limited to decisions on admissibility in these instances. The analysis focuses exclusively on Art. 4 violations, even though some cases address violations of multiple ECHR Arts.

*M. and Others v. Italy and Bulgaria*¹⁶¹ involved an alleged trafficking of a minor girl. The applicants, of Roma origin and Bulgarian nationality, claimed that after arriving in Italy to seek work, their daughter was detained by private individuals at gunpoint, was forced into marriage, work and theft and sexually abused at the hands of a Roma family in a village. They claimed that the Italian authorities had failed to investigate the events adequately. Regarding the violation of the prohibition of human trafficking, the Court found insufficient evidence to support the allegation. The *post facto* submitted medical records were inadequate to prove beyond a reasonable doubt that the first applicant had suffered any ill-treatment or exploitation, as described in the definition of trafficking. Hence, no violation of the prohibition of human trafficking was established and Bulgaria's responsibility was not engaged. Additionally, there was no evidence indicating that the first applicant had been subjected to servitude or forced or compulsory labour. Servitude would imply the presence of coercion to provide services, while forced or compulsory labour implied the presence of physical or psychological constraints.

Regarding the prohibition of slavery, the Court stated that, even if the applicant's father had received a sum of money for the alleged marriage, under the circumstances, this payment could not be viewed as a price for the transfer of ownership, which would invoke slavery. The Court noted that marriage carries deep-rooted social and cultural significance that can vary widely between societies and such a payment could reasonably be interpreted as a traditional gift exchanged between families, a practice common in many cultures. Hence, the ECtHR concluded that there was insufficient evidence to prove slavery.¹⁶²

161 ECtHR, Application no. 40020/03, 31 July 2012.

162 Guide on Art. 4 of the ECHR, 2024, p. 8; Buckley, Kamber and McCormick, 2022, p. 83; Harris et al., 2023, pp. 286–287.

In *Bucha v. Slovakia*¹⁶³ and *Mihal v. Slovakia*,¹⁶⁴ the applicants asserted violations of the prohibition against forced or compulsory labour. However, the applications were deemed inadmissible, as they were ill-founded. In *Bucha v. Slovakia*, the applicant, a lawyer appointed to represent a client under a free legal scheme, argued that the Constitutional Court had deviated from its usual practice by denying him compensation for costs associated with his participation in an oral hearing. In *Mihal v. Slovakia*, an enforcement judicial officer contended that not being reimbursed for expenses incurred while attempting to enforce a court decision constituted forced labour. However, the ECtHR concluded that the burden imposed on the applicant had not been excessive, disproportionate or unacceptable.

Zhelyazkov v. Bulgaria and *Floroiiu v. Romania* considered Point (a) of Para. 3 of Art. 4, specifically, the issue of remuneration for prisoners' work. In *Zhelyazkov v. Bulgaria*,¹⁶⁵ the applicant's unpaid prison work was deemed to fall within Subpara. (a). He was convicted of minor hooliganism for insulting a prosecutor and was sentenced to two weeks in detention, during which he worked for an infrastructure development municipality project. While the Court noted a developing trend towards compensating prison work and acknowledged that the work took place before the 2006 European Prison Rules were introduced, it observed that the amount of work was modest. In *Floroiiu v. Romania*,¹⁶⁶ the applicant received a sentence of five years and ten months for theft. At his request, he was allowed to work on maintaining the prison's vehicle fleet during his imprisonment. As this work was considered essential for the prison's daily operations, he did not receive a wage; instead, he was granted a reduction of 37 days from his sentence as compensation. The applicant filed a complaint for non-payment for his work in prison. According to domestic law, prisoners could choose between two types of work after being informed of their conditions. The ECtHR observed that, given the significant reduction in the sentence, the work he performed was not entirely unpaid. Consequently, it determined that his work could be regarded as 'work required to be done in the ordinary course of detention', as defined in Subpara. (a).

*Krachunova v. Bulgaria*¹⁶⁷ concerned human trafficking. The applicant, a 26-year-old woman, following a dispute with her parents, moved in with X, a man whose main occupation at that time was to drive prostitutes to and from their places of work. Initially agreeing to sex work out of financial necessity and curiosity, she faced multiple arrests while working on Sofia's ring road and experienced a troubled relationship with X, who eventually threatened and manipulated her into continuing the work despite her desire to leave, culminating in her seeking police assistance to escape. In court, the applicant attempted to obtain compensation for the earnings from sex work because, instead of receiving direct financial compensation, X took all her earnings, providing her with the necessities and some pocket money.

163 Application no. 43259/07, 20 September 2011.

164 Application no. 31303/08, 28 June 2011.

165 Application no. 11332/04, 9 October 2012.

166 Application no. 15303/10, 12 March 2013.

167 Application no. 18269/18, 28 November 2023.

This arrangement kept her financially dependent on him, while he controlled her identity card to ensure that she could not escape. The Bulgarian courts denied her compensation, arguing that her involvement in prostitution implied that returning her earnings would contradict ‘good morals’. The applicant asserted that there was no legal path for her to reclaim the income from her sex work that had been taken from her. The Court determined that this constituted a violation of Art. 4 ECHR, as the Bulgarian courts did not adequately consider her rights concerning the interests of the community. It emphasised that States must provide avenues for trafficking victims to claim compensation for lost earnings, referencing international treaties, such as Para. 6 of Art. 6 of the Palermo Protocol and Para. 3 of Art. 15 of the Anti-Trafficking Convention, which mandate that States Parties should, in their domestic legal system, provide for the right of victims to compensation. This marked the first instance where the Court recognised a trafficking victim’s entitlement to seek compensation for pecuniary damage from her trafficker under Art. 4 ECHR.

7. Summary and Conclusion

This contribution highlights the enduring significance of Art. 4 ECHR. Despite the formal abolition of slavery, its modern forms, including domestic servitude, debt bondage and human trafficking, persist in Europe. The ECtHR, through Art. 4 ECHR, combats these practices by enshrining the right to freedom from slavery and forced labour as one of the core values of democratic societies in Europe.

Art. 4 ECHR is structured around two prohibitions. The first establishes the absolute right not to be subjected to slavery or servitude, while the second concerns forced or compulsory labour, with certain delimitations regarding work during detention or conditional release, military service, service required during an emergency or calamity and civic obligations. The lack of explicit definitions within the ECHR required the ECtHR to rely on other international treaties to clarify these terms. It adopted an evolutive approach, interpreting the ECHR as a living instrument that must adapt to modern circumstances, leading to the inclusion of human trafficking within the scope of Art. 4 ECHR. However, the ECHR imposes significant positive obligations on states. Governments are required to implement effective legislative and administrative frameworks, take operational measures to protect victims or potential victims and ensure that in a case of a ‘credible suspicion’, an effective and independent investigation is conducted.

The historical overview of slavery and forced labour traced their existence from ancient times to their formal abolition worldwide. It highlighted the first international efforts to address these issues, particularly through the 1926 Slavery Convention and the ILO Convention on Forced Labour No. 29. The comparison of Art. 4 ECHR with other universal and regional human rights instruments discussed the varying scope of protection provided by these instruments and their enforcement mechanisms. It underlined the advantages of the ECHR’s judicial framework, allowing individuals

and states to bring claims directly before the Court, which issued legally binding decisions.

Key cases concerning slavery, servitude, forced or compulsory labour and human trafficking were analysed. They emphasised that although the Court's activity under Art. 4 ECHR was initially limited, its scope progressively expanded. The landmark case *Siliadin v. France* was the first time that the ECtHR explicitly condemned modern forms of exploitation within a European state. Although the Court found that no 'genuine right of legal ownership' had been exercised over the applicant and the situation was not classified as slavery, it concluded that the case constituted (domestic) servitude. The evolutive interpretation of the ECHR was emphasised in *Rantsev v. Cyprus and Russia*, where the Court expanded the scope of Art. 4 ECHR to encompass human trafficking. This significant development in the ECtHR's jurisprudence on human trafficking was reinforced in *S.M. v. Croatia*, which continued to shape the legal framework on the matter.

The prohibition of slavery and forced labour, enshrined in various international and European legal instruments, applies to Central and Eastern European countries. However, the ECtHR has addressed this in only a limited number of cases, involving certain countries. This contribution included the analysis of notable ECtHR judgments, such as *M. and Others v. Italy and Bulgaria* and *Krachunova v. Bulgaria*. The international community underlines the need for a holistic international response to persistent violations, understanding that the phenomenon impacts the whole society. Therefore, the response must be reinforced and supported both regionally and nationally.¹⁶⁸ The ECHR framework, through Art. 4 ECHR and the ECtHR case law, provides a strong legal basis for combating slavery, forced labour and human trafficking in Europe. Its strengths lie in its binding judicial decisions and interpretation of the Convention as a living instrument. However, it faces limitations concerning implementation and international cooperation, particularly in addressing complex transnational issues. Nonetheless, the ECHR remains a vital instrument in protecting human dignity and combating modern forms of exploitation.

168 Borg Jansson, 2014, p. 61.

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Right to Liberty and Security

Barbara JANUSZ-POHL

ABSTRACT

The discussion of Article 5 of the ECHR emphasises the ECtHR's autonomous interpretation of the Convention. The latter, on the other hand, serves as a point of reference for the national legislator at both the lawmaking and law-in-action levels. It is, moreover, a point of ex post control, i.e., a subsidiary control, which the Strasbourg Court exercises in the context of a concrete application to examine in concreto whether there has been a violation of the Convention provisions.

Art. 5, refers to the various forms of application of detention measures under national law and, therefore, extends beyond criminal proceedings. However, some parts of the articles analysed refer exclusively to criminal procedural coercive measures. From a national regulatory perspective, the most problematic is the mosaic of isolative measures unrelated to criminal proceedings. The ratio legis of their applicability has to be linked to the issue of security in the broadest sense: of society, of persons or even of the state.

Moreover, Article 5 defines lawful detention and arrest; by highlighting in detail the issue of procedural guarantees, it addresses the correctness aspect. In the background of the use of coercive, isolating measures, the general guarantees of fairness flowing from Article 6 ECHR also remain.

The Strasbourg Court supports the primacy of national law, acting as a subsidiary authority and setting boundaries after national procedures are exhausted, particularly concerning non-criminal coercive measures. Its case law highlights concerns about the misuse of detention and arrest, focusing on arbitrariness and the importance of quality law to prevent negative instrumentalisation.

KEYWORDS

right to security and liberty, the ECHR, coercive measures, fair trial, instrumentalization

1. Article 5 ECHR – Right to Liberty and Security – Acknowledgement

Before we delve into a detailed analysis of the specific elements related to the right to liberty and security, it is essential to provide some foundational observations. First, it is crucial to highlight that Article 5 of the European Convention on Human Rights (ECHR) offers robust protection against unlawful detention. This provision safeguards individuals from arbitrary infringements on their personal liberty and security, ensuring that everyone has the right to be free from unjustified interference in their lives.

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Consequently, Article 5 of the ECHR operates with the concepts of “liberty” and the “right to security of person”.¹ The meaning of the two guarantees and their relationship may be unclear for several reasons. One reason is that, after affirming the importance of liberty and personal security in Article 5(1), the remainder of the provision focuses solely on freedom. However, it is accepted in scholarly literature that there is a close connection between these concepts. Even so, the terms “freedom” and “security” must only be read together. On the one hand, freedom can only be restricted in strictly defined situations, including those related to the security of the individual; while on the other hand, the security of the person deprived of his or her liberty must be safeguarded in a sensitive manner, as he or she then becomes a vulnerable person. It is also recognised that both terms refer to physical freedom and security. A combined reading of the two concepts amounts to the fact that the essence of this right is to counteract the arbitrariness of state power against the individual. Thus, the right to personal security should be read as a guarantee that no one will be deprived of his or her liberty arbitrarily as it endangers personal security – that is, without an adequate legal foundation and a decision by a competent authority within the framework of a legally prescribed procedure that meets the standards set out in Article 5. It is essential to note that the right to liberty and security is of the utmost significance in a “democratic society”.² The Court concludes that the unacknowledged detention of an individual completely negates the essential guarantees outlined in Article 5 of the Convention, revealing a serious violation of that provision.³

Although the focus of this analysis is on the ECHR regulations, it is worth pointing out that the guarantees of respect for the “right to liberty” and the “right to security of person” are now firmly established at the European level under Article 6 of the Charter of Fundamental Rights of the European Union, which states that

‘Everyone has the right to liberty and security of person. The enshrinement of the protection of liberty and security in the Charter of Fundamental Rights will, therefore, imply the incorporation of the jurisprudential standard developed against the background of Article 5 ECHR into EU law’.⁴

Furthermore, it is generally recognised that personal liberty and security of the individual are components of natural rights, i.e. inherent and inalienable human rights. They stem from the idea of protecting the integrity and dignity of human beings. Combined with the principle of equality, human freedom is not an ancient civilisational achievement, as it is known throughout history that it has not been guaranteed to all humans. Accordingly, in the classical view of the right to liberty, the State’s

1 Powell, 2007.

2 *Medvedyev and Others v. France* [GC], 2010, § 76; *Ladent v. Poland*, 2008, § 45.

3 *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], 2012, § 233; *Al Nashiri v. Poland*, 2014, § 529; *Belozorov v. Russia and Ukraine*, 2015, § 113.

4 Guild and Lesieur, 1998.

contribution consists of creating guarantees to protect the individual against arbitrary action by its authorities that may result in an unlawful deprivation of liberty.⁵

Article 5 ECHR operates with the concept of “lawful” detention. As the case law of the ECtHR shows, it is understood in a multifaceted way. It also consists of pure legality, justiciability and correctness.

It is recognised that decisions to deprive an individual of his or her liberty must be taken based on the applicable legal provisions (“legality aspect”). In the context of a restriction of the right to liberty, the question of the legitimacy and regularity of the measures applied is also relevant. Justiciability implies that, in the specific factual situation, the measure applied was justified and the only one possible, that its application was necessary as well as indispensable, and thus that the application of a non-custodial measure was considered insufficient (proportionality aspect). Correctness, on the other hand, is a category that also refers to the set of actions accompanying the application of a coercive measure detrimental to an individual’s freedom, which endangers his or her personal security.⁶ Correctness means that the application and choice of a given measure were legal (there was a legal basis for its application), the measure was proportionate, and its execution (implementation) took place in a guarantee-oriented manner.⁷

The question of the legality of measures restricting the right to liberty is also linked to the risk of instrumentalisation. For the sake of clarity of the argument, let us point out that two major strands of instrumentalisation may be distinguished. First, the instrumental conception of law consists of treating the law as a tool or a means to achieve goals external to the essence of the law.⁸ This understanding creates the notion of instrumentalisation in the broad sense and implies that law always has an instrumental character, as it serves to achieve or realise goals that can be understood as policy values. The instrumental conception of law is a rationalisation of the instrumental exercise of the law (“use of the law”) by the legislator, the bodies applying the law, or the addressees of the law, which occurs in various guises. One shall point to the narrow understanding of instrumentalisation⁹, according to which the law serves as a tool rather than a mechanism for realising policy goals.¹⁰ For our consideration, when clarifying the notion of instrumentalisation, it must be added that the acts of instrumentalisation might be positive, indifferent or negative, with the latter meaning that the goals of an act are mutually reversed to the goals of the law itself.

Regardless of the many specific approaches to instrumentalization,¹¹ for the purpose of this study, we adopt the narrow sense of instrumentalisation, which

5 See cases: *Askoy v Turkey* 1996; *McKay v United Kingdom* 2006; *Engel v The Netherlands* 1976; *Nikolaishili v Georgia* 2009.

6 About the perception of correctness, see Janusz-Pohl and Wawrzyńczak, 2024, pp. 179–202.

7 *Ibid.*, p. 180.

8 Wronkowska, 2017, pp. 107–112.

9 Gromski, 2018, pp. 95–106.

10 Cyuńczyk, 2019, pp. 40–50; Gribnau, 2013, pp. 89–109.

11 Atiyah and Summers, 1987, p. 404; Gillaerts, 2019, pp. 27–43; Summers, 1982, p. 120 et seq.

describes it as ‘a tool for realising policy goals’. However, as mentioned before, it may take a positive, indifferent, or negative character. Due to the scope of this work, it is important to highlight the risks associated with acts of negative instrumentalisation of deprivation of liberty measures.

One may propose a three-fold understanding of the negative instrumentalisation phenomenon, corresponding to the specific regime of criminal law.¹² Consequently, instrumentalisation is a concept that encompasses both the abuse and the violation of law. Consequently, this concept is broader than the formula of the abuse of law, even in the widest sense. At the same time, the discussion on the legislative gaps connected with the use of coercive measures covers negative instrumentalisation. It must be said that the Article 5 ECHR, creating the prism of control by the ECtHR of deprivation of liberty by national enforcement authorities, shall be perceived as a unique tool for detecting negative instrumentalisation.

In this study, instrumentalisation is understood as situations in which (a) a given actor makes use of the powers granted to them, but the purpose of their action does not correspond to the aim designed by the legislator (abuse of law *sensu stricto*); (b) a given actor goes beyond the powers granted to them by the legislator with their action/inaction, but does not directly violate an existing legal norm, acts *ultra vires* (abuse of law *sensu largo*); and c) the entity concerned exceeds the existing legal norms with its action/inaction and violates a specific legal norm in extreme cases, by committing a criminal act (violation of the law).¹³

In the context of unlawful detention, abuse of law *sensu stricto* may refer to the issue of justiciability of detention; meanwhile, abuse of law *sensu largo* may include the issue of the correctness of detention and, due to the nature of coercive detention, also fall under the concept of illegality. In contrast, violation of law refers directly to the pure illegality of the act in question.

2. The Content of the Right

When starting the examination of Article 5, several points should be noted. The first paragraph of Article 5 establishes the right to liberty and security of the person. It absolutises this right, so to speak, in order to indicate in the second sentence that the only exceptions to it can be related to the lawful use of deprivation of liberty, which are further specified in subsequent paragraphs a–f. Furthermore, each exception under which a deprivation of liberty shall be lawfully applied may include detention, arrest, conviction, and other custodial measures.¹⁴ As we know, the Court has already made a conclusive statement on how to interpret the term “detention under Article

¹² Janusz-Pohl and Wawrzyńczak, 2024, p. 180.

¹³ Ibid., p. 109.

¹⁴ Patel, 2005, pp. 303–310.

5,” opting for a broad interpretation.¹⁵ The European Court has developed a method for determining whether there has been a deprivation of liberty within the terms of Article 5.

The leading interpretation regarding deprivation of liberty was established in the case of *Guzzardi v. Italy*. In this case, the applicant, who was suspected of being affiliated with the Mafia, was placed under special supervision by the Italian courts. This supervision required him to reside in a 2.5-km² area on a small island, Asinara, located off the coast of Sardinia. The order included various measures, such as a curfew and restrictions on social interaction with the local population. The key question before the European Court was whether this supervision regime constituted a deprivation of liberty under Article 5(1) of the ECHR. The Court concluded that the residence requirement did indeed amount to a deprivation of liberty, as the conditions resembled those of an open prison. In reaching this conclusion, the European Court made several important observations. It noted that the guarantee provided in Article 5(1) is focused on the physical liberty of individuals and aims to ensure that no one is arbitrarily deprived of this liberty. The Court emphasised that Article 5(1) is not concerned solely with basic restrictions on liberty of movement. To determine whether someone has been “deprived of his liberty” as defined by Article 5, it ‘is essential to consider the individual’s concrete situation, taking into account various factors such as the type, duration, effects, and manner of implementation of the measures in question’.

Additionally, the Court highlighted that the distinction between deprivation of liberty and mere restriction of liberty is one of degree or intensity rather than of nature or substance. Although classifying cases into these categories can sometimes be a subjective task, the Court has a duty to make a determination that will dictate the applicability or inapplicability of Article 5 in each case (*in concreto* assessment). Accordingly, it must be added that mere restrictions on liberty of movement are governed by Article 2 of Protocol No. 4.¹⁶ In conclusion, deprivation of liberty is not limited to the classic case of detention following arrest or conviction but may take numerous other forms.¹⁷ As a side note, it has been pointed out that, in the context of a variety of measures leading to restrictions of individual liberty, Article 5 impact on national law is insufficient.¹⁸

15 *Guzzardi v. Italy*, 1980, § 95.

16 *De Tommaso v. Italy* [GC], 2017; *Creangă v. Romania* [GC], 2012; *Engel and Others v. the Netherlands*, 1976; *Guzzardi v. Italy*, 1980; *Medvedyev and Others v. France* [GC], 2010.

17 *Guzzardi v. Italy*, 1980, § 95.

18 It is argued that: “Today, in addition to the arrest, the citizen can be subject to a wide range of modern police powers that have clear implications for liberty. These powers come in many forms. For instance, notwithstanding powers enacted to deal with terrorism, police officers enjoy powers to stop and search powers, the power to conduct road traffic stops, the power to stop and check travel documents, and the common law power to control crowds. Yet, as will be shown below, the impact of Article 5 on such powers has been surprisingly limited. In several cases dealing with police powers the courts have decided that Article 5 simply does not apply” (Edwards, 2020, pp. 331–356).

3. Lawful Deprivation of Liberty General Remarks

The most important principle when deciding on the lawfulness of the detention relates to the principle of the autonomous assessment of the Strasbourg court.¹⁹ Consequently, when examining the concept of lawful detention, it is important to note that the Court does not feel constrained by the legal conclusions of domestic authorities regarding whether a deprivation of liberty has occurred in a case at hand.²⁰ As we mentioned before, to determine if someone has been “deprived of his liberty” as defined by Article 5, the analysis begins with the individual’s specific circumstances (concrete aspect of the assessment).

As an example of the principle of the autonomous assessment, one shall refer to the case *Khlaifia and Others v. Italy* [GC], 2016. This case involves three Tunisian nationals who attempted to reach Italy by boat during the “Arab Spring”. After being intercepted by the Italian coastguard, they were taken to an overcrowded reception centre (CSPA) in Lampedusa, where they faced unacceptable sanitary conditions, lack of sleeping space, constant police surveillance, and no contact with the outside world. After an uprising at the reception centre, they were moved to a sports complex, then escaped to Lampedusa, participating in demonstrations with about 1,800 others. They were apprehended by police and returned to the CSPA before being flown to Palermo on September 22. In Palermo, they were confined to overcrowded ships with limited restroom access and no information from authorities; they claimed mistreatment by police. After 5 to 7 days, they were taken to Palermo airport for repatriation, identified by the Tunisian consul, and deported to Tunisia under a bilateral agreement. They alleged that they had never received any documents during their time in Italy. In court, the Italian government provided repatriation decrees in Italian with Arabic translations, noting the applicants had refused to sign. Despite a complaint from anti-racist organisations leading to a criminal investigation into their arrest, the case was shelved without charges. The applicants filed complaints with the European Court of Human Rights (ECtHR), alleging unlawful deprivation of liberty, inhumane treatment, and collective expulsion. In its September 2015 ruling, the ECtHR found their detention unlawful and the conditions degrading. It determined that their individual situations were not properly considered before their return to Tunisia.

The Grand Chamber of the ECtHR stated that the detention was arbitrary and lacked legal certainty, and the lack of information impaired the applicants’ ability to challenge their detention. While the conditions did not violate Article 3 due to the short duration, there was no violation of Article 4, as they had opportunities to raise concerns about their repatriation. Their complaints about collective expulsion

¹⁹ Letsas, 2004, pp. 279–305.

²⁰ See interpretation in cases: *Khlaifia and Others v. Italy* [GC], 2016; *H.L. v. the United Kingdom*, 2004; *H.M. v. Switzerland*, 2002; *Creangă v. Romania* [GC], 2012.

were rejected since there were no indications of real risk of inhumane treatment in Tunisia.

Additionally, it shall be said that when characterising the concept of lawful detention, the court drew attention to both subject-oriented and object-oriented aspects of the application of the measure in question.

The objective element of a person's confinement in a particular restricted space for a not negligible length of time, and an additional subjective element, is that the person has not validly consented to the confinement in question.²¹ As relevant objective factors to consider in the possibility of leaving the restricted area, the degree of supervision and control over the person's movements, the extent of isolation, and the availability of social contacts were regarded.²² Furthermore, the relatively short duration of the detention does not affect this conclusion.²³ Consequently, it was said that an element of coercion in the exercise of police powers of stop and search is indicative of a deprivation of liberty, notwithstanding the short duration of the measure.²⁴ As an example, one shall add that even measures taken for protective reasons or in the interest of the individual may still constitute a deprivation of liberty if they might be perceived as lawful based on Article 5. The intent behind the authorities' actions is not the deciding factor in assessing whether a deprivation of liberty has actually occurred. This intention is only relevant at a later stage of the Court's analysis, which examines the compatibility of the measures with Article 5 § 1.

The assessment of whether a coercive measure has been lawfully imposed thus encompasses both the primary plane – that is, the compliance of a given procedural act with the procedural rules – and the secondary plane – that is, the compliance of national rules with the standard set by the Convention. The analysis covers both the level of mere compliance with the Convention of a given legal regime and the practice of application of a given institution in a given (national) legal order. The primary and secondary levels reflect the two independent duties of the States Parties to the Convention, the duty to establish an adequately guarantee-oriented procedure (the law-making level) and the law-application level. Thus, in the framework of instrumentalisation phenomena, the concept of lawfulness must be understood as broadly as possible in terms of legality, correctness, and justiciability.

The broad understanding of lawfulness is justified by the Court's elaboration. One shall observe that the correctness criterion is referred to the overall procedural requirements of the detention. The court argued that the lack of records regarding key details – such as the date, time, and location of detention, the name of the detainee, the reasons for the detention, and the identity of the person carrying it out – must be viewed as fundamentally incompatible with the purposes of Article 5 of the

21 *Storck v. Germany*, 2005, § 74; *Stanev v. Bulgaria* [GC], 2012, § 117.

22 *Guzzardi v. Italy*, 1980; *H.M. v. Switzerland*, 2002; *H.L. v. the United Kingdom*, 2004; *Storck v. Germany*, 2005.

23 *Rantsev v. Cyprus and Russia*, 2010, § 317; *Zelčs v. Latvia*, 2020, § 40.

24 *Krupko and Others v. Russia*, 2014; *Foka v. Turkey*, 2008; *Gillan and Quinton v. the United Kingdom*, 2010; *Shimovolos v. Russia*, 2011; *Brega and Others v. Moldova*, 2012.

Convention. Additionally, this absence of documentation contradicts the requirement of lawfulness outlined in the Convention.²⁵

The astonishing level of misconduct by investigation authorities was demonstrated, for example, in the case *Anguelova v. Bulgaria*, 2002. The applicant, Mrs. Assya Anguelova, a Bulgarian national, claimed that her son had been subjected to violations of the European Convention on Human Rights. On 29 January 1996, her son, Anguel Zabchekov, aged 17, who was known to the police as a suspect on theft charges, died after being in police custody in Razgrad for several hours following his arrest for attempted theft. Although it was routine procedure, no written order for his detention was issued upon his arrival at the police station at 12:50 a.m. He was left in the corridor to sober up. A police sergeant noticed he was shivering and moved him to a warmer room. Later that evening, at 3.50 a.m., the sergeant observed his condition had worsened. A doctor from the nearby hospital was summoned, who advised that he should be taken to the hospital and examined by the on-duty doctor. The doctors declared him dead due to a skull fracture, asserting that it generally takes about four hours for a person to die from such an injury. The subsequent investigations by the prosecution authorities concluded that the death was likely caused by an accidental injury that pre-dated Mr Zabchekov's arrest, based on a second medical report stating that such injuries can take up to 12 hours to cause death. The applicant disputed the investigation's conclusion. She claimed her son had died as a result of ill-treatment by the police, that the authorities had failed to conduct an effective investigation, and that discrimination had occurred against her son because he was of Roma origin.

When determining the lawfulness of detention based on the Court's case law, the repeated emphasis on the lawfulness of the detention, both procedural and substantive aspects, shall be reconsidered; among procedural aspects, the key role plays the promptness of the requisite judicial controls.²⁶

In the case of *Selahattin Demirtaş v. Turkey* (No. 2) [GC], 2020, the Grand Chamber of the European Court of Human Rights (ECtHR) determined that the Turkish government violated Mr. Demirtaş's rights under several articles of the European Convention on Human Rights (ECHR), including Article 10 (freedom of expression) and Articles 5(1) and 5(3) (right to liberty). Mr. Demirtaş, the leader of the opposition and co-chair of the Peoples' Democratic Party, was arrested on November 4, 2016, following his political speeches against the government regarding the Kurdish-Turkish conflict. The Court found that his right to freedom of expression was violated, as the lifting of his parliamentary immunity and the charges against him lacked legal foreseeability. The Court held that his detention aimed to suppress political pluralism and debate essential to democracy. It ordered the Turkish government to secure his immediate release and stated that continued pre-trial detention would prolong the violations of the ECHR.

²⁵ *Anguelova v. Bulgaria*, 2002; *Kurt v. Turkey*, 1998.

²⁶ *Selahattin Demirtaş v. Turkey* (no. 2) [GC], 2020; *S., v. and A. v. Denmark* [GC], 2018; *Buzadji v. the Republic of Moldova* [GC], 2016.

To ensure compliance with legal requirements, detention must be “in accordance with a procedure prescribed by law.” Article 5 § 1 does not solely reference domestic law; it also emphasises the “quality of the law.” This means that if a national law permits deprivation of liberty, it must be sufficiently accessible, clear, and predictable in its application. Key factors in evaluating the “quality of law,” often referred to as “safeguards against arbitrariness,” include the existence of clear legal provisions regarding the ordering of detention, the extension of detention, and the establishment of time limits for detention. Additionally, there should be an effective remedy available for the applicant to challenge the “lawfulness” and “length” of their ongoing detention.²⁷ The concept of quality law allows us to refine our assessment of the legality of detention in relation to the plane we have called correctness.

The case *J.N. v. the United Kingdom* involved Mr. J.N., an Iranian national who sought asylum in the UK in 2003 but had his claim refused. Following a conviction for indecent assault, he was subjected to immigration detention for a total of 55 months across two periods, interrupted by conditions for his release. Mr. J.N. refused to cooperate with efforts for voluntary return to Iran, including signing a disclaimer. He was eventually released after the High Court granted him permission for judicial review, which found his detention unlawful and awarded him damages. The court emphasised a lack of effort in pursuing his deportation, stating it did not meet the required legal obligation of “reasonable diligence and expedition.” Mr. J.N. complained about the excessive length and unclear time-limits of his detention, referencing Article 5 § 1 (f) regarding liberty and security. In this judgment the Court referred to the concept of quality law.

At the same time, domestic law must meet the requirements set in the convention. Reversely, the requirement for lawfulness is not satisfied merely by compliance with the relevant domestic law; rather, the domestic law itself must conform to broader legal principles that are either explicitly stated or implied within it. Specifically, the general principles referenced by the case law connected to Article 5 § 1 of the European Convention on Human Rights embody several key concepts. First, the rule of law necessitates that laws are applied consistently and fairly, ensuring that all individuals are subject to the same legal standards. This principle underpins a just society, where no one is above the law, thus fostering trust in legal institutions. Second, the principle of legal certainty requires that laws be clear, accessible, and predictable. This allows individuals to understand their rights and obligations, promoting stability and confidence in the legal framework. Moreover, the principle of proportionality mandates that any restrictions on individual rights must be necessary and proportionate to the aim pursued, preventing excessive or unjustified limitations on freedoms. Lastly, the principle of protection against arbitrariness is paramount, as it seeks to safeguard individuals from unfair or unpredictable governmental actions. This is particularly crucial in the context of Article 5, which aims to protect personal liberty and security. Together, these principles form a cohesive foundation that ensures legal processes

27 *J.N. v. the United Kingdom*, 2016.

respect individual rights while maintaining public order and safety.²⁸ It must be emphasised that the notion of “arbitrariness” in Article 5 § 1 extends beyond pure lack of conformity with national law so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention²⁹. The concept of arbitrariness may instead refer to the plane of correctness and, as such, allude to the negative instrumentalisation mentioned in the introductory part of this study.

Article 5 indicates a precise, enumerative catalogue of legal formulas for arrest or detention. These categories relate to the various cases in which a person’s liberty shall be restricted, and it should be clarified that they go beyond the scope of criminal law areas and, consequently, may be linked to the broader concept of security of the State or security of the society concerned, as well as of individuals. To sum up, Article 5 contains a catalogue in the nature of a *numerus clausus* specifying cases of authorised deprivation of liberty. In this sense, the catalogue cannot be interpreted in an expansive manner.

In the jurisprudence of the ECtHR,³⁰ it is indicated that the question of the applicability of Article 5 has arisen in a variety of circumstances, including: the placement of individuals in; psychiatric or social care institutions;³¹ questioning in a police station;³² placement in a police car to draw up an administrative offence report;³³ stops and searches by the police;³⁴ house search;³⁵ police escort;³⁶ crowd control measures adopted by the police on public order; grounds;³⁷ house arrest;³⁸ holding sea-migrants in reception facilities and on ships;³⁹ keeping irregular migrants in asylum hotspot facilities;⁴⁰ national lockdown on account of the Covid-19 pandemic;⁴¹ taking of an individual by paramedics and police officers to hospitals, confinement in airport transit zones;⁴² confinement in land border transit zones.⁴³

28 *Khlaifia and Others v. Italy* [GC], 2016, § 92; *Del Río Prada v. Spain* [GC], 2013, § 125; *Creangă v. Romania*, 2012, § 120; *Medvedyev and Others v. France* [GC], 2010, § 80.

29 Trechsel, 1993, pp. 277–344.

30 See the official guidelines for the Article 5 interpretation by the ECtHR August 2024 Guide on Article 5 – Right to liberty and security.

31 *De Wilde, Ooms and Versyp v. Belgium*, 1971; *Nielsen v. Denmark*, 1988; *H.M. v. Switzerland*, 2002.

32 *Cazan v. Romania*, 2016; *I.I. v. Bulgaria*, 2005; *Osypenko v. Ukraine*, 2010; *Salayev v. Azerbaijan*, 2010; *Farhad Aliyev v. Azerbaijan*, 2010; *Creangă v. Romania* [GC], 2012.

33 *Zelčs v. Latvia*, 2020.

34 *Foka v. Turkey*, 2008; *Gillan and Quinton v. the United Kingdom*, 2010; *Shimovolos v. Russia*, 2011.

35 *Stănculeanu v. Romania*, 2018.

36 *Rozhkov v. Russia* (no. 2), 2017; *Tsvetkova and Others v. Russia*, 2018.

37 *Austin and Others v. the United Kingdom* [GC], 2012; *Auray and Others v. France*, 2024.

38 *Buzadji v. the Republic of Moldova* [GC], 2016; *Mancini v. Italy*, 2001; *Lavents v. Latvia*, 2002.

39 *Khlaifia and Others v. Italy* [GC], 2016.

40 *J.R. and Others v. Greece*, 2018.

41 *Terheş v. Romania* (dec), 2021.

42 *Z.A. and Others v. Russia* [GC], 2019; *Amuur v. France*, 1996; *Shamsa v. Poland*, 2003.

43 *Ilias and Ahmed v. Hungary* [GC], 2019; *R.R. and Others v. Hungary*, 2021.

3. Authorised Deprivations of Liberty under Article 5 § 1 as a *Numerous Clausus List*

3.1. *Detention after Conviction*

‘a. The lawful detention of a person after conviction by a competent court.’

In this case, it is crucial to establish the meaning of the term “conviction.” The case law established by the court clearly delineates that the term encompasses both a determination of guilt and the application of a penalty or other measures that result in the restriction of individual liberty.⁴⁴ However, it must be said that the phrase “after conviction” does not merely indicate that detention must occur at some point in time following a conviction. Instead, it signifies that the detention must be a direct result of the conviction; in other words, it must depend on or arise from the conviction itself. The Tribunal characterises this relationship as a necessary causal connection between the conviction and the deprivation of liberty in question.⁴⁵ Let us note that the provision being interpreted does not contain the term valid conviction, and therefore, detention can also follow such a conviction that can be overturned in a review (appeal) procedure.

An interesting case involves Inés del Río Prada, who was a member of the Basque separatist group ETA. She was convicted in 1989 for multiple terrorist attacks, resulting in cumulative sentences totalling over 3,000 years of imprisonment. Under Spanish law at the time, the maximum duration of actual imprisonment for such cases was 30 years. Del Río benefited from sentence reductions due to work and good behaviour while in prison, and she was scheduled for release in July 2008. However, before her release, Spain’s Supreme Court applied a new interpretation of the sentence remission rules, known as the “Parot Doctrine,” named after another ETA prisoner, Henri Parot. Established in 2006, this doctrine retroactively changed how remissions were calculated, specifying that they should apply to each individual sentence rather than the 30-year maximum. As a result, Del Río’s release was delayed until 2017. Based on the Grand Chamber ruling of the European Court of Human Rights (ECtHR), the extension of her imprisonment was deemed unlawful under both Spanish and European law. Her detention after July 2008 lacked a legal basis that was foreseeable and accessible.

Following the court argumentation, a defendant is considered to be detained “after conviction by a competent court” within the meaning of Article 5 § 1 (a) once the judgment has been delivered at first instance, even where it is not yet enforceable and remains amenable to appeal. The phrase “after conviction” should not be narrowly construed to apply exclusively to cases of final conviction. This restricted

44 *Del Río Prada v. Spain* [GC], 2013; *James, Wells and Lee v. the United Kingdom*, 2012; *M. v. Germany*, 2009; *Van Droogenbroeck v. Belgium*, 1982; *B. v. Austria*, 1990.

45 *James, Wells and Lee v. the United Kingdom*, 2012; *Monnell and Morris v. the United Kingdom*, 1987; *Del Río Prada v. Spain* [GC], 2013.

interpretation neglects the circumstances surrounding individuals who have been apprehended following their conviction yet were free during the trial process. It is crucial to acknowledge that the guilt of a person held in custody during the appeal or review stages has already been established through a trial that complied with the essential requirements outlined in Article 6. This ensures that the judicial process was fair and thorough, reinforcing the integrity of the findings against such individuals.⁴⁶ Since the conviction is to be the result of an adjudication by a competent court, the condition of a competent court extends to the entire proceedings; it must be understood that the conviction is to be the result of proceedings conducted by a competent court.

Finally, it must be noted that the notion of conviction shall be perceived in a broad manner. Based on the court assessment, Article 5 § 1 (a) applies where persons of unsound mind are detained in psychiatric facilities after conviction.⁴⁷ Conviction, therefore, covers both those cases in which the guilt of the perpetrator of the offence is imputed and situations in which imputation cannot take place due to an obstacle (exculpation cases) related to the existence of circumstances excluding guilt.

Relevant interpretation is presented in *Klinkenbuß v. Germany* case. Andreas Klinkenbuß, a German national born in 1964, is currently confined in a psychiatric hospital in Lippstadt. As a minor in the late 1970s and early 1980s, Klinkenbuß committed serious sexual and violent offenses. National courts determined that he lacked criminal responsibility at the time and sentenced him to five years of imprisonment under juvenile law, with an order for placement in a psychiatric hospital under Article 63 of the German Criminal Code. Klinkenbuß alleged that his continued confinement in the psychiatric facility violated his right to liberty under Article 5 § 1 of the European Convention on Human Rights. The case involves a sensitive intersection of Article 5 § 1 – the right to liberty – and preventive or psychiatric detention. Such detentions must comply with the permissible grounds under the Convention, including the lawful detention of individuals deemed to be of “unsound mind” per Article 5 § 1(e). The European Court typically requires that such detention takes place in a suitable institution for mentally disordered individuals and is related to a genuinely serious mental disorder, rather than merely a predisposition to criminal behaviour. In Klinkenbuß’s case, the central issue likely concerns whether his mental condition warranted continued detention and whether the conditions of his confinement met the standards set by the European Convention on Human Rights.

3.2. Detention for Failing to Comply with a Court Order or Legal Obligation

‘b. The legal arrest or detention of a person for non-compliance with a lawful court order or to ensure the fulfilment of any legal obligation.’

Another case of lawful detention applies for failure to comply with a court order or with other legal obligations and covers a wide spectrum of situations. In the case

⁴⁶ *Wemhoff v. Germany*, 1968.

⁴⁷ *Klinkenbuß v. Germany*, 2016; *Radu v. Germany*, 2013; *X v. the United Kingdom*, 1981.

under consideration, the legality of detention is referred to separately in two categories. In the first, it covers non-compliance with the court order; and in the second, non-compliance with the legal obligation. In the first case the basis for the application of the isolative measure is the violation of a specific individual and concrete norm that has materialised in the court order. The second case concerns materialised legal obligations. In the second case, therefore, it is not in relation to abstract obligations but ones that have been concretised.

In reference to the first group, we can highlight several notable examples of non-compliance that underscore the challenges within the legal system. These include the failure to pay a court-imposed fine, which reflects a disregard for judicial authority; the refusal to undergo a court-ordered medical examination assessing mental health or a mandated blood test, indicating non-cooperation with legal directives; and the neglect of residence restrictions that are intended to ensure public safety and compliance with court mandates. Additionally, there is the alarming failure to comply with a court decision requiring the return of children to a parent. Violating binding-over orders demonstrates an unwillingness to adhere to preemptive measures designed to protect the community, while breaching bail conditions highlights a serious lack of accountability in the face of legal obligations. Lastly, the confinement in a psychiatric hospital, especially when domestic proceedings do not offer sufficient protections against arbitrary detention, raises significant concerns about individual rights and the potential for misuse of institutional powers. Collectively, these examples illustrate the various forms of non-compliance that challenge the integrity and effectiveness of the legal process.⁴⁸

The second variant provided for in Article 5 § 1 (b) allows for detention only to “secure the fulfilment” of any obligation prescribed by law. Therefore, the use of an isolative measure is completely exceptional in this case.

When it comes to more precise interpretation, it shall be observed that it must be the notion “prescribed by law” must point to domestic law. There must be an unfulfilled obligation on the part of the individual, and the arrest and detention should aim solely to ensure its fulfilment, not to punish. Once the obligation has been fulfilled, the grounds for detention under Article 5 § 1 (b) no longer apply. Therefore, the basis for depriving someone of their liberty in the current case is conditional; it is legitimate only as long as the detention is necessary for fulfilling a legal obligation.⁴⁹ Situations addressed under the second limb of Article 5 § 1 (b) encompass a range of obligations that individuals may face. These include the requirement to undergo a thorough security check upon entering a country, providing detailed information about one’s personal identity, submitting to a psychiatric evaluation, vacating designated areas,

48 See cases: *Velinov v. the former Yugoslav Republic of Macedonia*, 2013; *Airey v. Ireland*, Commission decision of 7 July 1977; *Trutko v. Russia*, 2016 and *Beiere v. Latvia*, 2011; *X. v. Germany*, Commission decision of 10 December 1975; *X. v. Austria*, Commission decision of 13 December 1979; *Freda v. Italy*, Commission decision of 7 October 1980; *Paradis v. Germany* (dec.), 2007; *Steel and Others v. the United Kingdom*, 1998; *Gatt v. Malta*, 2010; *Ciulla v. Italy*, 1989.

49 *Vasileva v. Denmark*, 2003; *S., v. and A. v. Denmark* [GC], 2018.

appearing for questioning at a police station, maintaining public order by abstaining from criminal activities, or disclosing the whereabouts of attached property to facilitate the settlement of tax debts. Each of these obligations reflects a balance between individual rights and the necessity of maintaining safety and order within society.⁵⁰

3.3. *Detention on Remand*

‘c. The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.’

Earlier, we noted that Article 5 addresses detention and arrest in cases relevant to criminal law, as well as those related to security – whether concerning the state, society, or individuals. However, Article 5, paragraph 1(c), has a more limited scope and is specifically focused on criminal law. A person may only be detained under the first part of Article 5, paragraph 1(c) in connection with criminal proceedings.

This detention is intended to bring the individual before the appropriate legal authority on the suspicion that he or she has committed an offence.⁵¹ Pre-trial detention functions as a preventive measure primarily when it is supported by reasonable suspicion of a specific offense for which criminal proceedings are underway. This means that authorities must have credible grounds to believe that a crime has been committed before an individual can be lawfully arrested and detained. The concept of reasonable suspicion is based on objective facts and circumstances that would lead a cautious person to believe that an offense has occurred. Consequently, establishing reasonable suspicion is a crucial prerequisite for the legality of any arrest within this context. This requirement not only protects the rights of individuals but also ensures that pre-trial detention is used judiciously and not arbitrarily. It safeguards against unjust imprisonment and upholds the integrity of the legal process, ensuring that detaining individuals is based on sound, evidence-based reasoning rather than mere conjecture or assumptions.

However, the provision under review also deals with the second ground for lawful arrest or detention, which states ‘when it is reasonably considered necessary to prevent his committing an offence or fleeing after doing so.’ A policy of general prevention that targets individuals or groups deemed dangerous or likely to commit unlawful acts is strictly prohibited. This means that authorities cannot detain individuals solely based on perceptions of risk. To lawfully justify a detention under the second clause of Article 5 § 1 (c) of the European Convention on Human Rights, the authorities must present compelling evidence. This evidence must clearly demonstrate that the

50 *McVeigh and Others v. the United Kingdom*, Commission report of 18 March 1981; *Vasileva v. Denmark*, 2003; *Novotka v. Slovakia* (dec.), 2003; *Sarigiannis v. Italy*, 2011; *Nowicka v. Poland*, 2002; *Epple v. Germany*, 2005; *Iliya Stefanov v. Bulgaria*, 2008; *Osypenko v. Ukraine*, 2010 and *Khodorkovskiy v. Russia*, 2011; *Ostendorf v. Germany*, 2013; *Göthlin v. Sweden*, 2014.

51 *Selahattin Demirtaş v. Turkey* (no. 2) [GC], 2020; *Şahin Alpay v. Turkey*, 2018; *Ječius v. Lithuania*, 2000; *Schwabe and M.G. v. Germany*, 2011.

individual in question would almost certainly have participated in a specific, concrete offence, had their detention not intervened to prevent such involvement. This requirement underscores the necessity for a clear link between the detention and the specific threat posed by the detained individual.⁵²

The issue of the “factual background for detention” was illustrated in the case of *Selahattin Demirtaş v. Turkey* (no. 2) [GC], 2020. The applicant, Selahattin Demirtaş, is a prominent Kurdish politician and the leader of the Peoples’ Democratic Party (HDP) in Turkey. He was detained in November 2016 alongside several other HDP members on charges that included terrorism-related offenses. The Turkish authorities claimed that Demirtaş’s activities and speeches were connected to the Kurdistan Workers’ Party (PKK), which is designated as a terrorist organisation by both Turkey and the EU. Demirtaş was kept in pre-trial detention for over four years, a period marked by ongoing legal proceedings, allegations of politically motivated prosecution, and suppression of political expression. In a unanimous ruling by the Grand Chamber on December 22, 2020, the Court found violations of Article 18 (limitation on the use of restrictions on rights) in conjunction with Article 5 (right to liberty and security) and Article 10 (freedom of expression). Regarding the violation of Article 5 – Right to Liberty and Security, the Court ruled that Demirtaş’s pre-trial detention was unlawful and disproportionate. The duration of his detention violated his rights, and there was insufficient judicial oversight. The Court determined that the detention did not meet the standard of being based on reasonable suspicion of a crime under Article 5 §1 of the Convention. Furthermore, the detention was not aimed at ensuring a fair trial but rather at suppressing his political participation and freedom of expression. This constituted a violation of his right to liberty and security.

Detention under Article 5 § 1 (c) must be a proportionate measure designed to achieve a specific objective, such as ensuring the individual’s presence at trial or safeguarding the integrity of the judicial process. It is incumbent upon the domestic authorities to convincingly demonstrate the necessity of such detention, including presenting clear justifications that outweigh the individual’s rights and freedoms. When authorities decide to detain an individual pending trial based on their failure to appear before them when summoned, they are required to ensure that the individual has received timely and adequate notice of the summons. This notice should clearly inform them of the date, time, and location of the required appearance, as well as the consequences of failing to attend. Furthermore, the authorities should provide the individual with a reasonable amount of time to comply with the summons. In addition, it is crucial for authorities to take appropriate and reasonable steps to verify that the individual has, in fact, absconded or is intentionally avoiding the judicial process. This may involve investigating the circumstances surrounding the missed appearance, checking for any valid reasons for non-compliance, and considering whether alternatives to detention, such as bail or electronic monitoring, might suffice to ensure the individual’s presence at trial. Through these measures, the authorities

52 *Kurt v. Austria* [GC], 2021; *S., v. and A. v. Denmark* [GC], 2018.

uphold the principles of fairness and justice while addressing the legitimate concerns of public safety and legal process integrity.⁵³ The “ultima ratio” rule states that, under the second limb of Article 5 § 1 (c), a necessity test must be conducted. This test requires that alternatives less severe than detention be considered and deemed insufficient to protect individual or public interests. The offense in question must be grave enough to pose a significant threat to life and safety or result in substantial material damage. Moreover, detention should conclude as soon as the associated risks have been thoroughly mitigated, necessitating vigilant and ongoing oversight. The duration of the detention is also a critical aspect that warrants careful consideration, as it balances the need for public safety with the rights of the individual involved.⁵⁴

This implies that a specific procedure to ensure supervision, which depends on the stage of the proceedings under the model concerned, must be established, including the guarantee of the right to an effective remedy. In the context of this ground for lawful detention, it should be added that the Court did not exclude the premise of this measure linked to different types of “risks,” ranging from individual and concrete risks – most often linked to the fear of fleeing of the perpetrator or of trial obstruction – to more abstract risks, more precisely the fear of committing another serious crime, or even exclusively the risk resulting from the fact that in the given proceedings, a crime or an offence involving long-term imprisonment has been charged. Particularly, the latter case, i.e. the abstract risk associated with the severe sanction of the offence that the accused is about to commit, raises doctrinal debates in the context of the excessive use of arrest and detention.⁵⁵

Standards for pre-trial detention are set in a few leading judgments, inter alia in *Ladent v. Poland*, ECtHR judgment of 18 March 2008, which dealt with the right to liberty and security under Article 5 of the European Convention on Human Rights. The applicant, Mr. Ladent, a French national, was arrested in Poland in 2000 on suspicion of participating in fraud. The Polish authorities placed him in pre-trial detention, which was extended several times without proper judicial justification. Mr. Ladent claimed that his arrest was unlawful, his detention lacked reasonable suspicion, and the length and handling of his detention breached Article 5. The Court found that the Polish court that ordered his arrest had no valid legal basis, as the warrant was issued in connection with another person’s case, and procedural safeguards were not met. Furthermore, the authorities failed to justify his continued detention with concrete evidence, such as risks of absconding or tampering with evidence. In addition, the Court noted that the review of detention decisions was not prompt and lacked effective judicial oversight.

In the case of *Mooren v. Germany* [GC], 2009, Mooren was held in pre-trial detention on allegations of fraud. He challenged the lawfulness of his detention in domestic courts, arguing that it was invalid from the beginning due to procedural flaws.

53 *Ladent v. Poland*, 2008; *Vasiliciuc v. the Republic of Moldova*, 2017.

54 *S. and A. v. Denmark* [GC], 2018.

55 Janusz-Pohl and Wawrzyńczak, 2024, p. 111 et seq.; Lach, 2021.

According to Article 5 § 1, detention must be lawful under domestic law and must also be free from arbitrariness. Even if a detention complies with national law, it must not be arbitrary; there must be a genuine connection between the detention and the objectives it aims to achieve. The Court found a violation of Article 5 § 1, concluding that Mooren's detention was not sufficiently justified and had procedural defects that undermined its legality.

When examining the notion of deprivation of liberty, the ECtHR decides on the various forms of deprivation of liberty in relation to the use of new technologies, particularly electronic monitoring (E.M.). The Court applies a “degree and intensity” test, which involves assessing the specific circumstances surrounding the measure, including the type, duration, effects, and implementation of the monitoring. Key considerations include the extent of confinement or limitations on daily life, such as whether the individual can leave their home, work, socialise, and access public spaces. The Court focuses on the practical realities – the “de facto” situation. The jurisprudence of the ECtHR is not entirely consistent. On the one hand, the ECtHR has held that electronic tagging or house arrest under E.M. conditions generally does not constitute a deprivation of liberty if the individual can leave their home for specific hours or maintains some degree of autonomy. Factors that can mitigate the intensity of control include being allowed to go to work, shop, or receive visitors. On the other hand, electronic monitoring can be classified as a deprivation of liberty if the conditions are excessively stringent, resembling continuous house arrest. For example, suppose there is 24-hour confinement, constant surveillance, and no meaningful freedom of movement. In that case, it may cross the threshold and be considered a deprivation of liberty under Article 5(1).

Relevant cases that illustrate this issue include *Buzadji v. Moldova* (2016, Grand Chamber), which compared pre-trial detention with alternatives to detention. In this case, the court held that E.M. should be considered a form of detention under Article 5. Another significant case is *Suveges v. Hungary* (2016).

3.4. The Detention of a Minor

‘d. The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.’

The rationale related to the deprivation of liberty for a minor is linked to the possibility of applying educational, educational, rehabilitative, and correctional measures to minors. The initial concept against the background of this provision is that of “minor”. It encompasses persons under the age of 18 – in this sense, a standard identical to the UN Convention on the Rights of the Child. This provision outlines specific circumstances – though it is not an exhaustive list – under which minors may be detained. These circumstances include: (a) the necessity of educational supervision, such as ensuring that minors attend school and comply with educational regulations, and (b) the requirement to bring them before the appropriate legal authority, such as in cases where legal proceedings are initiated or when the minor is involved in

a situation requiring judicial intervention. These guidelines aim to ensure that the welfare of minors is considered while maintaining a structured legal framework for their supervision and protection.⁵⁶ Both grounds must be specified in national law, and their application must adhere to the principle of proportionality. The cases should be interpreted strictly.

The case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, decided by the ECtHR on 12 October 2006, addresses the treatment of unaccompanied migrant children and the obligations of States under the European Convention on Human Rights (ECHR). Ms. Mubilanzila Mayeka, a Congolese national with refugee status in Canada, and her five-year-old daughter, Kaniki Mitunga, who was born in the Democratic Republic of Congo (DRC), are at the centre of this case. The child travelled alone to Belgium to join her mother in Canada. Upon her arrival in Belgium, she was refused entry and placed in a closed detention facility for adults for two months, awaiting deportation to the DRC. During her detention, she had no relatives in Belgium and received minimal assistance. Ultimately, she was deported to the DRC. The Court found that detaining a very young child alone in an adult detention centre, without proper care or psychological support, constituted inhuman and degrading treatment under Article 3 of the ECHR. The detention was deemed unlawful given the child's extreme vulnerability and the authorities' failure to consider less restrictive alternatives, violating Article 5 § 1. Furthermore, the child's ability to challenge her detention was essentially non-existent due to her age and lack of legal assistance, which breached Article 5 § 4. Additionally, the Court found a breach of Article 8, as the Belgian authorities did not take adequate steps to reunite mother and daughter or facilitate family life, despite being aware of the mother's location and refugee status in Canada. The child was ultimately taken into foster care until Canada later granted her entry.

This case is frequently cited alongside *Rahimi v. Greece* (2011) and *Popov v. France* (2012) to reinforce the principle that the detention of migrant children must be exceptional, used as a last resort, and for the shortest possible duration.

3.5. Detention for Medical or Social Reasons

‘e. The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.’

The cases of legal detention analysed relate strictly to the sphere of security – both public and individual security. Article 5 § 1 (e) explicitly identifies several categories of individuals who may be subject to deprivation of liberty: those who spread infectious diseases, individuals suffering from mental health disorders, individuals struggling with alcoholism, drug addicts, and homeless individuals, often referred to as vagrants. It is essential to emphasise that the Tribunal has established a significant link among these groups, as they may be deprived of their liberty to ensure they receive necessary medical treatment, due to broader social policy considerations, or for a combination

56 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 2006.

of both medical and social reasons. The rationale behind the Convention's allowance for the detention of these socially maladjusted individuals extends beyond concerns for public safety; it also encompasses the recognition that, in certain circumstances, their own health and well-being may necessitate their confinement. This dual consideration underscores the complexity of balancing individual rights with societal protection and the need for appropriate interventions in their lives.⁵⁷

An example can be found in the case of *Ilmseher v. Germany*, involving Mr. Ilmseher, a German national who was convicted at the age of 19 for the murder of a child. He was initially sentenced to ten years in youth detention under German juvenile criminal law. However, shortly before his release, a court ordered preventive detention (Sicherungsverwahrung) based on the assessment that he still posed a serious risk to the public. This preventive detention was imposed under new legislation allowing such orders for young offenders deemed dangerous at the end of their sentence. Mr. Ilmseher argued that this post-sentence preventive detention violated his rights to liberty. The decision for preventive detention was informed by new psychiatric evidence indicating a high risk of reoffending due to a mental disorder characterised by sexual sadism. The court ruled that this situation fell under Article 5 § 1 (e), which allows for the detention of a person deemed “of unsound mind,” provided that certain procedural safeguards are in place. The court regarded this measure not as a continuation of the criminal sentence, but as a separate preventive action justified by public safety concerns. The Grand Chamber concluded that German law included sufficient safeguards: a judicial decision made after an adversarial hearing, regular reviews of continued detention, access to appropriate therapy, and conditions distinct from prison punishment. Ultimately, the court determined that there was no violation of Article 5 § 1 – the detention was deemed lawful and proportionate. The court also distinguished this case from previous German preventive detention cases (such as *M. v. Germany*, 2009), which had raised concerns about detention conditions and retroactive application.

At the same time, the different categories of persons who are the source of specific threats have been subject to interpretation.

When evaluating the “lawfulness” of detaining a person to prevent the spread of infectious diseases, two essential criteria must be considered. First, we need to determine whether the infectious disease poses a significant danger to public health or safety. Second, it is crucial to assess whether detaining the infected individual is the last resort. This means that less severe measures should have been explored and deemed inadequate to protect the public interest. If these criteria are no longer met, the justification for depriving the individual of their liberty no longer exists.⁵⁸

It may also be noted that the denotation of the term “persons of unsound mind” is not precisely defined. We might observe a rather “negative” interpretation by the

57 *Ilmseher v. Germany* [GC], 2018; *Stanev v. Bulgaria* [GC], 2012; *D.D. v. Lithuania*, 2012; *Kallweit v. Germany*, 2011; *Shtukaturv v. Russia*, 2008; *Varbanov v. Bulgaria*, 2000.

58 Feldman, 2020, pp. 80–93.

Tribunal that said what shall not be seen as rightful detention based on an “unsound mindset mind must refer to a specific state of a person that is covered by specific forensic opinions provided for in the national procedure. An individual cannot be deprived of his liberty as being of “unsound mind” unless the following three minimum conditions are satisfied:⁵⁹ ‘1) It is essential to provide clear evidence from qualified medical professionals demonstrating that the individual is of unsound mind, unless emergency detention is warranted. 2) The individual’s mental disorder must be severe enough to justify involuntary confinement. It should be established that the restriction of liberty is necessary under the circumstances and that the mental disorder, supported by objective medical evidence, continues to persist throughout the duration of the detention.’

The case *Winterwerp v. the Netherlands*, decided by the European Court of Human Rights (ECtHR) on 24 October 1979, is a foundational case regarding the lawful detention of individuals with mental disorders under Article 5 § 1(e) of the European Convention on Human Rights (ECHR). The applicant, Mr. Winterwerp, a Dutch national, had been detained in a psychiatric hospital for several years after being declared legally incapable of managing his own affairs. He claimed that his detention was unlawful, arguing that he had not been given a real opportunity to challenge the medical justification for his confinement. He also stated that he was denied access to his case file and did not have effective legal representation. In its judgment, the Court established three minimum conditions for lawful psychiatric detention under Article 5 § 1(e): ‘1. Objective Medical Evidence: The person’s mental disorder must be reliably established by a qualified medical expert. 2. Nature or Degree of Disorder: The mental disorder must be of a kind or severity that warrants compulsory confinement. 3. Persistence of Disorder: Continued confinement is only justified if the disorder persists; otherwise, the individual must be released’. Furthermore, the Court emphasised that judicial review under Article 5 § 4 must be meaningful. This means that the detainee must have the ability to contest the medical justification for their detention, which requires access to relevant documents and, where necessary, legal assistance.

Another example that could be referred to is the case of *Enhorn v. Sweden*, decided by the ECtHR on January 25, 2005, which addresses Article 5, which pertains to the right to liberty in the context of public health-related detention. Mr. Lennart Enhorn, a Swedish national diagnosed as HIV-positive in 1994, was detained by Swedish authorities on the grounds that he had not adhered to medical advice and had potentially jeopardised others by putting them at risk of infection. A court subsequently ordered his compulsory isolation under the Communicable Diseases Act. He was held for approximately a year and a half in a hospital’s infectious diseases ward. While his detention was subject to periodic reviews, it was repeatedly extended. Mr. Enhorn argued that his detention was disproportionate and not the least restrictive means available. He claimed it violated Article 5 § 1 (e), which permits the detention of individuals for the prevention of the spread of infectious diseases. The Court concluded

59 *Enhorn v. Sweden*, 2005, § 43; *Guzzardi v. Italy*, 1980, § 98.

that although Mr. Enhorn did present some risk, the authorities had failed to establish that such a long period of detention was strictly necessary. Sweden did not demonstrate that it had explored less restrictive alternatives, such as regular monitoring or imposing restrictions short of detention. In the Court's view, the prolonged isolation without continuous reassessment exceeded what was justified for public health purposes.

As the literature points out, the isolation of persons on the grounds of mental disorder is a particularly sensitive matter and must therefore be reviewed in detail in terms of both temporality and legality per se. The detention of individuals with mental health conditions should be conducted in a hospital, clinic, or another authorised institution specifically designated for this purpose. The implementation of appropriate therapeutic measures has become essential for ensuring that such detention is lawful. The primary objective of detaining individuals with mental health issues must be therapeutic in nature, focusing on the treatment and alleviation of their condition. Additionally, it may involve efforts to mitigate or manage any potential risks they may pose to themselves or others.⁶⁰

3.6. Detention of a Foreigner

'(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'

The article being examined discusses two cases. The first case involves detaining individuals to prevent unauthorised entry, while the second case concerns deportation and extradition. Both cases involve the control of the liberty of non-citizens within the context of immigration.⁶¹

The initial segment of this provision allows for the detention of asylum seekers and other immigrants before the State grants authorisation for their entry. However, it is crucial that such detention aligns with the overarching principles of Article 5, which is designed to protect the fundamental right to liberty. This ensures that no individual is deprived of their freedom in an arbitrary manner, upholding the dignity and rights of every person involved in the immigration process.⁶²

For the analysis of this provision, the interpretation of the expression "unauthorised entry into the country" is of fundamental importance. To put the problem synthetically, this issue is left to the sovereign states, which regulate at the national level the issue of formal authorisation and entry or stay.⁶³ However, it should be stressed that a pro-guarantee approach can be seen on the side of the ECtHR, which is sceptical of practices that may be abusive, such as the practice of the authorities to

60 *Rakevich v. Russia*, 2003; *L.B. v. Belgium*, 2012; *Ashingdane v. the United Kingdom*, 1985; *O.H. v. Germany*, 2011; *Rooman v. Belgium* [GC], 2019.

61 See more: Pinto Oliveira, 2021, pp. 97–117.

62 Lester, 2021; See also: *Saadi v. the United Kingdom* [GC], 2008.

63 *Khlaifia and Others v. Italy* [GC], 2016; *Suso Musa v. Malta*, 2013.

automatically place asylum seekers in detention without an individual assessment of their particular needs.⁶⁴

The second part of the article under examination addresses detention aimed at deportation or extradition. Article 5 § 1 (f) does not require that the detention be viewed as necessary, for instance, to stop the individual from committing a crime or from fleeing. In this regard, the Court notes that Article 5 § 1 (f) offers a different level of protection compared to Article 5 § 1 (c): under subparagraph (f), all that is necessary is that ‘action is being taken with a view to deportation or extradition.’ Consequently, for the purpose of its application, it does not matter whether the foundational decision to expel can be supported by national or Convention.⁶⁵ The principle of proportionality is a fundamental legal concept that must be considered in cases involving deprivation of liberty. Specifically, under the second limb of Article 5 § 1 (f) of the European Convention on Human Rights, a person’s detention is only justified for the duration that deportation or extradition proceedings are actively underway. This means that authorities must take prompt and decisive action to ensure that these legal processes are carried out without unnecessary delays. If there is a lack of diligence in pursuing the deportation or extradition, and if the proceedings are not advancing effectively, the justification for continued detention will lapse, rendering it impermissible under Article 5 § 1. Thus, it is crucial for legal authorities to adhere to a meticulous timetable and to respect the rights of the individual during such proceedings to maintain the law’s integrity and uphold human rights standards.⁶⁶

4. Guarantees for Persons Deprived of Liberty

From the perspective of the analysis of Article 5, it is crucial to consider not only the limits on the lawfulness of arrest or detention but also the guarantees afforded to individuals deprived of their liberty. Lawfulness, in a strict sense, refers to the legal grounds for arrest or detention, while procedural guarantees pertain to the proper application of these laws. In certain instances, these guarantees may also address the issue of justiciability, particularly regarding the availability of specific protective measures. This includes ensuring that individuals receive adequate information about their rights, such as the right to lodge an appeal and access the reasoning behind decisions related to isolation measures.

Article 5 outlines five levels of protection: the right to information, the right to adequate legal oversight, the right to a fair trial, the right to have the lawfulness of detention reviewed quickly by a court, and the right to effective compensation. In summary, these rights can be encapsulated as the right to a fair procedure, as well

64 *Thimothawes v. Belgium*, 2017; *Mahamed Jama v. Malta*, 2015.

65 *Chahal v. the United Kingdom*, 1996; *Čonka v. Belgium*, 2002; *Nasrulloev v. Russia*, 2007; *Soldatenko v. Ukraine*, 2008; *Muzamba Oyaw v. Belgium* (dec.), 2017; *J.R. and Others v. Greece*, 2018.

66 *Khlaifia and Others v. Italy* [GC], 2016; *A. and Others v. the United Kingdom* [GC], 2009; *Amie and Others v. Bulgaria*, 2013; *Shiksaitov v. Slovakia*, 2020.

as an effective means of protection and remedy. The following sections will briefly discuss these five areas.

4.1. Right to Information

‘Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.’

For a suitable interpretation of this provision, it is crucial to indicate the meaning of the term arrest. As with the rest of Article 5, the term arrest – in accordance with the principle of autonomous meaning of expressions in the Convention – has an autonomous meaning, subject to a functional interpretation. The term “arrest” extends well beyond the narrow confines of criminal law, indicating a broader range of situations where an individual’s liberty may be restricted. The phrase “any charge” does not merely suggest a condition under which legal processes apply; rather, it signifies a potentiality that must be taken into account in various legal contexts. Importantly, Article 5, Section 2 of the European Convention on Human Rights, for example, introduces a fundamental safeguard: any individual who is arrested has the right to be informed clearly and promptly about the reasons for their detention. This right to information is not merely procedural; it serves as a critical component of the overall legal framework designed to protect personal freedoms. Ensuring that an arrested person understands the basis for their deprivation of liberty is essential for maintaining justice and accountability within the legal system. Thus, this requirement is integral to the protective measures outlined in Article 5, reinforcing the principle that the law should always uphold the dignity and rights of individuals.⁶⁷ If an individual has been informed about the specific reasons for their arrest or detention, they have the right to take legal action by applying to a court. This application allows them to challenge the lawfulness of their deprivation of liberty, as stipulated in Article 5 § 4 of the relevant legal framework. Such a challenge can help ensure that their rights are protected and that the reasons for their detention are examined thoroughly in a fair trial.⁶⁸

4.2. Right to Appropriate Legal Control

‘Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.’

Judicial control, as provided for in this article, may be exercised either by a court or by another competent authority. The control of interferences by executive authorities concerning an individual’s fundamental right to liberty is a pivotal aspect of the protection enshrined in Article 5 § 3 of the European Convention on Human Rights. This provision ensures that any deprivation of liberty is subject to judicial oversight, reinforcing the principle that no one should be deprived of their freedom without

67 *Khlaifia and Others v. Italy* [GC], 2016.

68 *Fox, Campbell and Hartley v. the United Kingdom*, 1990; *Čonka v. Belgium*, 2002.

adequate legal safeguards. Judicial control is inherently tied to the rule of law, a cornerstone of democratic societies. As explicitly stated in the Preamble to the Convention, the rule of law underpins the entire framework of human rights protections. It serves as a guiding principle that inspires the development and implementation of the Convention, ensuring that individual rights are upheld and that any actions taken by the state are conducted through a transparent and accountable legal process. This cultivates a society where personal freedoms are protected from arbitrary state action, fostering trust in legal institutions and reinforcing democratic governance.⁶⁹ Judicial control is essential for ensuring effective safeguards against the risk of ill-treatment, which is particularly high during the early stages of detention. It also helps prevent the abuse of power and instrumentalisation by law enforcement officers and other authorities, who should only exercise their powers for narrowly defined purposes and strictly in accordance with established procedures.

From the perspective of the provision in question, judicial review is to be carried out in accordance with the principle of promptness. In the light of the case-law of the Court, speed must be assessed *in concreto*. In the light of such an assessment, the character of the coercive measure must also be taken into account.⁷⁰ In its interpretation of the term “promptness”, the court concluded that any duration exceeding four days is generally deemed excessive. Furthermore, even shorter timeframes may constitute a breach of the promptness requirement if no special difficulties or exceptional circumstances hinder the authorities from presenting the arrested individual before a judge sooner.⁷¹ The necessity for promptness is especially critical in situations where an individual is placed in police custody following a prior period of actual deprivation of liberty, such as detention or imprisonment. In these cases, timely action is essential to safeguard the rights of the detainee and to ensure that due process is followed. Any delay in formalising custody can exacerbate the psychological and emotional impact on the individual, making it imperative for law enforcement to act swiftly and transparently.

4.3. Right to Trial Within a Reasonable Time

‘Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (...) shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.’

The temporal aspect, which is linked to speed, is, of course, not only an attribute of the control concerning the use of detention but also concerns the realisation of the right to the court of the subject under an isolative measure. The guarantee described in Article 5(3) concerns the guarantee linked to the application of detention in relation to a pending trial. In such a configuration, arrest or detention is intended to ensure

69 *Brogan and Others v. the United Kingdom*, 1988; *Ladent v. Poland*, 2008.

70 *Vassis and Others v. France*, 2013.

71 *Oral and Atabay v. Turkey*, 2009; *McKay v. the United Kingdom* [GC], 2006; *Năstase-Silivestru v. Romania*, 2007, *Gutsanovi v. Bulgaria*, 2013; *İpek and Others v. Turkey*, 2009; *Kandzhov v. Bulgaria*, 2008.

the effectiveness of the criminal prosecution. It functions as a preventive measure in this regard. The jurisprudence of the court draws attention to the correlation between the duration of detention and the duration of the criminal proceedings concerned. The Court acknowledges that when establishing the duration of detention before trial in accordance with Article 5 § 3 of the Convention, the time frame considered starts from the date the accused is apprehended and concludes on the date the charges are resolved, even if that resolution comes only from a first-instance court.⁷² The second limb of Article 5 § 3 of the European Convention on Human Rights establishes a clear mandate for judicial authorities: they must either ensure that an accused individual is brought to trial within a reasonable timeframe or grant provisional release pending trial. This provision underscores that the judicial process must respect the principle of presumption of innocence, which mandates that an individual is considered innocent until proven guilty. The central aim of this provision is to stipulate that provisional release must be granted as soon as the justification for continued detention wanes and is no longer reasonable or necessary. In practical terms, this means that if delays in the judicial process extend beyond what is acceptable – due to excessive duration, lack of justification, or procedural inefficiencies – the accused has a right to be released to ensure that their liberty is not unduly compromised. Furthermore, the application of pretrial detention can be viewed as a punitive measure that conflicts with the presumption of innocence. When an individual is isolated from society prior to a final judgment, it raises significant concerns regarding the infringement of their rights. Such measures – if not justified by compelling state interests or the urgency of the case – can violate the guarantees afforded by the presumption of innocence and threaten the integrity of the judicial process itself.

The Court also adopts the principle of assessment *in concreto* when it comes to assessing the duration of a measure detrimental to the right to liberty against the background of the provision under consideration. The question of whether a period of pre-trial detention is reasonable cannot be evaluated in isolation; it must be examined in the context of the unique facts and circumstances surrounding each individual case. The determination of reasonableness considers various factors such as the severity of the alleged offense, the potential risk to public safety, the possible flight risk of the accused, and the complexity of the case proceedings.

Continued detention can be justified only if there are compelling indicators of an urgent public interest that necessitates such action. This justification must be substantial enough to override the fundamental principle of the presumption of innocence and the right to personal liberty established in Article 5. In essence, the balance between the need for public safety and the protection of individual rights must be carefully navigated to ensure fair treatment under the law.

Bearing in mind the role that Article 5 ECHR plays from the perspective of counteracting the arbitrariness of a public authority towards a citizen, it should be stressed

72 *Selahattin Demirtaş v. Turkey* (no. 2) [GC], 2020; *Štvrtický v. Slovakia*, 2018; *Solmaz v. Turkey*, 2007.

that the primary responsibility lies with the national judicial authorities to ensure that the pre-trial detention of an accused person is not prolonged beyond a reasonable timeframe. In each case, these authorities must carefully evaluate all relevant circumstances surrounding the detention while respecting the fundamental principle of the presumption of innocence. This evaluation process includes a thorough examination of both the arguments supporting and opposing the claim that public interest necessitates deviation from the protections guaranteed under Article 5. Furthermore, the judicial authorities are required to articulate their reasoning in detail when rendering decisions regarding applications for release. They must address the specific facts and circumstances that influence the necessity for continued detention. This explanation is crucial, as it forms the basis on which the Court will assess potential violations of Article 5 § 3, which mandates that any individual detained pending trial should be brought promptly before a judge. Therefore, the clarity and comprehensiveness of the reasoning provided by the national authorities directly impact the Court's determination of whether the rights of the accused have been compromised.⁷³

Brogan and Others v. the United Kingdom, ECtHR judgment of 29 November 1988, is a landmark case regarding the interpretation of “promptly” in Article 5 § 3 of the European Convention on Human Rights (ECHR), which guarantees the right to be brought promptly before a judge. The case involved four men suspected of terrorist activities in Northern Ireland who were arrested under the Prevention of Terrorism (Temporary Provisions) Act 1984. Each man was detained by the police without being presented before a judge for periods ranging from four days and six hours to six days and sixteen and a half hours. Their detention was authorised internally by the Secretary of State (an executive authority), rather than by a judge or judicial officer. The detainees argued that this practice violated Article 5 § 3.

The key legal question was whether a detention of more than four days without an appearance before a judge could still be considered “prompt” under Article 5 § 3. The case examined whether a review by an executive authority could satisfy the requirements of the Convention. The Court concluded that Article 5 § 3 mandates a prompt appearance before a judge – typically within hours or, at most, a few days. Furthermore, it emphasised that judicial review must be independent of the executive. Consequently, even in cases related to terrorism, strict time limits must be adhered to. The Court ultimately determined that detentions exceeding four days without judicial oversight could not be justified as “prompt”.

Counteracting the arbitrariness of public authority must presuppose the realisation of adequate protection both at the level of lawmaking and its application. Therefore, the legislator is obliged to introduce temporal limits for the application of isolation coercive measures at the statutory level. The use of pre-trial detention is, as is well known, a particularly controversial issue. Article 5 § 3 should not be interpreted as granting unconditional authorisation for pre-trial detention, even if it is limited to a specific minimum duration. This provision emphasises the need for

73 *Buzadji v. the Republic of Moldova* [GC], 2016; *McKay v. the United Kingdom* [GC], 2006.

safeguards in the application of detention, highlighting that any restriction on personal liberty must be justified and cannot be imposed arbitrarily or without proper legal grounds. The use of pre-trial detention must be reviewed on an ongoing basis as to its justification and necessity.⁷⁴ In this context, it is the justifiability of the detention that is examined; as we indicated at the outset, justifiability refers to the verification conducted in concreto whether the given grounds for applying the coercive measure have materialised. At the same time, justiciability must be fully substantiated in the authority's decision; it cannot be presumed.

Quality law creates a legal framework for isolated coercive measures in national law. In spite of the guarantee character of the Convention, it should be explicitly noted that in its jurisprudence, the Court has not forgotten the functions of coercive measures and their relationship to the achievement of the objectives of the criminal process; in particular, the directive of an adequate penal response and general and individual prevention. In this context, it should be noted that the Court's jurisprudence has developed a standard on the basis of which refusing bail is justified. Among these, the following categories should be pointed out:

- (a) the risk that the accused may not appear for trial;
- (b) the risk that the accused, if released, would take action to prejudice the administration of justice, or (obstruction);
- (c) the risk of committing further offences. We must note, in line with the Court's position, the seriousness of a charge may lead judicial authorities to detain a suspect on remand to prevent any attempts to commit further offenses. However, it is crucial that the perceived danger is plausible and that this measure is appropriate given the circumstances of the case. This includes taking into account the individual's past history and personality. For instance, previous convictions may justify a reasonable fear that the accused could commit a new offense.⁷⁵
- (d) Finally, there is the risk connected with the special diligence. The complexity and unique characteristics of an investigation play a crucial role in determining whether the authorities exhibited "special diligence" throughout the legal proceedings. It is essential to recognise that while the right of an accused individual in detention to have their case reviewed expeditiously is fundamental, this urgency should not compromise the judicial authorities' ability to perform their duties with the necessary thoroughness and attention to detail. Ensuring a balanced approach is vital—one that respects the rights

74 *Idalov v. Russia* [GC], 2012; *Tase v. Romania*, 2008; *Castravet v. Moldova*, 2007; *Belchev v. Bulgaria*, 2004.

75 *Clooth v. Belgium*, 1991; *Selçuk v. Turkey*, 2006; *Matznetter v. Austria*, 1969; *Sulaoja v. Estonia*, 2005.

of the accused while allowing the judicial system to conduct its investigations meticulously and effectively.⁷⁶

The risks associated with pre-trial detention must be thoroughly substantiated, and the reasoning presented by the authorities must avoid being vague, overly general, or based on stereotypes. Nonetheless, national judicial authorities may choose to endorse or refer to the specific arguments put forth by the authorities requesting the imposition of pre-trial detention, ensuring a comprehensive evaluation of the situation at hand.⁷⁷

Buzadji v. the Republic of Moldova [GC], ECtHR Grand Chamber judgment of 5 July 2016, is one of the Court's most significant modern rulings on Article 5 § 3 of the ECHR. The applicant, Mr. Buzadji, is a Moldovan businessman who was arrested in 2007 on suspicion of fraud and abuse of office while managing a state-owned company. He was placed in pre-trial detention for over nine months, followed by an additional year of house arrest. The detention orders were extended repeatedly with formulaic justifications, citing the gravity of the charges and public interest, but these lacked concrete evidence of any risk.

The Grand Chamber clarified the legal standards established in earlier case law (*Letellier v. France*, *Idalov v. Russia*). It stated that reasonable suspicion of an offense is required from the outset. However, after the initial period following arrest, continued detention must be supported by other relevant and sufficient reasons, such as the risk of absconding, reoffending, interfering with evidence, or public disorder. The Court emphasised that these reasons must be specific and backed by evidence, rather than relying on general references to the seriousness of the offense. Furthermore, the Court dismissed Moldova's argument that economic crimes justified lengthier preventive detention to maintain public confidence. It highlighted that Article 5 § 3 takes effect as soon as detention begins and that the "initial period" should be measured in days rather than months.

4.4. Right to Have the Unlawfulness of Detention Speedily Examined by a Court

'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

The interpretation of the terms "the lawfulness of detention" and "decided speedily by a court" used therein is important against the background of the indicated wording unit. This provision is intended, first, to oblige the parties to the Convention to establish control procedures concerning the application of measures depriving (restricting) the right to liberty. Second, the mere existence of control procedures

76 *Scott v. Spain*, 1996; *Shabani v. Switzerland*, 2009; *Sadegül Özdemir v. Turkey*, 2005; *Buzadji v. the Republic of Moldova [GC]*, 2016; *Tiron v. Romania*, 2009; *Smirnova v. Russia*, 2003; *Piruzyan v. Armenia*, 2012.

77 *Merabishvili v. Georgia [GC]*, 2017.

in a given legal system cannot be considered sufficient. As we indicated earlier, an adequate formula for implementing the provisions of the Convention into national law is the introduction of quality law. Indeed, it is necessary to ensure that persons subject to measures excluding or restricting the right to liberty have real access to review procedures. Third, these procedures must be of a guarantee-oriented nature, the guaranteed nature encompassing, on the one hand, the status of the determining authority, in particular its independence, as well as the promptness of the control procedures. Indeed, it is recognised that deprivation and restriction of liberty must be subject to immediate ad hoc monitoring.

However, due to the diverse nature of the legal remedies that fall under the notion of “detention” and “arrest” as used in Article 5 of the ECHR, the nature of the review procedures may vary considerably. The concept of “court” as used in this provision should be interpreted broadly. Indeed, for a control procedure to comply with Article 5(4), it is essential that the procedure is guaranteed and that the person subjected to detention has real access to this procedure.

It should also be added that the existence of a control procedure is aimed at verifying the issue of “lawfulness” of detention, which means that the actualisation of this provision occurs, so to speak, in the foreground, and a violation of Article 5(4) is independent of the decision of the merits, i.e. there may be a violation of this provision even if the substantive decision on the application of detention is correct, but the control procedure is defective (primary defect, i.e. at the level of national regulation), or was implemented in a defective manner (secondary defect, arising in the process of law application). One must note here that the issue of speed of procedure will usually consist of a secondary defect. An overly dilatory implementation will instrumentalise the existing procedure.

The body of jurisprudence established by the European Court of Human Rights (ECHR) clearly demonstrates that Article 5 § 4 functions as the habeas corpus provision of the European Convention on Human Rights. This article guarantees detained individuals the fundamental right to actively seek a judicial review of the lawfulness of their detention. It ensures that anyone who is deprived of their liberty can challenge the reasons for their detention before a court, which is crucial for protecting personal freedoms and upholding the rule of law. This provision not only reinforces the principle of individual liberty but also fosters accountability within the justice system by allowing detainees to contest the legality of their confinement and obtain timely resolutions.⁷⁸ Article 5 § 4 ensures that individuals who are arrested or detained have the right to a swift court review of the lawfulness of their detention. If the court finds that the detention is not lawful, it must order the individual’s release. The fact that the Court has determined there was no violation of Article 5, § 1 of the Convention does not exempt it from reviewing compliance with Article 5 § 4. It is crucial to highlight that in situations where detainees have not been adequately informed of the specific reasons for their deprivation of liberty, the Court has decisively concluded that this

78 *Mooren v. Germany* [GC], 2009; *Rakevich v. Russia*, 2003.

lack of information effectively nullifies their right to appeal against their detention. This principle is grounded in the protection afforded by Article 5 § 4, which grants arrested or detained individuals the legal entitlement to initiate proceedings for a thorough judicial review. Such a review must assess both the procedural and substantive conditions that are vital for establishing the “lawfulness” of their detention, as outlined in Article 5 § 1. Thus, the failure to communicate the reasons for detention undermines the detainees’ ability to challenge the legitimacy of their confinement, diminishing the substantive protections intended by the law.⁷⁹

Mooren v. Germany [GC], ECtHR Grand Chamber judgment of 9 July 2009, is a significant case concerning Article 5 related to the lawfulness of detention and the interpretation of “in accordance with a procedure prescribed by law.” Mr. Mooren, a German national, was arrested in 2002 on suspicion of tax evasion and placed in pre-trial detention based on a warrant issued by a domestic court. He contended that the warrant was null and void from the outset due to a lack of proper reasoning and procedural flaws. He repeatedly sought release, but domestic courts upheld the detention. The Grand Chamber examined alleged violations of Article 5 § 1(c) by determining if the pre-trial detention was lawful under both domestic law and the Convention? And secondly, Article 5 § 4 by determining if the applicant had an effective and speedy means to challenge the lawfulness of his detention? Subsequently, the Court stated that, regarding Article 5 § 1, the term ‘lawful’ has a dual meaning: it must comply with both domestic law and Convention standards. The Court typically defers to domestic courts on the interpretation of national law unless their application is manifestly unreasonable or arbitrary. In Mooren’s case, although there were some arguable defects, the detention order had been issued by a competent court, under a valid statute, and was subject to review; therefore, it was not deemed arbitrary. When it comes to the possible violation of Article 5 § 4, the Court stated that the review of detention must be speedy and allow the detainee to contest the factual and legal basis for detention. In this case, the review procedures provided by German law were sufficient; there was no undue delay. In its ruling, the Court determined that there was no violation of Article 5, sections 1 or 4, in this case. It clarified that Article 5, section 1 allows for a limited international review of how domestic laws are applied, particularly concerning issues of arbitrariness. A detention order that is flawed under domestic law does not necessarily violate the Convention unless that flaw makes the detention arbitrary.

As a side note, it must be emphasised that the notion of “lawfulness” under Article 5 § 4 has the same meaning as in Article 5 § 1 – the arrested or detained person is entitled to a review of the “lawfulness” of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1.⁸⁰

79 *Khlaifia and Others v. Italy* [GC], 2016; *Idalov v. Russia* [GC], 2012; *Reinprecht v. Austria*, 2005.

80 *Khlaifia and Others v. Italy* [GC], 2016; *Suso Musa v. Malta*, 2013; *A.M. v. France*, 2016.

The “court” that a detained individual can access according to Article 5 § 4 does not necessarily have to resemble a conventional court as found in the typical judicial framework of a country. Nevertheless, it is imperative that this court possesses a “judicial character” and adheres to specific procedural safeguards. This entails that the court must maintain its independence from both the executive branch of government and the parties involved in the case, ensuring that its decisions are free from external influence. Moreover, the “court” in the context of Article 5 § 4 must be interpreted as a body that exhibits the same essential qualities of independence and impartiality that are mandated for the “tribunal” referenced in Article 6. This means that it should operate without bias, provide fair access to legal representation, and afford individuals the opportunity to present their cases effectively. Such a structure is crucial for protecting the rights of the detained person and upholding the principles of justice and due process.⁸¹

The case of *Stephens v. Malta* (no. 1), a judgment by the European Court of Human Rights (ECtHR) dated 21 April 2009, addresses issues related to extraterritorial arrest warrants, allegations of bad faith in extradition requests, and the safeguards outlined in Article 5. Mr. Stephens, a British national, was convicted in absentia in Malta of fraud and sentenced to 30 years in prison. In 2003, Maltese authorities issued an international arrest warrant through Interpol, leading to his arrest in Spain while he was on holiday. He was detained in Spain pending extradition to Malta. Mr. Stephens contended that the Maltese conviction was politically motivated and based on fabricated charges, asserting that the Maltese authorities acted in bad faith when requesting his extradition.

The Court concluded that his detention in Spain, resulting from the Maltese warrant, violated Article 5 § 1 of the ECHR because the conviction was fundamentally flawed. Although the arrest took place in Spain, Malta had extraterritorial jurisdiction under Article 1 of the ECHR, as the Maltese arrest warrant directly caused the detention. A conviction in absentia can be considered valid under Article 5 if the individual had a genuine opportunity for a retrial after surrender. In this case, doubts arose due to several factors. Firstly, the conviction was obtained without Mr. Stephens’ participation, as he claimed he was not properly informed of the proceedings. The Maltese authorities failed to demonstrate that he would be guaranteed a retrial in Malta. The combination of these factors, along with the allegations of bad faith, indicated that his detention was not free from arbitrariness. The requirement of good faith is crucial: even if there is a conviction, detention may be deemed incompatible with Article 5 if it stems from proceedings marred by bad faith or abuse of process.

It should be noted that due to the wide range of measures depriving individuals of their right to liberty and personal security, the nature of adequate remedies meeting the “judicial review” criterion may vary. In the case of *Khlaifia and Others v. Italy*, the Court indicated that the types of judicial reviews that meet the standards of Article 5

81 *Weeks v. the United Kingdom*, 1987; *Stephens v. Malta* (no. 1), 2009; *Ali Osman Özmen v. Turkey*, 2016; *Baş v. Turkey*, 2020.

§ 4 can differ across various contexts and will be influenced by the specific nature of the deprivation of liberty in question.⁸²

An interesting example is connected with the case *Z.A. and the Others v Russia* delivered by the European Court of Human Rights on 21 November 2019 (application no. 61411/15):

‘Four foreign nationals from Iraq, Somalia, Palestine, and Syria sought asylum at Moscow airports between 2015 and 2016. Russian border authorities denied them entry, placing them in the airport’s international transit zone due to immigration issues, despite their inability to return to their home countries. They were stuck in the transit zone for extended periods – ranging from months to nearly two years – living in poor conditions without formal recognition of their situation as detention or access to judicial review. The ECtHR found a violation of Article 5 §1 (Right to liberty and security). In court opinion, the confinement of applicants in transit zones was not legally justified, had no time limit, and was deemed arbitrary, violating Article 5 §4 (Right to Judicial Review). The Court clarified that “transit zones” are not legal voids; individuals held there remain under the state’s jurisdiction. It reaffirmed that any deprivation of liberty – whether at a border or an airport – must be founded on clear legal grounds and require judicial oversight. This judgment enhanced protections for asylum seekers and migrants, preventing states from evading responsibility by detaining them in airport zones or “international areas”.’

4.5. Right to Compensation for Unlawful Detention

‘Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.’

The last area of guarantees includes ex-post guarantees, i.e. remedy for unlawful arrest or retention. In this sense, Article 5 § 5 creates a direct and enforceable right to compensation before the national courts.⁸³ The entitlement specified in the indicated provision is updated when the right related to the protection of liberty and personal security has been violated. It should be recalled that to the extent of this violation, the ECtHR alone decides autonomously and, therefore, independently of the position of the national authority.⁸⁴ However, this relationship is one-sided in that the ECtHR is not bound by the decision of the national authority, but at the same time, the right to compensation may only result from a finding of a violation by the national court. Consequently, the establishment of the right to compensation depends, therefore, on the prior determination of the infringement. However, the determination of the infringement may take place both by virtue of a national authority’s decision and

82 *Khlaifia and Others v. Italy* [GC], 2016; *M.H. v. the United Kingdom*, 2013.

83 *A. and Others v. the United Kingdom* [GC], 2009; *Storck v. Germany*, 2005.

84 *Letsas*, 2004, pp. 279–305.

by virtue of a judgment of the ECtHR.⁸⁵ Moreover, it is said that the arrest or detention may be lawful under domestic law, but still in breach of Article 5, which makes Article 5 § 5 applicable.⁸⁶ Conversely, in jurisdictions where national laws establish a formal right to compensation for individuals who have been acquitted after a period of wrongful detention, this automatic entitlement does not automatically suggest that the detention itself is legally deemed as contrary to the provisions outlined in Article 5. This regulation emphasises the right to liberty and security, and while compensation may be available for those wrongfully imprisoned, the nuances of each case – such as the legality of the arrest or the circumstances leading to acquittal – must be carefully examined to determine whether the detention indeed violated the protections afforded by the article. This distinction highlights the complexity of balancing individual rights with the legal framework governing detention practices.⁸⁷

It is important to highlight that Article 5 § 5 does not prevent Contracting States from conditioning the award of compensation on the individual's capacity to demonstrate the existence of damage, whether that damage is pecuniary (financial losses) or non-pecuniary (emotional or psychological harm) resulting from a breach of rights. However, the Court has clarified that imposing excessive formalistic requirements for proving non-pecuniary damages stemming from unlawful detention violates the fundamental right to compensation. This indicates that while states may seek to verify damages claimed, they must do so in a manner that does not undermine the victims' access to justice or the principles of fairness and equity inherent in the compensation process.⁸⁸ Article 5 § 5 of the Convention does not entitle the applicant to a particular amount of compensation.⁸⁹ The right to compensation primarily pertains to financial compensation. However, as the court points out, it does not grant the right to secure the release of a detained person, which is addressed by Article 5 § 4 of the Convention (*Bozano v. France*, Commission decision of 15 May 1984). Additionally, having a period of pre-trial detention counted towards a penalty does not qualify as the compensation required by Article 5 § 5, as it has a non-financial nature.⁹⁰ A reduction of sentence could be considered as a form of compensation under Article 5 § 5, provided that it is explicitly granted as a means to redress a specific violation of rights. For it to qualify as compensation, the reduction must not only be clearly articulated as a remedial measure but also have a demonstrable and proportionate effect on the overall length of the sentence served by the individual in question. This means that the reduction should directly correlate to the severity of the violation experienced, ensuring that the individual's right to fair treatment is effectively acknowledged and remedied through a tangible adjustment in their sentencing.⁹¹

85 *N.C. v. Italy* [GC], 2002; *Pantea v. Romania*, 2003; *Vachev v. Bulgaria*, 2004.

86 *Harkmann v. Estonia*, 2006.

87 *Norik Poghosyan v. Armenia*, 2020.

88 *Danev v. Bulgaria*, 2010.

89 *Damian-Burueana and Damian v. Romania*, 2009; *Şahin Çağdaş v. Turkey*, 2006.

90 *Włoch v. Poland* (no. 2), 2011.

91 *Porchet v. Switzerland*, 2019.

5. Conclusion

The discussion of Article 5 of the ECHR presented above primarily emphasises the question of the ECtHR's autonomous interpretation of the provisions of the Convention. The latter, on the other hand, is a point of reference for the national legislator both at the level of lawmaking and law in action. It is, moreover, a point of *ex-post* control, i.e. a subsidiary control, which the Strasbourg Court exercises in the context of a concrete application to examine *in concreto* the question of a violation of the Convention provisions.

The foregoing discussion gives rise to the conclusion that Article 5, first, refers to the various forms of application of detention measures under national law and, therefore, extends beyond criminal proceedings. However, some parts of the articles analysed refer exclusively to criminal procedural coercive measures. From the perspective of national regulations, the most problematic is the mosaic of isolative measures that are not related to criminal proceedings. The *ratio legis* of their applicability has to be linked to the issue of security in the broadest sense: of society, of persons or even of the state.

Second, Article 5, on the one hand, makes it possible to define lawful detention and arrest; on the other hand, by highlighting in detail the issue of procedural guarantees, it makes it possible to address the correctness aspect. In the background of the use of coercive measures of an isolating nature, the general guarantees of fairness flowing from Article 6 ECHR also remain. Third and final, in its interpretation, the Strasbourg Court seeks to respect the primacy of national law, as a body acting in a supportive and subsidiary capacity, and thus, after exhausting national control procedures, the court in its jurisprudence introduces boundary criteria, while respecting—especially with regard to isolative coercive measures applied outside criminal proceedings—the particularity of national regulations. It is noted that the court's interpretations are presented from the perspective of a possible negative instrumentalisation of detention and arrest. From a certain perspective of the jurisprudential lines, it is clear that particular manifestations of negative instrumentalisation in the three formulations indicated in the introduction to this chapter have also been diagnosed by the Court. In its case law, it emphasises the concept of arbitrariness in the application of arrest and detention as well as the issue of quality law, which is of primary importance in the context of negative instrumentalisation.

The context of instrumentalisation can be related to a broader issue of the functioning of public authority organs and therefore falls within the concept of the rule of law.⁹²

According to the case law of the European Court of Human Rights (ECtHR), the concepts of abuse of power and the principles of legality are examined in various forms. First, these concepts are evaluated in the context of institutional guarantees

92 European Economic and Social Committee, 2024.

that public bodies must provide to prevent violations of human rights. This includes essential safeguards such as the independence of the judiciary, which ensures that judges can make decisions free from external pressures or influences. Such independence is crucial in maintaining public confidence in the legal system and protecting individual rights. Second, they are considered in terms of proportionality, which assesses whether the means used to deprive or restrict an individual's liberty are appropriate and necessary. This principle requires a careful balancing of interests to ensure that any restrictions on personal freedom are not excessive in relation to the intended objective. In the realm of formal guarantees of the rule of law, the institution of effective judicial remedies plays a pivotal role. An effective judicial remedy ensures that individuals have access to fair legal recourse when their rights are infringed upon. This includes the ability to challenge unlawful actions by authorities and seek redress, thus reinforcing the rule of law and protecting individual freedoms within the legal framework.

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Right to a Fair Trial

Kateřina FRUMAROVÁ

ABSTRACT

The chapter focuses on one of the fundamental rights enshrined in the Convention, the right to a fair trial. Attention is paid both to clarifying the nature of this right and to the basic concepts underlying its application, which must be interpreted in an autonomous manner. The individual rights which, in their totality, constitute and fulfil the right to a fair trial as a concept inseparable from any democratic state governed by the rule of law, are analysed in detail. Interpreting this right requires in particular a close examination of the ECtHR's broad case law, which concretises and illuminates the right in its sub-aspects and levels.

KEYWORDS

right to a fair trial, civil rights and obligations, criminal charges, fair and public proceedings, reasonable time, Article 6 of the Convention, European Court of Human Rights

1. Introduction

The right to a fair trial is one of the key rights in law, and is regulated by the Convention, by other European and international documents, and by national legal orders. Although this right is provided for in the relatively extensive provisions of Article 6 of the Convention, its interpretation and application in practice is very challenging. Article 6 contains a number of key concepts that are not defined in detail and that, moreover, must be interpreted in an autonomous manner, i.e. without regard to the terminology of the Contracting States to the Convention and their national laws and concepts. The ECtHR and its case law therefore both play a very important role in the interpretation of Article 6, the latter gradually interpreting and clarifying individual concepts and thereby facilitating their comprehension in the context of application in practice.

This chapter begins by defining the right to a fair trial and its meaning and functions. It then focuses its interpretation on two key concepts that constitute the *ratione materiae* of Article 6 – the notion of criminal charges and civil rights and obligations. This is because the right to a fair trial and the requirements associated with it do not

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apply to all legal proceedings, but only to proceedings in which criminal charges or civil rights and obligations are decided.

The right to a fair trial is essentially a set of several rights (and sub-rights) which, in their totality, fulfil this key concept, typical of any democratic state governed by the rule of law. Therefore, attention is then focused on a detailed analysis of the individual attributes of the right to a fair trial, which are regulated in para. 1 of Article 6.¹ This is a very broad subject which cannot be easily covered within the limited scope offered here. The main purpose is therefore to shed light on the nature and meaning of these rights and, above all, on how they should be understood and applied in practice, with the help of the ECtHR's extensive, illuminating, but sometimes contradictory case law.

2. Concept and Content of the Right to a Fair Trial

The right to a fair trial is undoubtedly one of the institutions that underpins every democratic society and every state governed by the rule of law.² It is enshrined in Article 6 of the Convention and is also in national legal systems. Anchoring this right and the institutions that guarantee it is, of course, one aspect, but it is even more important that this right be actually reflected and implemented in practice. As stated by the ECtHR,

‘the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective,³ (...) this is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial’.⁴

The right to a fair trial is a fundamental principle of the rule of law in a democratic society. However, it is very difficult to define this right precisely and unambiguously. Indeed, the Convention itself, in Article 6, describes it through individual attributes and individual rights. Both legal scholarship and case law have therefore attempted to define it. For example, Svoboda sees in it the possibility for every individual to claim rights or fulfil obligations in a process where the individual can make use of all the legal institutions and guarantees that the legal order offers or should offer, as they are an essential part of a democratic state governed by the rule of law. A fair trial must not put one party at a fundamental disadvantage *vis-à-vis* the other, but must on the

1 Paras. 2 and 3 of this Article also deal with this issue, but only in relation to the proceedings on criminal charges.

2 ‘...the guarantee of a fair hearing, which is the aim of Article 6 (art. 6), is one of the fundamental principles of any democratic society’. *Campbell and Fell v. the United Kingdom*, Application nos. 7819/77 and 7878/77, Judgment 28 June 1984.

3 *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.

4 *Airey v. Ireland*, Application no. 6289/73, Judgment 9 October 1979.

contrary prevent any arbitrariness that would make a fair process impossible or weak. The author considers this right to be one of the most important human rights.⁵ Přidal very succinctly defines this right as an independent subjective public right against the state to obtain legal protection in a process that maximally guarantees a fair outcome (which may not necessarily correspond to the subjective view of the participant).⁶ A fair trial is conducted under conditions of ‘equality of arms’ and this right covers the whole of the proceedings, including any enforcement of the decision.

The high courts in each country have defined the right to a fair trial in similar ways. For example, the Constitutional Court of the Czech Republic states that the right to a fair trial does not mean that an individual is guaranteed directly and immediately the right to a decision corresponding to his or her opinion, but that he or she is guaranteed the right to a fair trial in which all the principles of correct judicial decision-making are applied in accordance with the law and in accordance with the relevant constitutional principles.⁷ In another of its decisions, that same court elaborates its reasoning, stating that it is a structured right, comprising several separate subjective fundamental rights, formulated both specifically (e.g. publicity and speed of proceedings or an independent and impartial court) and generally (in particular ‘the right to a fair hearing’).⁸ According to the Constitutional Court, the right to a fair trial is a vague, open-ended and not precisely limited concept. It includes both guarantees expressly enshrined in the law and those derived from case law (for example, the principles of equality of arms and adversarial proceedings).⁹ It may be added that Article 6 of the Convention constitutes only a minimum standard of procedural protection which the Contracting States must guarantee to all those subject to their jurisdiction, and does not preclude the provision of a higher standard of procedural protection at the national level.¹⁰

Generalising from the above, we can conclude that the basis of Article 6 of the Convention is the requirement that the quality of the proceedings correspond to certain rights and obligations, which are discussed below, regardless of the branch of law governing the decision, and regardless of the jurisdiction of the authorities and parties. This guarantee is determined by the importance of the rights to be decided or which may be affected by the decision.¹¹ Should that right conflict with another right or protected public interest, it is necessary to resolve any such conflict by applying the traditional principle of proportionality.

The subject of the right to a fair trial can be both natural and legal persons.¹² Can these persons waive the right to a fair trial? In *Deweert v Belgium*, the ECtHR held that

5 Svoboda, 2007, pp. 101–103.

6 Přidal, 2010, pp. 731–736.

7 Judgment of the Constitutional Court of the Czech Republic, 14 August 2007, no. IV ÚS 687/06.

8 Judgment of the Constitutional Court of the Czech Republic, 22 January 2008, no. Pl. ÚS 54/05.

9 Judgment of the Constitutional Court of the Czech Republic, 22 January 2008, no. Pl. ÚS 54/05.

10 Kmec et al., 2012, pp. 572–573.

11 Hendrych, 2016, pp. 287–291.

12 *Fortum Oil And Gas Oy v. Finland*, Application no. 32559/96, Judgment 12 November 2002.

the Convention does not in principle preclude the person concerned from waiving his right to a trial. One of the conditions that must always be met is the absence of coercion.¹³ In subsequent case law, the conditions for waiving the right to a fair trial have been refined so that, although such a decision must be freely made, it may be done either expressly or tacitly (*Le Compte, Van Leuven and De Meyere v. Belgium*¹⁴), must always be unequivocal and must not affect an important public interest (*Håkansson and Sturesson v. Sweden*¹⁵).¹⁶

As regards the content of the right to a fair trial, it has already emerged from the above that it consists of a catalogue of (partial) fundamental rights and principles. Article 6, which regulates this right, is one of the most extensive provisions of the Convention. In terms of its structure, paragraph 1 contains general requirements that apply both to the adjudication of civil rights and obligations and to the adjudication of criminal charges. Paragraphs 2 and 3 then guarantee certain additional rights which, however, can only be invoked by a person facing a criminal charge within the meaning of paragraph 1.

Interpretation of the substantive scope of Article 6 of the Convention is quite a complex process. The right to a fair trial and its guarantees apply only to two types of proceedings: proceedings concerning civil rights and obligations and proceedings concerning criminal charges. As the Convention states, ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled...’. Of course, the possibility that both civil rights and obligations and criminal charges may be at issue in the same proceeding is not excluded. However, it is always important to be clear in a particular case on what basis the right to a fair trial is claimed. The point is that the requirements for proceedings in criminal cases are further specified in paragraphs 2 and 3, which do not apply to civil cases. The notions of ‘civil rights and obligations’, as well as that of a ‘criminal charge’, are to be interpreted autonomously, with the case law of the ECtHR as a key guide to their interpretation.

2.1. The Term ‘Criminal Charges’

The concept of criminal charges is one of those that must be interpreted autonomously in order to fulfil the meaning of Article 6 of the Convention. Why? Because one cannot rely on the meaning and content of this concept in the legal systems of individual Contracting States. The ECtHR made a very pertinent point in the now seminal case of *Engel and Others v. the Netherlands*.¹⁷ In that case, it was disputed whether the provisions of Article 6 could also be applied to proceedings concerning offences that are described in national law as disciplinary offences rather than criminal offences. The

13 *Deweert v. Belgium*, Application no. 6903/75, Judgment 27 February 1980.

14 *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 7238/75, Judgement 23 June 1981.

15 *Håkansson and Sturesson v. Sweden*, Application no. 11855/85, Judgment 21 February 1990.

16 *Kmec et al.*, 2012, pp. 607–609.

17 *Engel and Others v. the Netherlands*, Application no. 5100/71, Judgment 8 June 1976.

ECtHR has clearly and correctly stated that the Convention allows Contracting States to declare criminal any conduct which is not an exercise of the human rights and fundamental freedoms protected by the Convention. However, the opposite choice is already subject to stricter rules. Indeed, if Contracting States were free to classify certain offences as disciplinary rather than criminal, the scope of application of the Convention would become dependent on their sovereign will, which could lead to results incompatible with the object and purpose of the Convention.¹⁸ Therefore, it is always necessary to assess, on the basis of certain criteria, whether or not a given charge is criminal in nature, regardless of how it is labelled in national law.

In the same decision, the ECtHR developed criteria, dubbed the ‘Engel criteria’, for assessing the nature of a charge.¹⁹ The first criterion is the classification of the offence in national law: if the offence is described as a criminal offence in national law, Article 6 of the Convention is applicable. However, this is only a formal and relative criterion; if the act is not described as criminal in the national law, the ECtHR applies two other criteria, which are the nature of the offence and the type and severity of the sanction.²⁰

The second criterion is the nature of the offence (the charge). Here we examine the extent to which the offence is typically ‘criminal’ in nature. This criterion usually combines the answers to two questions: first, whether the protected interest is general or particular, or, more precisely, whether the legal norm in question is addressed to everyone or only to a certain group of people with a specific status, e.g. soldiers (as was the case in *Engel and others*);²¹ and second, whether the purpose of the sanction imposed for such an offence is (at least partly) preventive-repressive or whether it is (purely) reparative.²² The first question is therefore whether the offence in question arises from a breach of a legal norm addressed to everyone in general or a norm affecting only a certain group of persons with a special status (the aforementioned soldiers or, for example, civil servants,²³ judges,²⁴ lawyers,²⁵ prisoners²⁶ and others). The second question is whether the purpose of the sanction imposed for such an offence is preventive-repressive (even if only partly) or purely reparative in nature. ‘Preventive’ is meant in the sense of deterring future offending, i.e. that the sanction has been imposed as a punishment with the aim of deterring further commission of such acts, rather than with the aim of immediately preventing the offender from continuing his criminal activity.²⁷

18 *Engel and Others v. the Netherlands*, Application no. 5100/71, Judgment 8 June 1976.

19 Hendrych, 2016, p. 530.

20 *Engel and Others v. the Netherlands*, Application no. 5100/71, Judgment 8 June 1976.

21 Kmec et al., 2012, pp. 573–583.

22 Husseini et al., 2021, pp. 1035–1036.

23 *Kremzow v. Austria*, Application no. 16417/90, Judgment 7 November 1990.

24 *Kremzow v. Austria*, Application no. 16417/90, Judgment 7 November 1990.

25 *Brown v. the United Kingdom*, Application no. 38644/97, Judgment 24 November 1998.

26 *Ezeh and Connors v. the United Kingdom*, nos. 39665/98 and 40086/98, Judgment 15 July 2002.

27 Kmec et al., 2012, pp. 573–583.

The third and final ‘Engel’ criterion is the type and degree of severity of the sanction – not the sanction actually imposed, but the sanction which could be imposed in the particular case for the particular offence.²⁸ These threatened sanctions must be of sufficient severity, for example, imprisonment or a high fine. The second and third criteria are in principle alternative, not cumulative.²⁹

The application of Article 6 in relation to administrative offences, especially misdemeanours, is a particularly difficult issue. Its applicability to misdemeanours has been dealt with by the ECtHR in a number of its decisions, the best known and most cited being its judgments in *Lauko v. Slovakia* and *Kadubec v. Slovakia*.³⁰ Mr Lauko was guilty of a public order offence, fined CZK 300 and ordered to pay legal costs of CZK 150. Mr Kadubec was found guilty of an offence against public order, fined CZK 1 000 and ordered to pay legal costs of CZK 150. Under the first criterion, the ECtHR found that the applicant’s offences were not criminal offences in Slovak law, but this was not in itself decisive for a conclusion that they did not constitute ‘criminal charges’ within the meaning of Article 6(1) ECHR. As regards the second criterion, the Court stated that the relevant provision (legal norm) is of a general nature, since it is addressed to all natural persons in the country concerned. The penalties provided for therein were also intended as a punishment with a view to deterring further commission of such acts. The ECtHR thus concluded that Article 6 of the Convention was applicable, notwithstanding the relatively low severity of the sanction imposed (very low fine).³¹ Thus, as far as misdemeanours are concerned, they should generally fall under Article 6, but this cannot be generalised to all legal systems.

As far as offenses resulting from a breach of procedural obligations are concerned, these may also fall within the concept of criminal charges within the meaning of Article 6 of the Convention, but the ECtHR’s case law is not clear on this issue and contradictory decisions can be found. As regards whether the parties to the proceedings can be regarded as a specific group of persons with a special status, the ECtHR gives both negative³² and affirmative responses (for example, *Žugić*).³³ Similarly, inconsis-

28 *Campbell and Fell v. the United Kingdom*, Application no. 7819/77 and 7878/77, Judgment 28 June 1984.

29 Husseini et al., 2021, pp. 1035–1036.

30 *Lauko vs. Slovakia*, Application no. 26138/95, Judgment 2 September 1998; and *Kadubec vs. Slovakia*, Application no. 27061/95, Judgment 2 September 1998.

31 *Lauko vs. Slovakia*, Application no. 26138/95, Judgment 2 September 1998; and *Kadubec vs. Slovakia*, Application no. 27061/95, Judgment 2 September 1998.

32 *Zaicevs v. Latvia*, Application no. 65022/01, Judgment 31 July 2007.

33 Judgment of the ECtHR in *Žugić v. Croatia*, Application no. 3699/08, Judgment 31 May 2011.

34 Kmec et al., 2012, pp. 573–583.

tencies can be found in the assessment of the severity of the sanction.³⁵ In the Czech Republic, for example, this issue was clearly resolved by the Czech Constitutional Court, which in its 2004 decision stated that any decision to impose a fine must be considered as a decision on a criminal charge within the meaning of Article 6(1) of the Convention. The Constitutional Court stated:³⁶

‘Fines are a sanction for tortious conduct. They are provided for by law and are intended as both a preventive and punitive measure by the public authorities. They may be issued on a discretionary basis, so that the discriminatory effect of their imposition on different subjects is not excluded. (...) It must be inferred from the foregoing that a person subjected to a fine must have the constitutional procedural guarantees provided for in Article 6(1) of the Convention’.³⁷

This is a very good solution, as it specifically does not exclude the possibility that the State and its authorities may decide to provide broader protection than that guaranteed by Article 6 of the Convention (i.e. the Czech approach means that Article 6 applies to all disorderly offences without further consideration).

2.2. Civil Rights and Obligations

As with the concept of criminal charges, the interpretation of the concept of ‘civil rights and obligations’ is also challenging and dependent on supporting criteria again set out within ECtHR case law. This concept must also be interpreted autonomously. Here, too, the tendency is towards a broader interpretation and, as with criminal charges, reliance cannot be placed on the terminology of national legal systems.

35 In *T. v. Austria*, Application no. 27783/95, Judgment 14 November 2000, the ECtHR found that the imposition of a civil fine of 30,000 Austrian shillings, subsequently converted into ten days’ imprisonment, was – even if only the fine and its amount were taken into consideration – a decision on a criminal charge. By contrast, in *Jurík v. Slovakia*, Application no. 50237/99, Judgment 18 March 2003, the ECtHR did not consider the imposition of a fine of SKK 10,000 on the basis of section 66 of the (former Czechoslovak) Criminal Procedure Code to be a decision on a criminal charge. In this connection, it took into account, in particular, that: the applicant’s act is not considered a criminal offence in domestic law (unlike the offence of contempt of court under section 169b of the Criminal Code); the maximum amount of the fine is considerably lower than the maximum amount of the fine provided for in the Criminal Code; and the fine cannot be converted into a custodial sentence. See *T. v. Austria*, Application no. 27783/95, Judgment 14 November 2000 and *Jurík v. Slovakia*, Application no. 50237/99, Judgment 18 March 2003.

36 Judgment of the Constitutional Court of the Czech Republic, 30 November 2004, no. Pl. ÚS 15/04.

37 Judgment of the Constitutional Court of the Czech Republic, 30 November 2004, no. Pl. ÚS 15/04.

As stated by Kmec, based on ECtHR case law,³⁸ three basic categories of questions can be formulated, which in the end answer the question of the applicability of Article 6 ECHR in its civil part: is there a dispute over a right or obligation which is genuine and serious and the determination of which has a direct bearing on the existence, extent or manner of enforcement of that right or obligation?; does this right or obligation have a basis in national law?; is the right or obligation at issue in the case civil in nature?³⁹

The first criterion contains several sub-criteria. First, there must be a dispute. Thus, the civil branch of Article 6(1) does not apply to uncontested or ‘unilateral’ proceedings.⁴⁰ In certain respects, the meaning of the words ‘contestations’ (disputes) over ‘civil rights and obligations’ has been clarified, for example in the *Ringeisen vs. Austria* judgment of 16 July 1971. According to the judgment, the phrase in question covers ‘all proceedings the result of which is decisive for private rights and obligations’, even if the proceedings concern a dispute between an individual and a public authority acting in its sovereign capacity; the character ‘of the legislation which governs how the matter is to be determined’ and of the ‘authority’ which is invested with jurisdiction in the matter are of little consequence.⁴¹ The *Golder vs. the United Kingdom* judgment is also very important.⁴² The Court concluded that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. One consequence of this is that Article 6 para. 1 is not applicable solely to proceedings which are already in progress:⁴³ it may also be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the opportunity to submit that claim to a tribunal meeting the requirements of Article 6 para. 1.⁴⁴

Furthermore, the dispute must be ‘genuine and serious’. In other words, it must be a matter the outcome of which has an impact on the person’s legal sphere and must

38 *Krosta v. Poland*, Application no. 36137/04, Judgment 2 February 2010, § 50: ‘The Court reiterates that, according to the principles laid down in its caselaw –, it must first ascertain whether there was a ‘dispute’ (‘contestations’) over a ‘right’ which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether this ‘right’ is also protected under the Convention (see, inter alia, *Neves e Silva v. Portugal*, 27 April 1989, § 37, Series A no. 153-A). The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question (see, among other authorities, *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV; *Mennitto v. Italy* [GC], no. 33804/96, § 23, ECHR 2000-X, and *Markovic and Others v. Italy* [GC], no. 1398/03, § 93, ECHR 2006-...). Lastly, the right must be a ‘civil’ right’.

39 Kmec et al., 2012, pp. 584–594. See also, in more detail, Hendrych, 2016, pp. 529–530.

40 *Alaverdyan v. Armenia*, Application no. 4523/04, Judgment 24 August 2010; Husseini et al., 2021, pp. 1037–1039.

41 *Ringeisen vs. Austria*, Application no. 2614/65, Judgment 16 July 1971.

42 *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.

43 *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.

44 See also very important *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 7238/75, Judgement 23 June 1981.

be of fundamental importance to that person. It is more of an ancillary criterion, which in essence functions more as a kind of corrective to a potentially overly broad interpretation of other criteria.⁴⁵ It is thus of less importance compared to the other criteria. In principle, there should be a presumption of the ‘genuineness and seriousness’ of the dispute unless there are clear indications to the contrary.⁴⁶ Finally, the dispute must be one whose decision has a direct bearing on the existence, scope or manner of enforcement of the right or obligation in question. As the ECtHR stated in *Le Compte, Van Leuven and De Meyere v. Belgium*:

‘As regards the question whether the dispute related to the above-mentioned right, the Court considers that a tenuous connection or remote consequences do not suffice for Article 6 par. 1 (art. 6–1), in either of its official versions (‘contestation sur’, ‘determination of’): civil rights and obligations must be the object – or one of the objects – of the ‘contestation’ (dispute); the result of the proceedings must be directly decisive for such a right’.⁴⁷

Disputes regarding the meaning of Article 6 ECHR are relevant to the very existence of civil rights and obligations, and also to their scope or the conditions for their enforcement. They may concern questions of fact as well as questions of law.⁴⁸

The second criterion is that the right or obligation has its basis in national law. Article 6 applies in its ‘civil part’ where there is a dispute over a right or obligation which it can – at least defensibly – be argued is recognised by domestic law, irrespective of whether it is also protected by the Convention.⁴⁹ The ECtHR cannot therefore, by interpreting Article 6, create a new private law claim which has no legal basis in the relevant legislation.⁵⁰ Nor is Article 6 logically applicable in cases where the applicant seeks to invoke an existing right, but claims it to a greater extent than that guaranteed to him by domestic law.⁵¹

The last criterion requires that the right or obligation in question be civil in nature. Typically, it will be a dispute between private parties. However, we can also include disputes which are understood by national law to be of a public law nature but which at the same time have an impact on civil rights and obligations.⁵² The ECtHR

45 Kmec et al., 2012, pp. 584–594.

46 See *Rolf Gustafson v. Sweden*, Application no. 23196/94, Judgment 1 July 1997.

47 *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 7238/75, Judgement 23 June 1981.

48 Kmec et al., 2012, pp. 584–594.

49 *J.S. and A.S. v. Poland*, Application no. 40732/98, Judgment 24 May 2005.

50 *Fayed v. the United Kingdom*, Application no. 17101/90, Judgment 21 September 1990.

51 *Varvarovsky v. Czech Republic*, Application no. 29086/05, Judgment 5 February 2007.

52 For example, proceedings for the granting of a building permit (*Sporrong and Lönnroth v. Sweden*, Application nos. 7151/75, 7152/75, Judgment 23 September 1972), the granting of a permit to operate a private clinic (*König v. Germany*, Application no. 6232/73, Judgment 28 June 1978), or disciplinary proceedings before the statutory bodies in which the right to continue to practise is at stake (*Ringeisen vs. Austria*, Application no. 2614/65, Judgment 16 July 1971).

has traditionally held that rights of a proprietary nature are generally also of a civil nature within the meaning of Article 6 of the Convention (e.g. *König v Germany*⁵³).⁵⁴ The ECtHR summed up this criterion very nicely in its decision in *Ringeisen v Austria*:

‘For Article 6, para. (1) (Article 6–1), to be applicable to a case (‘contestation’) it is not necessary that both parties to the proceedings should be private persons, which is the view of the majority of the Commission and of the Government. The wording of Article 6, para. (1) (Article 6–1), is far wider; the French expression ‘contestations sur (des) droits et obligations de caractère civil’ covers all proceedings the result of which is decisive for private rights and obligations. The English text ‘determination of ... civil rights and obligations’, confirms this interpretation. (...) The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence’.⁵⁵

The conditions for the application of Article 6(1) ECHR in its civil branch are cumulative: all of them must be fulfilled simultaneously.⁵⁶

3. Attributes of the Right to a Fair Trial Within the Meaning of Article 6(1) of the Convention

3.1. Right to a Trial Before an Independent and Impartial Tribunal Established by Law

According to Article 6(1), ‘...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. The first attribute of the right to a fair trial is therefore the right to a trial before a tribunal that is independent, impartial and established by law. How is this requirement to be interpreted and what is its content?

In *Golder v. United Kingdom*, the ECtHR solved this important question:

‘Is Article 6 para. 1 limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?’.⁵⁷

53 *König v. Germany*, Application no. 6232/73, Judgment 28 June 1978.

54 Tax matters, on the other hand, do not fall within the dictates of Article 6 of the Convention. *Ferrazzini v. Italy*, Application no. 44759/98, 12 July 2001.

55 *Ringeisen vs. Austria*, Application no. 2614/65, Judgment 16 July 1971.

56 *Husseini et al.*, 2021, pp. 1037–1039.

57 *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.

The ECtHR stated that the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 must be read in the light of these principles. A different interpretation could risk arbitrariness: If Article 6(1) were understood to refer exclusively to the conduct of proceedings already brought before a court, a Contracting State could, without acting inconsistently with the text, abolish its courts or withdraw from them the power to adjudicate certain categories of civil actions and confer it on bodies dependent on the government.⁵⁸

The Court thus reaches the conclusion that Article 6 para. 1 ensures to everyone the right to have any claim relating to his civil rights and obligations brought before a court (tribunal). In this way the Article embodies the ‘right to a court’, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 as regards both the organisation and composition of the court and the conduct of the proceedings. The whole makes up the right to a fair hearing.⁵⁹ To summarise, the right to a fair trial and its guarantees apply not only to proceedings already initiated and pending, but also include the right of everyone to bring before a court or tribunal any claim relating to their civil rights and obligations (right of access to justice).

The right of access to the court also exists in the case of criminal charges, but here it is not exercised by the accused bringing the case to court, but (mostly, though not exclusively) by an indictment brought by the competent state authority. However, if the adjudication of certain less serious offences is entrusted in the first instance not to the courts but to administrative authorities, then even in criminal cases the right of access to the courts may be realised by the accused bringing the case before the court by way of an appeal against the decision of the administrative authority on the validity of the criminal charge within the meaning of Article 6(1).⁶⁰

The term ‘tribunal’ itself is not defined in the Convention, but only the requirements it should fulfil: independent, impartial and established by law. These attributes are therefore again specified in more detail by the ECtHR in its decision-making. As it stated in *De Wilde, Ooms and Versyp* (*‘Vagrancy Cases’*) v. *Belgium*:

‘It is true that the Convention uses the word ‘court’ (French ‘tribunal’) in several of its Articles. It does so to mark out one of the constitutive elements of the guarantee afforded to the individual by the provision in question. (...) In all these different cases it denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case (see *Neumeister* Judgment of 27th June

58 Husseini et al., 2021, pp. 1068–1073.

59 *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.

60 *Štefanec v. Czech Republic*, Application no. 75615/01, Judgment 18 July 2006.

1968, Series A, p. 44, para. 24), but also the guarantees of judicial procedure. The forms of the procedure required by the Convention need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place.⁶¹

In *Sramek v. Austria* the ECtHR added that for the purposes of Article 6, however, it comes within the concept of a ‘tribunal’ in the substantive sense of this expression: its function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.⁶² A tribunal within the meaning of Article 6 should also have full jurisdiction, that is, it should have the power to examine all individual questions (both of law and fact) that are relevant to the decision of the case.⁶³

While Article 6(1) guarantees the right of access to a court in terms of the above requirements, this does not mean that all cases concerning civil rights and obligations or criminal charges must be decided primarily and in the first instance by such authorities. In a number of Contracting States, the adjudication of such cases is also entrusted to other authorities, such as various public administrative authorities. This may be due to tradition and historical development, but also to the requirement of expertise or the exercise of the right to self-government, among others. Such bodies do not, as a rule, fulfil all the requirements, such as independence. Nevertheless, such legislation is not contrary to Article 6 of the Convention if the decisions of administrative (or other) authorities are reviewable by a court with full review powers (i.e. capable of dealing with questions of both fact and law) and meeting the other requirements of Article 6 of the Convention.⁶⁴ It is important that at least one national authority and the proceedings before it meet all the requirements for a court and the proceedings before it.

A court within the meaning of Article 6 of the Convention must be independent and impartial. The ECtHR has traditionally stated that ‘independence’ means, in particular, independence from the executive and from the parties to the dispute.⁶⁵ This is not an entirely precise concept, since independence from the parties to the proceedings is more likely to be linked to the aspect of impartiality, but the two aspects

61 *De Wilde, Ooms and Versyp* (‘Vagrancy Cases’) *v. Belgium*, Application no. 2832/66; 2835/66; 2899/66, Judgment 10 March 1972.

62 *Campbell and Fell v. the United Kingdom*, Application no. 7819/77 and 7878/77, Judgment 28 June 1984.

63 *Kilián v. Czech Republic*, Application no. 48309/99, Judgment 7 December 2004. For more details on this, see Husseini et al., 2021, p. 1070.

64 *Albert and Le Compte v. Belgium*, nos. 7299/75 and 7496/76, Judgment 10 February 1983 or *Štefanec v. Czech Republic*, Application no. 75615/01, Judgment 18 July 2006.

65 *Campbell and Fell v. the United Kingdom*, Application no. 7819/77 and 7878/77, Judgment 28 June 1984.

are nevertheless closely related.⁶⁶ The judiciary must be as independent of the other powers as possible. Judicial independence refers to the courts (and the judiciary as a whole) as institutions and requires independence, particularly in terms of budgetary matters or the internal organisation of the court (for example, in the selection of the presidents of the chamber, the selection of new judges or the running of the court).⁶⁷ A judge's independence is already individual in nature and is linked to the freedom of his decision-making.⁶⁸

As a rule, independence ensures, through a combination of institutional and personal guarantees of various kinds, a legal and *de facto* status of judges such that, although they are in a sense 'employees' of the State, they can disregard any interests that the State may have in the outcome of the proceedings and decide exclusively according to the law and their own best knowledge and conscience.⁶⁹ However, the independence of the courts may also be threatened by other entities that are not themselves holders of public power, such as the media or political parties.⁷⁰ The pressure on a particular judge may come not only from outside the judiciary, but also from within. Judges must also not be subject to pressure from their colleagues or from persons exercising the administration of the courts, e.g. court presidents. There must also be sufficient safeguards in the legal order against such pressures.⁷¹ The ECtHR further adds that, in order to determine whether a court can be considered 'independent', it is necessary to take into account, *inter alia*, the manner in which its members are appointed and their term of office, the existence of safeguards against external pressures and whether the institution gives the appearance of independence.⁷²

In addition to independence, the court must also be impartial. In very general terms, impartiality is the absence of a relationship between a particular decision-maker (judge) and one of the parties to the proceedings (or their representatives), as well as to the case itself.⁷³ It therefore relates above all to the specific person representing the relevant public authority, his moral qualities and his responsibility. In layman's terms, it is a matter of ensuring that the personal attitudes, feelings and relations of that person to the parties or the case under consideration do not manifest themselves in the decision-making process, or that his decision-making is not influenced by any other interests or considerations⁷⁴ (e.g. political, financial, personal) except those arising from the legal order.⁷⁵ The judge must not have a specifically

66 Frumarová, 2019, pp. 17–25.

67 Hussein et al., 2021, p. 1074.

68 Molek, 2012, p.150.

69 Resolution of the Extended Chamber of the Supreme Administrative Court of the Czech Republic, 20 November 2012, no. 1 As 89/2010–119.

70 *Viorel Burzo v. Romania*, nos. 75109/01 and 12639/02, Judgment 30 June 2009.

71 *Khrykin v. Russia*, Application no. 33186/08, Judgment 19 April 2011.

72 See, for example, *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 7238/75, Judgement 23 June 1981.

73 Frumarová, 2023, pp. 41–56.

74 Svoboda, 2007, p. 284.

75 Frumarová, 2023, pp. 97–108.

definable interest in the outcome of the proceedings.⁷⁶ Indeed, already in Roman times, the principle of *nemo iudex in causa sua* applied. A lack of impartiality is typically dealt with by disqualifying a judge or other official for bias.

The conclusion of a conflict of interest and the possible exclusion of a person from hearing and deciding a case cannot be made without the existence of factual grounds giving rise to a reasonable presumption of bias.⁷⁷ This is because, in a state governed by the rule of law, any action under the law must be based on objective criteria and on rational reasons grounded in reality, and not on the purely subjective, non-factual will of the person exercising the power.⁷⁸ Doubt as to lack of bias is therefore established where there are reasonable grounds, based on reality, for believing that there may be an undesirable relationship which could ‘influence’ the attitude of the official towards the exercise of the power conferred on him.

The Constitutional Court of the Czech Republic has very aptly commented on this issue. It stated⁷⁹ that impartiality is primarily a subjective psychological category, expressing the judge’s internal psychological state towards the case at hand in a broader sense (when it includes the relationship to the subject of the proceedings, the parties and their representatives), which only the judge himself is able to report relatively accurately. However, such a narrowly defined category of impartiality would be difficult to apply in practice due to the difficulty of objective review, and impartiality must therefore be perceived more broadly, i.e. also in objective terms. In other words, there must be not only a subjective conviction of bias on the part of the judge or official or the parties, but, in particular, there must be clearly established objective circumstances which justify that conclusion.⁸⁰ The case law of the European Court of Human Rights is also based on a twofold test of the judge’s impartiality.⁸¹

The subjective test of impartiality is based on a rebuttable presumption of the judge’s impartiality.⁸² According to this test, a judge is presumed to be impartial as long as there are no subjective grounds of bias relating to his person (see *Morice v. France*).⁸³ A more stringent, individual assessment is required to prove the judge’s lack of impartiality, and concrete and tangible evidence of the judge’s bias must be produced. The mere perception of a judge as biased by the party concerned does not stand alone.⁸⁴ As regards the objective assessment of impartiality, the judge’s bias or legitimate doubts as to his impartiality must be sufficient from the point of view of an

76 Bartoň et al., 2016 p. 526.

77 Frumarová, 2023, pp. 97–108.

78 Resolution of the Extended Chamber of the Supreme Administrative Court of the Czech Republic, 27 November 2012, no. 1 As 19/2010-106.

79 Judgment of the Constitutional Court of the Czech Republic, 7 March 2007, no. I. ÚS 722/05.

80 Judgment of the Constitutional Court of the Czech Republic, 3 July 2001, no. II ÚS 105/01.

81 See, e.g. Judgment of the ECtHR in *Saraiva de Carvalho v. Portugal*, Application no. 15651/89, Judgment 22 April 1994 and *Gautrin and Others v. France*, Application no. 38/1997/822/1025–1028, Judgment 20 May 1998.

82 Hussein et al., 2021, p. 1086.

83 *Morice v. France*, Application no. 29369/10, Judgment 23 April 2015.

84 Molek, 2012, p. 173.

ordinary and reasonable observer.⁸⁵ We must ask whether an informed and reasonable person would have perceived the judge in question as impartial (see *Kyprianou v. Cyprus*⁸⁶). According to the case law of the ECtHR, the opposite principle to the subjective test as to the presumption of impartiality also applies here. A reasoned objection of objective partiality creates a rebuttable presumption of bias on the part of the judge. The public authority must then rebut it and show that there are sufficient procedural safeguards to exclude any legitimate doubt of impartiality (*Salov v. Ukraine*).⁸⁷ In deciding whether there is a legitimate reason to fear that a particular judge is not impartial in a given case, the subjective perception of the litigant is important, but not decisive. What is determinative is whether the concern can be considered objectively justified (*Piersack v. Belgium*).⁸⁸

Finally, the last requirement is that it must be a court established by law. This attribute is undoubtedly intended to specifically strengthen the independence of the court and the objectivity and transparency of its decisions. Both the court's organisational matters and its decision-making activities must be regulated by law. The term 'law' here has essentially the same meaning as elsewhere in the Convention, and thus sources of law other than acts of the legislature may be regarded as law (in the material sense) under certain conditions.⁸⁹ However, it follows from the nature of the law in question that certain matters can only be regulated by the legislature (by means of a law in the formal sense); they must not be left to the discretion of the executive. This is undoubtedly true of the establishment of the court itself, but it also applies to fundamental questions relating to the jurisdiction, competence and organisation of the court.

3.2. Right to a Fair and Public Hearing

3.2.1. Right to a Fair Hearing

The requirement of a fair⁹⁰ hearing (or fairness of the proceedings) is understood as a kind of 'residual clause' from which the ECtHR can (and does) infer anything else that it considers should be part of the right to a fair trial and that the drafters of the Convention did not explicitly include in Article 6. It has become a space for creative interpretation of Article 6, which is understandable given that the notion of a 'fair hearing' is itself virtually ungraspable.⁹¹ The ECtHR had to elaborate its meaning and was undoubtedly inspired in this respect by the legal systems of the individual Contracting States to the Convention and their understanding of this concept. Thus, the ECtHR derived from the requirement of a fair hearing the principles of equality

85 Hussein et al., 2021, p. 1086.

86 *Kyprianou v Cyprus*, Application no. 73797/01, Judgment 15 December 2005.

87 *Salov v. Ukraine*, Application no. 65518/01, Judgment 6 September 2005.

88 *Piersack v. Belgium*, Application no. 8692/79, Judgment 1 October 1982.

89 Kmec et al., 2012, pp. 685–686.

90 Čeladník, 2009, pp. 847–849.

91 Čeladník, 2009, pp. 847–849.

of arms and adversarial proceedings, the right to be present at the trial, the right not to incriminate oneself, the right to know the reasons for the court decision and some other rights.⁹²

The ECtHR states that, according to the principle of equality of arms, as one of the features of the broader concept of a fair trial, each party must be given a reasonable opportunity to present its case under conditions that do not disadvantage it compared to the opposing party.⁹³ The aim of the principle is to achieve a ‘fair balance’ between the parties to the dispute.⁹⁴

Furthermore, a key principle of due process is the principle of adversarial proceedings⁹⁵: each party must in principle have the opportunity not only to make known any evidence needed for its claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court’s decision.⁹⁶ What is essential is that the parties should be able to participate properly in the proceedings before the ‘tribunal’ (see *Kerojärvi v. Finland*).⁹⁷ Given that the purpose of Article 6(1) is primarily to protect the interests of the parties and of the proper administration of justice, the ECtHR has noted that what is at stake here is the confidence of the parties in the functioning of the judicial system, and that this confidence is based, *inter alia*, on the certainty of the person concerned that he has had the opportunity to comment on all the documents in the file.⁹⁸ The fact that a piece of evidence requested by the court and on which it based its decision was not communicated to either party to the dispute does not constitute a breach of the principle of equality of arms, but it may constitute a breach of the principle of the adversarial system.⁹⁹ A relatively large category in ECtHR case law includes cases where the principle of the adversarial procedure has been infringed as a result of the fact that the national court did not give the applicant the opportunity to comment on the position taken in the proceedings by the public authority (lower court or administrative authority) whose decision was challenged by the applicant in the proceedings before that court.¹⁰⁰

Another of the rights recognised is the right to be present in court. This is a crucial right, and is especially so in criminal cases. In this context, the ECtHR states that the

92 Other principles that the ECtHR has reached in its jurisprudence and the right to a fair trial include the principle of legal certainty. This is linked by the Court, in particular, to respect for the principle of legal authority, i.e. the finality of judicial decisions, which must be respected – see *Brumărescu v Romania*, Application no. 28342/95, Judgment 28 October 1999.; *Kmec et al.*, 2012, pp. 735–736.

93 Judgment of the ECtHR in *Bulut v. Austria*, 22 February 1996, No. 20807/92, or Judgment of the ECtHR in *Foucher v. France*, 18 March 1997, no. 22209/93.

94 Judgment of the ECtHR in *Dombo Beheer B. V. v. the Netherlands*, 27 October 1993, no. 14448/88. 95 Stoykova, 2023.

96 Judgment of the ECtHR in *Mantovanelli v. France*, 18 March 1997, no. 21497/93.

97 Judgment of the ECtHR in *Kerojärvi v. Finland*, 19 July 1995, no. 17506/90.

98 Judgment of the ECtHR in *Ziegler v. Switzerland*, 21 February 2002, no. 33499/96.

99 *Kmec et al.*, 2012, pp. 740–750.

100 Judgment of the ECtHR in *Mantovanelli v. France*, 18 March 1997, no. 21497/93.

presence of the accused in court is of fundamental importance for the fairness of the proceedings and the obligation to guarantee the accused the right to be present in the courtroom is one of the essential components of Article 6(1) of the Convention.

‘It may thus be considered that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial after he or she emerges – ranks as one of the essential requirements of Article 6 and is deeply entrenched in that provision. Therefore, criminal proceedings which have been held in absentia and whose reopening has been subsequently refused, without any indication that the accused has waived his or her right to be present during the trial, may fairly be described as ‘manifestly contrary to the provisions of Article 6 or the principles embodied therein’.¹⁰¹

A person charged with a crime should have the right to be present at the trial, though the personal appearance of the accused at a hearing of the Court of Appeal is not necessarily of the same crucial importance as in the case of the proceedings before the trial court.¹⁰² The right in question may be waived, but the accused must do so voluntarily, unequivocally, seriously and without prejudice to any important public interest. As regards civil matters, this right is understood to be a more general right to defend one’s case effectively before the court and the right to equality of arms in relation to the opposing party.¹⁰³

Another sub-right mentioned by the ECtHR is the right to a statement of reasons.¹⁰⁴ This right fulfils several key functions. First, it is a means of ensuring the transparency of proceedings, a certain element of control over judicial decision-making. It is also a prerequisite for a party to be able to defend a decision with which it disagrees or, on the contrary, to be convinced of the correctness of the decision in its case (by having the court deal with all the relevant submissions, arguments, evidence and other background to the decision).¹⁰⁵

The application of this right in practice has been further elaborated by the ECtHR in its case law. First, it has established that this is by no means an absolute right: if Article 6(1) imposes an obligation on courts to give reasons for their decisions, this cannot be understood as requiring a detailed response to every argument.¹⁰⁶ It is appropriate to take into account whether an argument which the court has not answered in the grounds of its decision is relevant to the case and whether it may have influenced the outcome of the proceedings.¹⁰⁷ The extent of that obligation may vary

101 Judgment of the ECtHR in *Stoichkov v. Bulgaria*, 24 March 2005, no. 9808/02.

102 Judgment of the ECtHR in *Kamasinski v. Austria*, 19 December 1989, no. 9783/82.

103 Kmec et al., 2012, pp. 751–756.

104 Dymitruk, 2019, pp. 21–44.

105 Skulová, 2016, č. 10, pp. 895–912.

106 *Van de Hurk v. the Netherlands*, Application no. 16034/90, Judgment 19 April 1994.

107 *Luka v. Romania*, Application no. 34197/02, Judgment 21 July 2009.

according to the nature of the decision. In addition, particular account must be taken of the variety of legal means available before the court and the differences between Contracting States as regards statutory provisions, customs, doctrinal concepts and the presentation and drafting of decisions. Accordingly, the question whether the court has failed to fulfil its obligation to state reasons under Article 6 cannot be assessed other than on the basis of the particular circumstances of the case.¹⁰⁸

As far as the admissibility of evidence is concerned, Article 6 does not address this issue and, according to the ECtHR, the matter is therefore primarily a matter of national law.¹⁰⁹ In this connection, the ECtHR adds that, in principle, it is therefore not for the ECtHR itself to comment on the admissibility of certain types of evidence, such as evidence gathered illegally under national law, or on the guilt of the applicant. However, it must consider whether the proceedings, including the manner in which the evidence was gathered, were fair as a whole.¹¹⁰

It is also worth mentioning the right not to incriminate oneself. Although they are not explicitly mentioned in Article 6, there can be no doubt that the right to remain silent and the right not to self-incriminate are generally accepted international standards that fulfil the notion of a fair trial under Article 6.¹¹¹ In *Saunders v. the United Kingdom*, the ECtHR stated that the right not to self-incriminate presupposes, in particular, that the prosecution in a criminal case seeks to prove guilt without resorting to evidence obtained through coercion or duress; in this sense, this right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.¹¹² The Court added, however, that the right not to contribute to incriminate oneself relates primarily to respect for the accused's will to remain silent.¹¹³

3.2.2. Right to a Public Hearing

The public character of the proceedings and their main purpose and function is very well captured by the ECtHR in its decision *Malhaus v. Czech Republic*,¹¹⁴ where it stated:

‘The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in para, 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial,

¹⁰⁸ Kmec et al., 2012, pp. 757–761.

¹⁰⁹ *Schenk v. Switzerland*, Application no. 10862/84, Judgment 12 July 1988.

¹¹⁰ *P.G. and J.H. v. the United Kingdom*, Application no. 44787/98, Judgment 25 December 2001.

¹¹¹ *John Murray v. the United Kingdom*, Application no. 18731/91, Judgment 8 February 1996.

¹¹² *Saunders v. the United Kingdom*, Application no. 19187/91, Judgment 17 December 1996.

¹¹³ Kmec et al., 2012, p. 765.

¹¹⁴ *Malhaus v. Czech Republic*, Application no. 33071/96, Judgment 12 July 2001.

the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention'.¹¹⁵

It is further apparent from the case law that Article 6 requires a party to be heard in public at least once, unless there are special circumstances that would justify not holding a public hearing.¹¹⁶

Kmec point out¹¹⁷ that the ECtHR sometimes confuses two things in its case law, namely the right to a *public* trial and the right to an oral trial. It is important to note that each of these rights pursues a different objective: the principle of public hearings is intended to ensure control of the administration of justice, while the principle of orality is intended to ensure that a party to proceedings has the opportunity to be heard directly before the court beyond written submissions. While the exceptions to the principle of publicity are directly set out in the second sentence of Article 6(1) ECHR, the exceptions that the ECtHR has drawn in its case law relate more to the aspect of orality. The question is therefore whether the right to an oral hearing is a right distinct from the right to a public hearing, a right that is not expressly enshrined in Article 6 but (like other rights) only implicitly so.¹¹⁸

As regards the permissible exceptions to the principle of publicity of proceedings, they are set out directly in Article 6(1), which states that

‘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’.

Therefore, it is not contrary to the Convention if national legal orders provide for certain types of proceedings where the public is excluded, for the reasons set out above.

While the public nature of court proceedings is one of the essential attributes of the right to a fair trial, the ECtHR adds that neither the letter nor the spirit of this provision prevents a person from expressly or tacitly waiving the right to a public hearing of his case of his or her own volition.¹¹⁹ However, the waiver must be made in an unequivocal manner and must not be contrary to any important public interest.¹²⁰

115 Similarly *Golder v. the United Kingdom*, Application no. 4451/70, Judgment 21 February 1975.

116 Paduch, 2021, p. 11. See also *Schlumpf v. Switzerland*, Application no. 29002/06, Judgment 8 January 2009.

117 Kmec et al., 2012, p. 687.

118 Kmec et al., 2012, p. 687.

119 *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 7238/75, Judgement 23 June 1981.

120 *Håkansson and Stureson v. Sweden*, Application no. 11855/85, Judgment 21 February 1990.

A certain ‘sub-right’ of the right to a public hearing, which is also expressly provided for in Article 6(1) of the Convention, is the right to public pronouncement of the judgment.¹²¹ This concept (judgment and its pronouncement) must be interpreted in a material sense, regardless of national terminology.¹²²

3.3. *Right to a Hearing Within a Reasonable Time*

The right to a hearing within a reasonable time constitutes the last attribute of the right to a fair trial within the meaning of Article 6(1) of the Convention. It is a manifestation of the principle of the expeditiousness of proceedings, which is one of the universal principles typical of all judicial and administrative proceedings.¹²³ The main problem in the application of that right is to determine and interpret what a reasonable period is, when it begins and ends and how long it should be in a particular case. In this respect, ECtHR case law is again a key guide.

As a general rule, a reasonable period of time relating to decision-making may start to run from the moment the proceedings are initiated. It should not be difficult to determine that time, since it is normally fixed directly by law. The end of the reasonable period can then be determined at the moment when the uncertainty as to the legal position of the person concerned is brought to an end.¹²⁴ This is typically the case only when the decision becomes final. For example, in *Wemhoff v. Germany*¹²⁵ the ECtHR held that there is no reason for the protection of individuals against delays in proceedings to end at the first oral hearing, as it is reasonable to fear unjustified delays or adjournments.

The basic criterion for determining the length of a reasonable period of time is that the specific circumstances of each individual case must always be taken into account, and it is not possible to proceed on the basis of some abstract, pre-determined (in type) length of time for issuing certain types of decisions. The judicial authority must therefore take into account, in each individual case, the two (often conflicting) components of the right to a fair trial, namely the right of the person concerned to have his or her case heard and determined within a reasonable time, and the general requirement to comply with the law and to ensure fair protection for all concerned.¹²⁶

According to the settled case law of the European Court of Human Rights,¹²⁷ the reasonableness of the time limit for the proceedings is assessed comprehensively

121 On the various forms of fulfilment of this right – see, for example, *Pretto and others v. Italy*, Application no. 7984/77, Judgment 8 December 1983.

122 *Axen v. Germany*, Application no. 8273/78, Judgment 8 December 1983.

123 Frumarová, 2021, pp. 109–120.

124 Čapek, 1994, pp. 362; *Wemhoff v. Germany*, Application no. 2122/64, Judgment 27 June 1968.

125 *Wemhoff v. Germany*, Application no. 2122/64, Judgment 27 June 1968.

126 Opinion of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 13 April 2011, no. Cpjn 206/2010.

127 *Guillemin v. France*, Application No. 19632/92, Judgment 21 February 1997; *Stamoulakatos v. Greece*, Application no. 164/1996/783/984, Judgment 26 November 1997; *Apicella v. Italy*, Application no. 64890/01, Judgment 29 March 2006.

according to the circumstances of each individual case, taking into account in particular the complexity of the case and the conduct of the parties and the authorities concerned. In doing so, it is also important to take into account what is at stake for the person concerned in the context of the proceedings. The determination of a reasonable period of time, or its length, must therefore always be based on the circumstances of each individual case, using (though of course not only) the supporting criteria developed by case law.¹²⁸

The first subsidiary criterion is the complexity of the case. This is a criterion of an objective nature, where both the procedural complications and the factual or substantive complexity of the case must be taken into account. The complexity of the proceedings from the point of view of the ECtHR includes in its specification both the number of instances in which the case has been heard¹²⁹ and the complexity of the case itself.¹³⁰ The complexity of the case comprises three elements: its factual complexity (the extent of the facts alleged by the parties and the resulting scope of the evidence, and the variety of means of proof used – interviews with many witnesses, expert reports, etc.); the complexity of the case¹³¹ in terms of the complexity of the legal assessment from the point of view of application and interpretation – depending in particular on the frequency of similar proceedings, the existing case law and its consistency¹³² or whether the case has an international element;¹³³ and last but not least, its procedural complexity (the procedural activity of the parties, the frequency and clarity of their submissions and procedural motions,¹³⁴ etc.).¹³⁵ In this respect, each competent authority has a special duty to ensure that everyone with a role in the proceedings does everything possible to avoid unnecessary delays.¹³⁶

Another criterion for assessing whether the time limit is reasonable is the conduct of the parties to the proceedings. This is a subjective criterion which can have both a negative and a positive effect on the length of proceedings. On the one hand, a party

128 The European Court's rather extensive case law on the violation of Article 6(1) of the Convention can be found, for example, in the Council of Europe publication 'The administration and you', Council of Europe Publishing, 1996 (see *König v. Germany*, Application no. 6232/73, Judgment 28 June 1978.; *Obermeier v. Austria*, Application no. 11761/85, Judgment 28 June 1990).

129 It shall apply that the total period of time to be justified shall in principle be extended by the period of the proceedings before the next instance. On this issue, cf. also Barinka, 2002, p. 439.

130 Opinion of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 13 April 2011, no. Cpjn 206/2010.

131 Cf. e.g. *Probstmeier v. Germany*, Application no. 24359/94, Judgment 1 July 1997; *Milasi v. Italy*, Application no. 14/1986/112/160, Judgment 25 June 1987; *Bořánková v. Czech Republic*, Application no. 41486/98, Judgment 7 January 2003; *Schmidtová v. Czech Republic*, Application no. 48568/99, 22 July 2003.

132 *Tímár v. Hungary*, Application no. 36186/97, Judgment 25 February 2003.

133 *Neumeister v. Austria*, Application no. 1936/63, Judgment 27 June 1968 or Barinka, 2002, p. 440.

134 *Monnet v. France*, Application no. 30955/12, Judgment 27 October 1993.

135 Opinion of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 13 April 2011, no. Cpjn 206/2010.

136 *Monnet v. France*, Application no. 30955/12, Judgment 27 October 1993.

to the proceedings may contribute to increasing the length of proceedings through inactivity (e.g. by failing to respond to the competent authority's requests) or through activity of a purely obstructive nature (e.g. repeatedly making unclear submissions, proposing the taking of numerous redundant pieces of evidence, numerous amendments to the application), both intentionally and negligently. On the other hand, however, parties may take action, at least in theory, to reduce the length of the proceedings, which may include the use of all available means capable of eliminating delays in the proceedings. However, it is not the duty of the parties to induce the public authorities to give a decision earlier, so the failure to make use of those means cannot be attributed to the parties. On the contrary, it is the general duty of those authorities to give a decision within a reasonable time, and that duty is to be discharged whether or not the parties avail themselves of those means.¹³⁷

Any attitude or behaviour of the person concerned which leads to delays in the proceedings weakens his complaint or other form of protection against delays. Such conduct is, according to the ECtHR, hardly compatible with the requirement of urgency with which a party to proceedings must act.¹³⁸ Thus, only delays attributable to the State can lead to a finding that a reasonable time has not been observed.¹³⁹

However, the fact that a party exercises its procedural rights under the law (e.g. filing appeals, objections, etc.) cannot be held against it.¹⁴⁰ On the contrary, the reasonableness of the remedies lodged may indicate maladministration on the part of the competent authority. On the other hand, the competent authority cannot be held liable for the prolongation of the length of the proceedings as a result of the need to respond to the parties' applications, appeals or objections,¹⁴¹ particularly if they are unfounded.¹⁴² There is, however, a certain exception in this respect in cases of a criminal nature. In most cases, the person whose guilt and sentence are being decided (in criminal or quasi-criminal proceedings) cannot be expected to cooperate actively (especially in those cases which are clearly aimed at proving his guilt).¹⁴³

The conduct or procedure of the authorities concerned is also important in assessing whether the time limit was reasonable. The conduct of the competent authority during the proceedings may be categorised as timely and expeditious (while, of

137 Opinion of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic, 13 April 2011, no. Cpjn 206/2010.

138 In *Deumeland v. Germany* the European Court held that parties are obliged to exercise due diligence in the exercise of their procedural rights, to not use delaying tactics and to use all the means provided by domestic law to bring the proceedings to a timely and orderly conclusion. Cf. also the judgment in *Proszaková v. Poland* of 16.12.1997 (where the applicant refused to undergo an expert examination, which significantly delayed the proceedings). In such cases, the ECtHR cannot even find a violation of Article 6(1) of the Convention. *Deumeland v. Germany*, Application no. 9384/81, Judgment 29 May 1986.

139 *Ciricosta and Viola v. Italy*, Application no. 19753/92, Judgment 4 December 1995.

140 *Patta v. Czech Republic*, Application no. 12605/02, Judgment 18 April 2006.

141 *Dostál v. Czech Republic*, Application no. 52859/99, Judgment 25 May 2004.

142 Judgment of the Supreme Court of the Czech Republic, 5 October 2010, no. 30 Cdo 1328/2009.

143 Čapek, 1994, p. 363. See also *Lammi v. Finland*, Application no. 53835/00, Judgment 15 November 2005.

course, respecting the legal principles and procedural procedures) or as unjustified inaction, arbitrariness or incompetence leading to unnecessary delays or absolute inaction. A breach of a reasonable time limit may thus consist, for example, of long delays between meetings, delays in the transmission of files between authorities, or failure to comply with other procedural rules. There are also cases where the decision of a lower authority is annulled simply because it did not respect a binding legal opinion of a higher authority.¹⁴⁴

The most common reason to justify inaction or delays is overload of the competent authority. However, congestion is generally not recognised as a sufficient excuse for excessive length of proceedings. In such cases, the ECtHR has held that Article 6 of the Convention obliges Contracting States to organise their judicial systems in such a way that they are able to comply with each of the requirements of that Article, in particular as regards the reasonableness of the length of the proceedings.¹⁴⁵ The obligation to act with urgency in the interests of the proper administration of justice belongs to the competent authorities in the first place (*Philis v Greece*).¹⁴⁶

However, the ECtHR allows exceptions to this principle. In fact, in some of its judgments it has held that a temporary backlog of cases may justify a certain extension if the competent authorities do everything possible to overcome this obstacle as soon as possible (*Unión Alimentaria Sanders S.A. v Spain*)¹⁴⁷. If, however, the situation threatens to become more widespread, measures must be taken to prevent a permanent breach of the Convention (*Martins Moreira v. Portugal*)¹⁴⁸. These measures must be assessed in terms of their effectiveness and timeliness. Delayed measures cannot obliterate the fact that the reasonable period has been exceeded,¹⁴⁹ nor can chronic congestion of the competent authority justify an excessive time limit for proceedings.¹⁵⁰

In determining and assessing the reasonableness of the time limit, ECtHR case law states that account must also be taken of the special interests of the person concerned in the proceedings, what is at stake for them and the importance the proceedings hold for them.¹⁵¹ The importance of the proceedings is determined by type, in the sense that certain types of proceedings are more important to the parties than others. These are primarily matters pertaining to criminality, custody, employment, personal status, social security or health and life.¹⁵² In addition, the importance of

144 Frumarova, 2012.

145 See, for example, *Probstmeier v. Germany*, Application no. 24359/94, Judgment 1 July 1997.

146 *Philis v Greece*, Application nos. 12750/87; 13780/88; 14003/88, Judgment 27 August 1991.

147 *Unión Alimentaria Sanders S.A. v Spain*, Application no. 11681/85, Judgment 7 July 1989. Similarly, the European Court also ruled in *Buchholz v Germany*, Application no. 7759/77, Judgment 6 May 1981.

148 *Martins Moreira v. Portugal*, 26 October 1988, Application no. 11371/85, Judgment.

149 For example, Judgment of the ECtHR in *Baggetta v. Italy*, Application no. 13/1986/111/159, Judgment 25 June 1987 or *Milasi v. Italy*, Application no. 14/1986/112/160, Judgment 25 June 1987.

150 *Probstmeier v. Germany*, Application no. 24359/94, Judgment 1 July 1997.

151 For example, *Stamoulakos v. Greece*, Application no. 32857/96, Judgment 26 November 1997.

152 For more details see the Judgment of the Supreme Court of the Czech Republic, 5 October 2010, no. 30 Cdo 4761/2009.

the subject-matter of the proceedings for a particular person is determined by the circumstances of the particular dispute, in particular the age or state of health of the party, where the competent authorities should take greater care in proceedings involving seriously ill or elderly persons.¹⁵³ In simple terms, these are situations where delays or inaction may have irreversible or difficult-to-remedy consequences and may fundamentally affect the rights and freedoms of individuals.

All of the above criteria must be taken into account, both individually and collectively, considering the circumstances of the case as a whole. It is clear that the individual criteria do not, as a rule, occur in isolation, without dependence on the other criteria. Moreover, the criteria mentioned are not, of course, the only possible ones, but they will normally be the basic guideposts for determining what constitutes a reasonable period.¹⁵⁴

4. Specific Requirements of the Right to a Fair Trial in Relation to Proceedings on Criminal Charges - Article 6(2) and (3) of the Convention

Paras. 2 and 3 of Article 6 are specific applications of the general principle set out in paragraph 1. The presumption of innocence enshrined in para. 2 and the various rights, a non-exhaustive list of which appears in paragraph 3, form – together with others – components of the concept of a fair trial in criminal matters.¹⁵⁵ The specific safeguards set out in Article 6(3) ECHR characterise the concept of a fair trial with regard to the typical procedural situations that arise in criminal proceedings. Their purpose is to always ensure, or at least contribute to, the fairness of the criminal proceedings as a whole.¹⁵⁶

4.1. Principle of Presumption of Innocence

Article 6(2) of the Convention enshrines the principle of presumption of innocence, that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. This is a principle recognised by all democratic legal systems in criminal or similar proceedings (e.g. administrative offences).¹⁵⁷ As stated by the Constitutional Court of the Czech Republic in this context,

153 For more details see the Judgment of the Supreme Court of the Czech Republic, 5 October 2010, no. 30 Cdo 4761/2009.

154 Frumarova, 2012.

155 *Deweert v. Belgium*, Application no. 6903/75, Judgment 27 February 1980: ‘The Court further points out that these two paras. (Article 6–2, Article 6–3) represent specific applications of the general principle stated in para. 1 of the Article (Article 6–1). The presumption of innocence embodied in para. 2 (Article 6–2) and the various rights of which a non-exhaustive list appears in para. 3 (Article 6–3) (‘minimum rights’, ‘notamment’) are constituent elements, amongst others, of the notion of a fair trial in criminal proceedings (see, for example, the Commission’s report in the case of *Nielsen v. Denmark*, 15 March 1961, Yearbook of the Convention, vol. 4, pp. 548–550)’.

156 Kmec et al., 2012, p. 787.

157 Stoykova, 2023.

‘the principles of a fair trial include the principle of presumption of innocence, according to which anyone against whom criminal proceedings are brought is presumed innocent unless he has been found guilty by a final judgment of conviction (Article 40(2) of the Charter and Article 6(2) of the Convention). The legal significance of the presumption of innocence lies, first and foremost, in the obligation of the criminal prosecution authorities to regard the person against whom criminal proceedings are brought as innocent, and this obligation continues until a final conviction has been handed down. It is one of the most important constitutional guarantees of a fair trial in criminal proceedings.’¹⁵⁸

An important part of the principle of presumption of innocence is the principle of *in dubio pro reo*. The essence of this principle is that if, after the evidence has been adduced, reasonable doubts persist as to the existence of relevant factual circumstances (e.g. the act, the person of the perpetrator or the culpability) which cannot be removed even by the taking of further evidence, the prosecuting authorities are obliged to decide in favour of the accused.¹⁵⁹ The application of the above principle is particularly appropriate where multiple versions of the facts can reasonably be arrived at or where no one body of conflicting evidence can be clearly admitted.¹⁶⁰ However high the degree of suspicion, this cannot in itself provide a lawful basis for a conviction.¹⁶¹ In the light of the above, the general courts are required in criminal proceedings to reach the highest degree of certainty that human knowledge can achieve, at least to the level of proof of the offence beyond reasonable doubt.

The ECtHR summarises this by saying that the principles of the presumption of innocence and that of *in dubio pro reo*, which follows from it, require judges

‘not to proceed on the basis of a preconceived notion that the accused has committed the act of which he is accused, that the burden of proof rests with the prosecution and that any doubts are used to the advantage of the accused’.¹⁶²

It follows from the case law of the ECtHR that the presumption of innocence is violated when a court decision or a public official’s statement concerning a person accused of a crime reflects the view that the person is guilty before his or her guilt has been established by law. Even if guilt is not formally established, the existence of some reasoning indicating that the court or public official in question views the accused as

158 Judgment of the Constitutional Court of the Czech Republic, 5 January 2021, no. III. ÚS 928/20.

159 Judgment of the Constitutional Court of the Czech Republic, 5 March 2010, no. III ÚS 1624/09; Judgment of the Constitutional Court of the Czech Republic no. II ÚS 1975/08; Judgment of the Constitutional Court of the Czech Republic, 24 February 2004, no. I ÚS 733/01.

160 Judgment of the Constitutional Court of the Czech Republic, 22 March 2006, no. IV ÚS 137/05.

161 Judgment of the Constitutional Court of the Czech Republic, 13 May 1998, no. IV ÚS 36/98.

162 *Melich and Beck v. Czech Republic*, Application no. 35450/04, Judgment 24 July 2008.

guilty is sufficient.¹⁶³ There is a fundamental distinction to be made between stating that someone is merely suspected of committing an offence and a clear statement that the person has committed the offence in question without having been convicted. The ECtHR has consistently stressed the importance of the words public officials choose to use in their statements before the person concerned is tried and found guilty of a particular crime.¹⁶⁴ It is relatively common in the case law of the ECtHR for courts in proceedings that do not directly address the issue of guilt and punishment to choose language that more or less clearly establishes the guilt of the accused. In the light of the principle of the presumption of innocence, these formulations are problematic, either in a situation where criminal proceedings are still ongoing and the guilt of the applicant has not yet been decided, or once the criminal proceedings have been concluded by a verdict that exonerates the applicant¹⁶⁵ (acquittal, discontinuance of the criminal prosecution).¹⁶⁶ In *Alenet de Ribemont v France*¹⁶⁷ the ECtHR extended the protection afforded by Article 6(2) ECHR to sentences pronounced by organs of the State other than the courts. The case in question concerned specifically the Minister of the Interior and two police officers who, at a press conference, had identified the applicant, Mr Patrick Alenet de Ribemont, as the instigator of the murder of a Member of Parliament and a former minister. However, journalists or the media in general may also violate this principle.¹⁶⁸

4.2. Rights under Article 6(3) of the Convention

Other rights associated with criminal proceedings arise from Article 6(3) of the Convention, which provides that 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; and (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

4.2.1. Right to Be Informed of the Charges

According to the ECtHR, the scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article

163 Kmec et al., 2012, pp. 787–793.

164 *Khuzhin and Others v. Russia*, Application no. 13470/02, Judgment 23 October 2008.

165 For details see Kmec et al., 2012, pp. 787–793.

166 *Khuzhin and Others v. Russia*, Application no. 13470/02, Judgment 23 October 2008.

167 *Alenet de Ribemont v. France*, Application no. 15175/89, Judgment 10 February 1995.

168 *Tourancheau and July v. France*, Application no. 53886/00, Judgment 24 December 2005.

6(1) of the Convention.¹⁶⁹ The Court considers that in criminal matters, the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.¹⁷⁰ This right is closely related and complementary to the other rights listed in para. 3.

As regards the time requirements, the court should do so without delay, particularly to allow the accused to properly prepare his defence. The communication of the charge is such an important act that it must always be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge of the existence of the charge is not sufficient.¹⁷¹ However, the Convention does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (*Kamasinski v Austria*¹⁷²). At the same time, the information in question must be communicated in a language which the person understands.¹⁷³

The person must be informed of the nature and grounds of the charge in detail. As the ECtHR has aptly stated,

'6(3)(a) refers to the need to pay particular attention to the notification of the 'charge' to the accused; the particulars of the offence play a crucial role in criminal proceedings, since from the moment they are served the suspect is formally informed of the factual and legal basis of the charge against him (*Kamasinski v Austria*¹⁷⁴). The accused must be informed 'promptly' and 'in detail' of the grounds of the charge, i.e. the essential facts of which he is accused and which form the basis of the charge, and of the nature of the charge, i.e. the legal classification of those essential facts. The Court considers that in criminal cases the provision of full and detailed information concerning the charges against the accused is an essential prerequisite for ensuring a fair trial.'¹⁷⁵

Although the extent of the 'detailed' information referred to in this provision varies according to the circumstances of each case, the accused must in all circumstances be provided with sufficient information to enable him to fully understand the scope of the charges against him in order to prepare an adequate defence. In this respect, the adequacy of the information must be assessed in relation to Article 6(3)(b), which

169 See *Deweert v. Belgium*, Application no. 6903/75, Judgment 27 February 1980 or *Artico v. Italy*, Application no. 6694/74, Judgment 13 May 1980.

170 *Pélissier and Sassi v. France*, Application no. 25444/94, Judgment 25 March 1999.

171 *T. v. Italy*, Application no. 14104/88, Judgment 12 October 1992.

172 *Kamasinski v. Austria*, Application no. 9783/82, Judgment 19 December 1989.

173 *Brožicek v. Italy*, Application no. 10964/84, Judgment 19 December 1989.

174 *Kamasinski v. Austria*, Application no. 9783/82, Judgment 19 December 1989.

175 *Mattoccia v. Italy*, Application no. 23969/94, Judgment 25 July 2000.

grants everyone the right to adequate time and resources to prepare his defence, and in the light of the more general right to a fair trial enshrined in Article 6(1) (*Pélissier and Sassi v. France*¹⁷⁶).

With regard to any changes in the charge, including changes in the ‘cause’ of the charge, the accused must be properly and fully informed of them, and given reasonable time and opportunity to respond to them and to organise his defence on the basis of any new information or allegations.¹⁷⁷ In principle, the ECtHR examines whether the change in the nature and cause of the charge could have been foreseeable to the applicant.¹⁷⁸ The accused is entitled to be informed even if the definition of the offence has remained the same and only the legal characterisation has changed.¹⁷⁹

4.2.2. Right to Have Adequate Time and Facilities for the Preparation of the Defence

As mentioned above, this right is closely related to the above-mentioned right to be informed of the nature and grounds of the charges, since this aspect is, among other things, a prerequisite for the preparation of a good defence. The rights of the defence, which are not exhaustive in Article 6(3)(b) ECHR, were established primarily with a view to establishing, as far as possible, equality between the prosecution and the defence. The opportunities which must be given to the accused are limited to those that assist or may assist him in the preparation of his defence.¹⁸⁰ As with all the other rights guaranteed in paragraph three, Article 6(3)(b) must be interpreted in the light of the general requirement of a fair trial within the meaning of Article 6(1) ECHR.

It is clear that in assessing whether the accused had adequate time and opportunity to prepare his defence, the particular circumstances of each case must consistently be taken into account. It is not surprising, therefore, that the ECtHR has not formulated too many general principles for the application of Article 6(3)(b) ECHR to rely on. However, it has at least stated that the accused must be given the opportunity to arrange his defence in a convenient manner and without limiting his ability to put forward all the arguments in his defence before the court and thus influence the outcome of the proceedings. The opportunities that anyone charged with a criminal offence could avail themselves of include the opportunity to learn the results of the investigation to date in order to prepare their defence.¹⁸¹ Lack of time or opportunity to prepare a defence at one stage of the proceedings can be remedied if the defence is given such an opportunity at a later stage (*Serves v. France*¹⁸²).¹⁸³

176 *Pélissier and Sassi v. France*, Application no. 25444/94, Judgment 25 March 1999.

177 *Mattoccia v. Italy*, Application no. 23969/94, Judgment 25 July 2000.

178 *Sadak and Others v. Turkey (Application No. 1)*, Application no. 29900/96, Judgment 17 July 2001.

179 Kmec et al., 2012, pp. 795–797.

180 *Mayzit v. Russia*, Application no. 63378/00, Judgment 20 January 2005.

181 *Galstyan v. Armenia*, Application no. 26986/03, Judgment 15 November 2007.

182 *Serves v. France*, Application no. 20225/92, Judgment 20 October 1997.

183 For more details see Kmec et al., 2012, pp. 803–810.

4.2.3. *Right to Defend in Person or Through Legal Assistance*

As the ECtHR states, while it confers on everyone charged with a criminal offence the right to ‘defend himself in person or through legal assistance ...’, Article 6 para. 3 (c) does not specify the manner of exercising this right.¹⁸⁴ It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court’s task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.¹⁸⁵ In this respect, it must be remembered that the Convention is designed to ‘guarantee not rights that are theoretical or illusory but rights that are practical and effective’ and that assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused.¹⁸⁶

Article 6(3)(c) essentially guarantees a person accused of a criminal offence three rights:¹⁸⁷ to defend himself in person, to defend himself through legal aid of his own choosing or, under certain conditions, to be granted legal aid free of charge.¹⁸⁸ It is up to the accused to decide whether to avail himself of the possibility of having a lawyer or to defend himself. However, if the accused does not wish to use the assistance of a lawyer and voluntarily decides to defend himself, he must also take proper care of his rights himself.¹⁸⁹ The ECtHR remarks:

‘However, the decision to allow an accused to defend himself or herself in person or to assign him or her a lawyer does still fall within the margin of appreciation of the Contracting States, which are better placed than the Court to choose the appropriate means by which to enable their judicial system to guarantee the rights of the defence.’¹⁹⁰

If the accused defends himself, the Convention does not give the accused an unlimited right to use any arguments in his defence.¹⁹¹ It would be beyond the concept of the rights of the accused to hold that they cannot be prosecuted if, in the exercise of those rights, they deliberately make false accusations of criminal conduct against witnesses or other persons involved in the criminal proceedings.¹⁹²

The accused has the right to choose a defence counsel only if he has the means to pay for one.¹⁹³ It is also important that the accused cannot, in principle, be deprived of the right to defend himself with the assistance of a lawyer on the sole ground that he is

184 *Imbrioscia v. Switzerland*, Application no. 13972/88, Judgment 24 November 1993.

185 *Quaranta v. Switzerland*, Application no. 12744/87, Judgment 24 May 1991.

186 *Artico v. Italy*, Application no. 6694/74, Judgment 13 May 1980.

187 *Kmec et al.*, 2012, pp. 803–810.

188 *Pakelli v. Germany*, Application no. 8398/78, Judgment 25 April 1983. Goss is very critical of the current case law of the ECtHR – see Goss, 2023.

189 *Melin v. France*, Application no. 12914/87, Judgment 22 June 1993.

190 *Correia de Matos v. Portugal*, Application no. 48188/99, Judgment 15 November 2001.

191 *Kmec et al.*, 2012, pp. 803–810.

192 *Brandstetter v. Austria*, Application no. 11170/84, Judgment 28 August 1991.

193 *Kmec et al.*, 2012, pp. 803–810.

unwilling to attend criminal proceedings.¹⁹⁴ With regard to free legal aid, the ECtHR states that an accused who does not wish to defend himself must be able to obtain legal aid of his own choosing; if he does not have sufficient means to pay for such aid (the accused's indigence), he is entitled under the Convention to have it provided free of charge if the interests of justice so require.¹⁹⁵ Whether the interests of justice so require is a question to be assessed in the light of the particular circumstances of each individual case. Among the criteria to be taken into account, the ECtHR has included, in particular, the gravity of the offence allegedly committed by the accused and the sanction he faces for its commission; the ability of the accused to defend himself, having regard to his individual circumstances and the nature of the proceedings in question; and the complexity of the case and the issues involved.¹⁹⁶ The competent authorities should duly inform the accused of the possibility of applying for free legal aid and the conditions (material and formal) for its granting.¹⁹⁷ An important part of the right is the right of the accused to communicate with his lawyer without the presence of third parties.¹⁹⁸

As regards the possibility of waiving this right, the Court considers that neither the letter nor the spirit of Article 6 of the Convention prevents a person from expressly or tacitly waiving his right to the guarantees of a fair trial. However, such a waiver must be unequivocal and must be accompanied by minimum guarantees appropriate to its meaning.¹⁹⁹ Any vulnerability of the accused person must also be taken into account.²⁰⁰

4.2.3. *Right to Question Witnesses*

Article 6(3)(d) of the Convention provides that everyone charged with a criminal offence has the right 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. The term 'witness' has an autonomous meaning in the case law of the ECtHR, which may differ from the meaning it has in the legal systems of the Contracting Parties.²⁰¹ The right to examine a witness is not strictly understood by the ECtHR to mean that the accused should be able to conduct the examination of the witness himself, as seen in the adversarial process of the *common law* system; it is fully sufficient if the accused is given the opportunity to comment on the witness's statement and is given the opportunity to ask questions of the witness.²⁰² This is, in principle, also allowed by procedural rules based on the inquisitorial

194 *Krombach v. France*, Application no. 29731/96, Judgment 13 February 2001.

195 *Pakelli v. Germany*, Application no. 8398/78, Judgment 25 April 1983.

196 *Gutfreund v. France*, Application no. 45681/99, Judgment 25 April 2002.

197 *Raykov v. Bulgaria*, Application no. 35185/03, Judgment 22 October 2009.

198 *S. v. Switzerland*, nos. 12629/89 and 13965/88, Judgment 28 November 1991.

199 Kmec et al., 2012, pp. 803–810.

200 *Borotyuk v. Ukraine*, Application no. 33579/04, Judgment 16 December 2010.

201 Kmec et al., 2012, pp. 811–814.

202 Kmec et al., 2012, pp. 811–814.

principle. However, Article 6(3)(c) ECHR does not give the accused an unfettered right to ask any question of the witness; national courts are entitled to exercise some control in this regard.²⁰³

Article 6(3)(d) ECHR contains two fundamental rights. First, the right to ‘examine or have examined witnesses against oneself’, and second, the right to ‘obtain the attendance and examination of witnesses in one’s favour’. The principles governing the interpretation and application of these rights are different; while the refusal of a defence application to examine a witness is not usually a ground for finding a violation of Article 6(3)(d) ECHR, the fact that a conviction is based on the testimony of a witness whom the defence has not had the opportunity to examine is usually found to be in breach of the Convention.²⁰⁴

The ECtHR recognises that it is primarily for national courts to decide whether it is necessary or appropriate to call a witness.²⁰⁵ Article 6(3)(d) ECHR does not require the summoning and examination of every witness on behalf of the accused.²⁰⁶ If the court decides not to grant the accused’s request to examine a witness or witnesses, it should also give proper reasons for its refusal. The accused must always properly request the examination of witnesses and explain why it is important that these witnesses be examined (their examination must be necessary to establish the objective truth).²⁰⁷

With regard to the right to question witnesses against oneself, the ECtHR has traditionally held that limiting the rights of the defence in a manner incompatible with Art. 6 occurs in particular where a conviction is based ‘solely or to a decisive extent’²⁰⁸ on the testimony of a witness whom the accused had no opportunity to interview or have interviewed at the investigation stage or at the trial.²⁰⁹ The ECtHR certainly does not follow a formalistic approach and does not consider any lack of opportunity to question a witness whose testimony has been adduced as evidence in court proceedings to be a violation of the right to examine a witness. Rather, it looks at the matter in a practical manner in that it always examines the relevance of the evidence at issue to the conviction of the accused.²¹⁰

Where an anonymous witness is part of the proceedings, the ECtHR examines whether the use of anonymous testimony has respected the requirements of Article 6(1) in conjunction with Article 6(3)(d) ECHR, in particular in the light of the following criteria: the reasons for concealing the identity of the witness; the relevance of the

203 *Judge v. the United Kingdom*, Application no. 35863/10, Judgment 8 February 2011.

204 *Kmec et al.*, 2012, pp. 811–820.

205 *Vidal v. Belgium*, Application no. 12351/86, Judgment 22 April 1992.

206 *Tarău v. Romania*, Application no. 3584/02, Judgment 24 February 2009.

207 *Perna v. Italy*, Application no. 48898/99, Judgment 6 May 2003.

208 For an interpretation of this concept, see *Al-Khawaja and Tahery v. the United Kingdom*, nos. 26766/05 and 22228/06, Judgment 15 December 2011.

209 *Balšán v. Czech Republic*, Application no. 1993/02, Judgment 18 October 2006.

210 *Kmec et al.*, 2012, pp. 811–820.

evidence to the conviction; and compensation for the difficulties of the defence.²¹¹ The ECtHR generally applies these criteria cumulatively.²¹²

4.2.4. *Right to the Assistance of an Interpreter*

The last of the rights provided for in Article 6(3) is the right to the free assistance of an interpreter if the accused does not understand or speak the language used in court. Given that the aim of Article 6(3)(e) of the Convention is to prevent any inequality between an accused who does not speak and understand the language used in the proceedings before the court and an accused who does speak and understand that language, this provision constitutes a special rule in relation to the general prohibition of discrimination in the exercise of the right to a fair trial within the meaning of Article 14 read in conjunction with Article 6(1).²¹³

The ECtHR very succinctly defined the nature and scope of this right, for example, in its decision *Kamasinski v Austria*:

‘The right, stated in para. 3 (e) of Article 6, to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. Para. 3 (e) signifies that a person ‘charged with a criminal offence’ who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court’s language in order to have the benefit of a fair trial’.²¹⁴

It further added that para. 3 (e) does not go so far as to require a written translation of all items of written evidence or official documents in the proceedings. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.²¹⁵

211 *Krasniki v. Czech Republic*, Application no. 51277/99, Judgment 28 February 2006.

212 *Kamasinski v. Austria*, Application no. 9783/82, Judgment 19 December 1989 and Kmec et al., 2012, pp. 824–828.

213 *Kamasinski v. Austria*, Application no. 9783/82, Judgment 19 December 1989 and Kmec et al., 2012, pp. 824–828.

214 See also *Luedicke, Belkacem and Koç v Germany*, Application nos. 6210/73; 6877/75; 7132/75, Judgment 28 November 1978.

215 *Kamasinski v. Austria*, Application no. 9783/82, Judgment 19 December 1989.

5. Conclusion

The right to a fair trial is undoubtedly one of the key rights and concepts associated with a democratic rule of law and a society based on respect for and the protection of rights and freedoms. As is clear from the above, the interpretation and application of this right is not straightforward. A number of concepts have to be interpreted autonomously, regardless of their designation and regulation in national legal systems. This is the only way to guarantee the equal application of this right in all Contracting States without distinction and the same guarantee of protection of this right. The application of the right to a fair trial is also made more difficult by the fact that it is made up of several sub-rights, some of which are more general in nature, others more specific, some of which are expressly enshrined, others of which have been established by case law. This 'open' concept and conception of this right is undoubtedly to be welcomed, as it allows it to be applied appropriately and to reflect changes in society.

As has been shown above, the ECtHR is of key importance in both the interpretation and enforcement of this right in the practice of the Contracting States. Its jurisprudence in this respect has been developing for decades, although of course it has not escaped problematic aspects, contradictions and also, of course, a certain evolution over time and in response to societal change. In conclusion, it should be stressed that what is important is not only the fact that a given right is legally established and recognised, but above all the fact that it is actually implemented in practice and its observance (and enforcement) guaranteed. Only then does it fulfil its function.

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No Punishment Without Law

Bianca SELEJAN-GUȚAN

ABSTRACT

The Chapter provides a comprehensive overview of the procedural rights related to the right to a fair trial in criminal cases, other than the ones set forth by Art. 6 of the European Convention on Human Rights. These rights are analysed from the perspective of the case law of the European Court of Human Rights, but also of the Explanatory Reports of the various Protocols to the Convention, highlighting the importance of the respect of these rights as a salient part of the overall respect of human rights in Europe.

KEYWORDS

no punishment without law, non-retroactivity, right to compensation, contractual obligations, right to appeal

The European Convention on Human Rights (ECHR) protects several procedural rights, some in its main body and some in the optional protocols. The main procedural rights are directly related to the right to a fair trial and its guarantees, expressly provided by or implied in Art. 6. Another procedural right included in the main body is the right to an effective remedy (Art. 13). Art. 7 provides two rights at the crossroads of substantial and procedural rights in criminal trials: no punishment without law and the non-retroactivity of criminal law, except for the more lenient criminal law. In this Chapter, we analyse the first right provided by Art. 7 and the procedural rights included in the subsequent protocols: the right not to be tried and punished twice, the right to appeal in criminal matters, the right to compensation for wrongful conviction and the prohibition of imprisonment for debt or breach of contractual obligations. Furthermore, the impact of the European Court of Human Rights' (ECtHR) case law regarding these rights on the national law of States and the rule of law in general will be highlighted.

1. No Punishment Without Law – Art. 7 of the ECHR

1.1. The Principle of Legality – Main Concepts

Art. 7 para. 1 of the European Convention on Human Rights (ECHR) reads as follows:

‘(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.’

These rights are guarantees of a fair trial in criminal cases (rights of the accused person) and of the rule of law. Art. 7 is one of the ‘core rights’ provided by Art. 15 of the ECHR, from which no derogation is possible even in times of war or other public emergencies. However, like most Convention rights, the object of the right guaranteed by Art. 7 is not explicitly defined. Therefore, the European Court of Human Rights (ECtHR) deciphered and interpreted the main concepts.

The first guarantee in Art. 7 is based on the principle of *nulla poena sine lege* (no punishment without law). This means that any conviction of a criminal penalty should be procedurally and substantially legal. The procedural basis for the conviction is ensured by Art. 6 ECHR, whereas the substantial foundation lies in Art. 7. Therefore, the ECtHR’s main task was, first and foremost, to define the concept of ‘law’.

1.1.1. The Concept of ‘Law’

The concept of ‘law’ is essential in the economy of the ECHR and its protocols and can be considered one of the ‘red threads’ that goes through it. It can be found in the clauses that set the rules for restricting certain rights (para. 2 of Arts. 8, 9, 10 and 11), in Arts. 5 (procedure prescribed by law) and 6 (tribunal established by law) and in Art. 2 (protected by law). In each instance, the ECtHR defined and interpreted the complex notion of ‘law’ to align the diverse meanings from diverse legal systems of the States Parties to the Convention to the same standard of rights protection.

As a general approach, the Court exercises its supervisory function over the national authorities; however, it ‘only exceptionally’ finds the interpretation and application of national law by national courts to be in breach of Art. 7.¹ Art. 7 is peculiar compared to the other texts that refer to the concept of ‘law’. It expressly invokes the notion of ‘international law’ and the crimes thereby defined, which requires further interpretation in the case law of the ECtHR.

1 Harris et al., 2023, p. 331.

1.1.1.1. Domestic Law

The concept of ‘law’ as part of the domestic legal system is a wide one, as interpreted by the ECtHR. The principle of legality is essential in a rule of law-based state; however, the peculiarities of each legal system must be considered. Thus, in *Cantoni v. France* (1996), the Court established that the notion of ‘law’ within the meaning of Art. 7: ‘comprises the written and unwritten law and implies qualitative conditions’. Furthermore, in *Sunday Times v. UK* (1979), the Court held, although not in the context of Art. 7, but of Art. 10, that: the word ‘law’ in the expression ‘prescribed by law’ covers not only statute law but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation.

In its analysis, the Court referred to the intention of the drafters and various legal traditions of the States Parties:

‘It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not ‘prescribed by law’ on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Art. 10(2) and strike at the very roots of that State’s legal system.’

Mutatis mutandis, this interpretation applies to the concept of ‘law’ used by Art. 7.

Regarding written law, this concept includes, within Art. 7, statute law (statutes understood as acts of Parliament or pieces of primary legislation) and lower-rank normative acts, such as prison regulations² or judicial decisions or case law.³ In a recent Advisory Opinion delivered under Protocol 16 to the Convention,⁴ the Court tackled the matter of judicial interpretation of constitutional provisions related to Art. 7. It admitted that ‘as in the case underlying the request for the present advisory opinion, the referenced constitutional provisions may be formulated as general principles, and therefore in a general and very abstract manner’. This entails the intervention of lower-ranking acts and of ‘non-codified constitutional customs and (...) jurisprudence’. Moreover, the Court cited its case law where it held:

‘Art. 7 of the Convention did not exclude the possibility that evidence of existing constitutional practice could form part of the national courts’ overall analysis of the foreseeability of an offence based on a provision of a constitutional

2 ECtHR, *Kafkaris v. Cyprus* [GC], 2008, para. 138, 145; see ECtHR, *De Wilde, Ooms and Versyp v. Belgium* (1971).

3 ECtHR, *Kafkaris v. Cyprus* [GC], 2008, para. 138.

4 ECtHR [GC], Advisory Opinion concerning the use of the ‘blanket reference’ or ‘legislation by reference’ technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, 2020, para. 69.

nature in the context of fundamental constitutional principles regulating the separation of powers.⁵

Although the Advisory Opinion has no binding force, it reflects the authoritative position of the Court and could become a part of the *res interpretata* effect of the Court's jurisprudence. Hence, Art. 7 does not apply to procedural regulations and only to substantive criminal law regulating the definition of the offences and penalties. This is important for temporal application because substantive criminal law can be applied retroactively, whereas procedural criminal law requires immediate application. Particularly important are the rules concerning the statute of limitations. According to the Court's case law, the rules on limitation periods are procedural. However, it held that the revival of prosecution after the expiry of the limitation period was contrary to Art. 7⁶ because of the penalty effects. The Court reminded:

'Limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period since the offence has been committed. Limitation periods are a common feature of the domestic legal systems of the Contracting States and serve several purposes, including that of ensuring legal certainty.'

Regarding the case at hand, the Court mentioned that 'the expiry of the statute of limitations in the applicants' case was explicitly established by the Supreme Court'. However, concerning the applicants, the way in which the domestic courts apply the rules regarding the statute of limitations could lead to uncertainty regarding their penalty and, therefore, was concluded as a violation of Art. 7.

1.1.1.2. International Law

The notion of 'international law' used by Art. 7(1) covers the classic sources of international law: international treaties⁷ ratified by the respondent state, international customary law, including laws and customs of war,⁸ genocide and other crimes against humanity as part of *ius cogens*.⁹ For example, in *Kononov v. Latvia*, the Court held that:

'The 1926 Criminal Code did not contain a reference to the international laws and customs of war and that those international laws and customs were not

5 ECtHR, *Haarde v. Iceland*, 2017, para. 129.

6 ECtHR, *Antia and Khupenia v. Georgia*, 2020. See: ECtHR, Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture, Requested by the Armenian Court of Cassation (Request No. P16-2021-001), *Strasbourg*, 26 April 2022, para. 76.

7 ECtHR [GC] *Streletz, Kessler and Krenz v. Germany*, 2001, para. 73.

8 ECtHR [GC] *Kononov v. Latvia*, 2010.

9 ECtHR [GC] *Korbely v. Hungary*, 2008, *Vasiliauskas v. Lithuania*, 2015, *Kononov v. Latvia*, 2010.

formally published in the USSR or in the Latvian SSR (as in *Korbely (...)* paras. 74–75). However, this cannot be decisive (...). international laws and customs of war in 1944 were sufficient, of themselves, to found individual criminal responsibility.’¹⁰

1.1.2. *The Concept of ‘Being Held Guilty of a Criminal Offence’*

The ECtHR has not interpreted ‘criminal offence’ for Art. 7. Therefore, the interpretation used by Art. 6 of the Convention is applicable. In Art. 6, the Convention uses the terms ‘criminal charge’ in para. 1 and ‘criminal offence’ in para. 2. The Court interpreted the meaning of the term used in para. 1 and applied it, *mutatis mutandis*, to the guarantees provided by paras. 2 and 3. The ‘original’ criteria for assessing the criminal nature of an offence in domestic law were stated in the famous *Engel and others v. Netherlands* case (1976) and comprised, besides the classification of the offence as ‘criminal’ in domestic law, the nature of the offence and the severity of the penalty imposed.

Regarding applicability, it is important to emphasise that Art. 7 only applies when the person has been ‘found guilty’ of committing ‘any criminal offence’. The decision of guilt, within this text, entails the imposition of a criminal sanction by a final judicial decision. Thus, an ongoing prosecution cannot be considered the finding of guilt and security measures, such as decisions to extradite or other pre-trial measures, cannot be implemented. However, if the actual conviction by a court of law was avoided due to the statute of limitations, even though the substantive elements of the offence were proved, including a formal declaration of criminal liability before the actual conviction, the Court stated that there was a ‘conviction’/finding of guilt within Art. 7.¹¹

1.1.3. *The Concept of ‘Penalty’*

The notion of ‘penalty’ is one of the autonomous concepts of the Convention, alongside ‘civil rights and obligations’, ‘criminal charge’ and ‘home’. The Court acknowledged this in *G.I.E.M. S.r.L. and Others v. Italy* (2018) regarding its method of assessing the meaning of the concept regarding the effectiveness of Art. 7:

‘The Court reiterates that the concept of a ‘penalty’ in Art. 7 has an autonomous meaning. To render the protection offered by this Art. effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a ‘penalty’ within the meaning of this provision.’¹²

The first factor accounted for by the Court in its assessment of a ‘penalty’ is the causality link between the ‘conviction’/finding of guilt of a criminal offence and the ‘penalty’.

10 ECtHR [GC] *Kononov v. Latvia*, 2010, para. 237.

11 ECtHR [GC], *G.I.E.M. S.R.L. and Others v. Italy*, 2018.

12 *Ibid.*, para. 210

However, as stated, the lack of conviction is insufficient to remove a penalty. Other factors used by the Court to identify a penalty, depending on each case, are: (a) Characterisation of the measure under national law; (b) Punitive purpose of a measure; (c) Severity of the measure in connection with its punitive purpose. However, the Court stated that ‘the severity of the order is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned’;¹³ (d) Manner and conditions of execution of the measure. The elements related to the execution are seen in connection to the severity of the measure; however, not decisively. For example, in *Ilmseher v. Germany*, which involved a criminal offence committed by a person with a mental disorder, the Court held that, in general: the specific conditions of execution of the measure in question may be relevant in particular for the nature and purpose, and also for the severity of that measure and thus for the assessment of whether or not the measure is to be classified as a penalty for the purposes of Art. 7 para. 1. These conditions of execution may change during a period of time covered by the same judicial order.¹⁴

However, regarding the case circumstances: The applicant’s preventive detention was imposed because of and with a view to the need to treat his mental disorder, having regard to his criminal history. The Court accepts that the nature and purpose of his preventive detention, in particular, was substantially different from those of ordinary preventive detention executed irrespective of a mental disorder. The punitive element of preventive detention and its connection with the criminal offence committed by the applicant was erased to such an extent in these circumstances that the measure was no longer a penalty.

Hence, Art. 7 was not breached.

Therefore, a variety of measures have been considered by the Court as being ‘penalties’ within Art. 7: (a) Imprisonment following a final conviction; (b) Confiscation of property following the finding of guilt, ‘in view of its punitive purpose, in addition to its preventive and compensatory nature’;¹⁵ (c) Administrative fines imposed for the wrongful construction of a building¹⁶ or wrongful market manipulation;¹⁷ (d) Confiscation of land on the grounds of illegal site development;¹⁸ (e) Preventive detention ordered by a national court following a conviction for serious offences for applicants undergoing therapy in specialist centres or ordinary prisons (a series of cases against Germany).¹⁹

13 ECtHR [GC] *Del Rio Prada v. Spain*, 2013, para. 82.

14 ECtHR [GC] *Ilmseher v. Germany*, 2018, para. 204.

15 ECtHR [GC] *Welch v. United Kingdom*, 1995, para. 29.

16 ECtHR, (dec.) *Valico v. Italy*, 2006.

17 ECtHR, *Georgouleas and Nestoras v. Greece*, 2020.

18 ECtHR, *G.I.E.M. S.R.L. and Others v. Italy*, 2018.

19 ECtHR, *M. v. Germany*, 2009, *Bergmann v. Germany*, 2016.

Nonetheless, other measures were excluded from the meaning of the concept:²⁰ (a) Preventive detention ordered by a criminal court following conviction for a serious criminal offence, whose execution conditions were essentially altered by a new legislation to ensure treatment for the prisoner's mental disorder. This situation was considered an evolution (dynamic) of the initial penalty and the measure ceased to be considered a penalty due to the changes;²¹ (b) Preventive detention imposed on a person lacking criminal responsibility;²² (c) Prohibition of residence, imposed in addition to imprisonment, following a criminal conviction;²³ (d) Administrative surveillance for preventive purposes, after serving the sentence, and further restrictions on freedom of movement and imposing reporting obligations.²⁴

Hence, a distinction should be drawn between the 'penalty' and 'enforcement of penalty'. The enforcement takes place after the 'imposition of the penalty' mentioned in Art. 7. The manner of enforcement may influence the punitive nature of a measure; however, in general, measures related to enforcement that concern the remission of a sentence or conditional release from prison are not considered part of the 'penalty' within Art. 7.²⁵ In other cases, the manner of enforcement influences the nature of the penalty and must be considered a part of it. The Court examines, case-by-case, the nature of the penalty and the measure where the enforcement affects the scope of the penalty, whereby the enforcement measure falls within Art. 7.²⁶

1.2. Principle of Legality and the Quality of Law – The Substance of the Principle

The principle of legality is the essential feature of the rule of law and the legality of offences and penalties is a central part of the principle of legality. Therefore, the ECtHR, as the main guardian of the 'European legal order'²⁷ is strict in requiring the existence of a legal basis for criminal convictions, which should fulfil certain quality features: accessibility, foreseeability and non-retroactivity of the more severe criminal law. Notably, the ECtHR does not censor the decisions of the national courts. According to the fourth instance doctrine,²⁸ it does not assess the way in which national courts deal with the facts of the case or apply national law, unless these actions breach the ECHR's rights (e.g., use of unlawfully collected evidence or other breaches of the right to a fair trial guarantees). Regarding Art. 7, the Court's mission in the cases brought before it is particularly important in assessing the quality of the 'law' that forms the basis of the conviction.

20 For a complete list, see: ECtHR, Guide on Art. 7 of the European Convention on Human Rights.

21 ECtHR, *Ilmseher v. Germany*, 2018.

22 ECtHR, *Berland v. France*, 2015.

23 ECommHR (dec.), *Renna v. France*, 1997.

24 ECtHR, *Timofeyev and Postupkin v. Russia*, 2021.

25 See, for example: ECtHR, *Kafkaris v. Cyprus* [GC], 2008, para. 151.

26 See: Guide on Art. 7 of the European Convention on Human Rights, p. 11.

27 Sudre, 1996, p. 50.

28 Harris et al., 2009, pp. 14–15.

1.2.1. *Quality of Law – Accessibility, Clarity, Foreseeability, Non-retroactivity*

The quality of the law has become a general standard for all Convention rights, especially for the ‘conditional’ ones, that is, the rights for which para. 2 of the respective Arts. 8–11 sets forth the restrictions by the State. Thus, all restrictions must, first and foremost, be ‘prescribed by law’. In such cases, and in the case of the legality required by Art. 7, the ‘law’ within the meaning of the Convention must meet certain quality requirements to be considered the basis for legitimate measures of rights’ restriction. Hence, some quality requirements are addressed to the legislator (accessibility, clarity, non-retroactivity and foreseeability) while others are addressed to the judge (foreseeability and interpretation of non-retroactivity).

1.2.1.1. Accessibility of the Law

Within the interpretation of Art. 7, accessibility of the law means that the criminal law establishing criminal offences and penalties is sufficiently accessible to the public, in general, and to the applicant, in particular. Thus, the law must be made public through the official means of publication of the concerned state. The matter of accessibility becomes sensitive in cases when the conviction is based on international law. In *Kononov v. Latvia* (2010) and *Korbely v. Hungary* (2008), the Court verified whether the international treaty in question (in the *Korbely* case, the Geneva Conventions on Humanitarian Law) was sufficiently accessible to the applicant. The Court stated that, although the ratification document – a Law-Decree – did not contain the text of the Geneva Conventions:

‘In 1955 the Ministry of Foreign Affairs arranged for the official publication of a brochure containing the text. It is also to be noted that an order of the General Chief of Staff was published in the Military Gazette on 5 September 1956 on the teaching of the Conventions and was accompanied by a synopsis of them. In these circumstances, the Court is satisfied that the Geneva Conventions were sufficiently accessible to the applicant.’²⁹

1.2.1.2. Clarity and Foreseeability of the Law

Clarity of the law means that the criminal offence should be defined in clear and non-ambiguous terms. The criminal behaviour in particular cases should be clearly identified in reference to the legal provisions establishing the offences. As stated in the doctrine, ‘the clarity must be appreciated in the light of the ‘ordinary legal experience’, because an absolute precision is impossible, therefore a great caution is necessary in this matter, by taking into account the interests at stake’.³⁰ Thus, this condition

29 ECtHR, *Korbely v. Hungary*, 2008, para. 75.

30 Renucci, 2009, p. 287.

is met when the justiciable persons can understand ‘what are the acts or omissions that engage criminal responsibility’ from the legal text, or the related case law.³¹

Clarity and foreseeability are two sides of the same coin in the economy of the rights protected by Art. 7. However, clarity is more related to the definition of the criminal acts and the limits of the penalties, while foreseeability requires a degree of interpretation of the legal provisions in reference to the individual behaviour of the applicant, that is, to be able to foresee the element of criminal responsibility within a particular act or omission. Therefore, if clarity is more objective, foreseeability is more subjective: ‘Art. 7 requires a mental link disclosing an element of liability in the conduct of the actual perpetrator of the offence if a penalty is to be imposed’.³² Although, clarity cannot be completely dissociated from foreseeability; however, they must be assessed separately. For example, the use of vague terms in a legislative text defining an offence can lead to the text being declared unclear and unforeseeable and incompatible with the Convention, as in *Liivik v. Estonia* (2009):

‘The Court finds on the whole that the interpretation and application of Art. 161 in the present case involved the use of such broad notions and such vague criteria that the criminal provision in question was not of the quality required under the Convention in terms of its clarity and the foreseeability of its effects.’³³

Regarding Art. 7, clarity and foreseeability are not conditioned by the understanding of the meaning of the law by a person without legal training. Thus, the quality requirements are met even if the concerned persons seek legal advice to assess the consequences of their behaviour and the risks of engaging in criminal responsibility.³⁴ Like accessibility, a special situation is that of convictions based on provisions of international criminal law. In these cases, similar to foreseeability, the Court assesses the requirement by accounting for the standards of international law (definitions, case law, interpretation) applicable at the time of the facts. For example, in *Jorgic v. Germany* (2007), the Court held:

‘The German courts’ interpretation has not only been supported by a number of scholars at the relevant time of the commission of the crime (...), the United Nations General Assembly also agreed with the wider interpretation adopted by the German courts in the present case in its Resolution 47/121 of 18 December 1992.’³⁵

31 Ibid, p. 288. For a controversial issue of clarity, see: *Cantoni v. France* (1996) and the related scholarship, for instance, Petit, 1997, p. 5.

32 ECtHR, *G.I.E.M. Srl and Others v. Italy*, 2018, para. 242.

33 ECtHR, *Liivik v. Estonia*, 2009, para. 101.

34 ECtHR, *Cantoni v. France*, 1996, para. 35; *Pessino v. France*, 2006, Para. 33; *Radio France and others v. France*, 2004, para. 20.

35 ECtHR, *Jorgic v. Germany*, 2007, para. 107.

Similar to the nature of the rights guaranteed by Art. 7, foreseeability is a requirement for national courts. No matter how clear a criminal legal provision may be, its actual effects on individual rights result from judicial decisions. The ECtHR acknowledged:

‘Art. 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.’³⁶

Hence, the judicial interpretation of criminal norms should meet the requirement of foreseeability. For example, in *Dragotoniu and Militaru-Pidhorni v. Romania* (2007), this requirement was not met by the judicial decisions convicting the applicants. The Court noted:

‘The absence of prior case law concerning the assimilation of the passive corruption offences of bank employees with those of ‘public officers’ and ‘other employees’ of the [public] organisations provided by the Criminal Code resulted from the fact that the Government has not produced any precedents in this respect (...). A different reasoning would mean to disregard the object and purpose of this disposition, which imposes that no one shall be convicted in an arbitrary manner (...). By consequence, even as professionals who could be surrounded by legal advisers, it was difficult, if not impossible, for the applicants to foresee the supreme court’s reversal of case law and thus to know that at the moment of their commission, their facts could entail criminal responsibility.’³⁷

Thus, an unforeseeable reversal of case law could entail a breach of Art. 7. Moreover, as stressed by the Court, the interpretations in the legal doctrine cannot replace judicial interpretations.

An interesting application of judicial foreseeability, although rare in the States Parties to the Convention, is jury trials. The Court established, in an inadmissibility decision, that:

‘In any criminal justice system based on trial by jury many defences are left for the jury to decide. Frequently, those defences involve an assessment of reasonableness, such as whether reasonable force has been used in self-defence. In any such case, any uncertainty is considerably lessened by the fact that the jury will have the benefit of full submissions from prosecution and defence counsel and the directions contained in the trial judge’s summing up.’

36 ECtHR, *S.W. v. UK*, 1995, Para. 36. See also Sudre et al., 2023, p. 700.

37 ECtHR, *Dragotoniu and Militaru-Pidhorni*, 2007, paras. 43–44.

In the case at hand:

‘The House of Lords’ ruling in the applicant’s case gave clear directions as to the factors which a trial judge could indicate to a jury in considering the issue of ‘reasonable excuse’ (...). These factors provide full and appropriate guidance as to the scope of the jury’s discretion (...) and how that discretion should be exercised’.

Therefore, the Court decided that the complaint was manifestly ill-founded under Art. 35 paras. 3 and 4 of the Convention. Hence, the quality of the law is at the core of the principle of legality. In the absence of accessibility, clarity and foreseeability, the ‘law’ lacks fundamental features required to effectively implement the rights guaranteed. In substantive criminal law, another essential feature that goes hand-in-hand with the other three is the non-retroactivity of the more severe legal provisions.

1.2.1.3. Non-Retroactivity of the More Severe Criminal Law and Retroactive Application of More Lenient Criminal Law (*Lex Mitior*)

Time is an essential element of the rights protected by Art. 7 ECHR. Imperatively, Art. 7 prohibits a person from being convicted to a ‘heavier penalty’ than the one applicable ‘at the ‘time’ the criminal offence was committed’. Therefore, a more severe criminal law concerning penalties cannot be applied retroactively. Non-retroactivity of any law is crucial for the rule of law; however, it has a special application and meaning in criminal law. Nonetheless, since time is so important in criminal law, it allows the only exception from non-retroactivity, that is, the retrospective application of the more lenient criminal law (*lex mitior*). Art. 7 expressly provides non-retroactivity, whereas the *lex mitior* principle was deduced by the ECtHR as a logical consequence of the former.

Non-retroactivity of criminal law concerns both aspects in the first sentence of Art. 7(1): the laws defining the offences and the provisions setting the penalties for each offence. The principle applies to the duration of the criminal trial and after the sentence has been imposed or during the execution of the penalty. In *Del Rio Prada v. Spain*, the Court stated:

‘While the Court accepts that the States are free to determine their own criminal policy, for example by increasing the penalties applicable to criminal offences (...), they must comply with the requirements of Art. 7 in doing so (...). On this point, the Court reiterates that Art. 7 of the Convention unconditionally prohibits the retrospective application of the criminal law where it is to an accused’s disadvantage.’³⁸

38 ECtHR [GC], *Del Rio Prada v. Spain*, 2013, para. 116.

The applicant had been convicted to a maximum imprisonment term, and, at the time of conviction, there was no indication of any changes in case law at the Supreme Court. However, the Supreme Court reversed its case law in this case, increasing the length of the penalty, which was considered by the ECtHR a breach of the non-retroactivity principle. The non-retroactivity principle applies, in certain conditions, to the statute of limitations: the immediate application of a law, which extends the periods of limitations, is not in breach of Art. 7 ‘since that provision cannot be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation’.³⁹

Regarding non-retroactivity, the Court rules on a case-by-case basis rather than creating general standards. For example, it ruled that a penalty of life imprisonment was not heavier than the death penalty, in cases where the death penalty, although applicable at the time of the offence, was subsequently abolished and replaced by life imprisonment.⁴⁰ In other cases, it had to compare imprisonment penalties with detention in a psychiatric ward⁴¹ or assess the effects of the application of the rules of release on parole on the severity of the penalty.⁴²

In contrast with other human rights international instruments (Art. 15(1) ICCPR and Art. 9 American Convention on Human Rights), the retroactive application of the more lenient criminal law is not expressly provided by Art. 7 ECHR. The jurisprudential entrenchment of this principle came late in the development of the ECtHR’s case law, in the landmark case of *Scoppola v. Italy* (No. 2) (2009). The Grand Chamber of the Court analysed the evolution of international law in this matter, including the Statute of the International Criminal Court, the case law of the International Criminal Tribunal for the former Yugoslavia and the EU Charter of Fundamental Rights, in which the principle was entrenched. The fact that the Court of Justice of the European Union (CJEU) had expressly recognised *lex mitior* as ‘a part of the constitutional traditions of the Member States’ of the EU was an incentive for the ECtHR in *Berlusconi and Others* (2005).⁴³ Thus, the evolution of international law encouraged the Court to conclude that the retroactivity of the more lenient criminal law can be considered a consequence of the second sentence of Art. 7(1):

‘A consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law. (...) [The Court] observes that in prohibiting the imposition of ‘a heavier penalty ... than the one that was applicable at the time the criminal offence was committed’, Para. 1 *in fine* of Art. 7 does

39 ECtHR, *Coëme v. Belgium*, 2000, para. 149.

40 ECtHR, *Oçalan v. Turkey* (no.2), 2001, para. 177.

41 ECtHR, *Kadusic v. Switzerland*, 2018.

42 ECtHR, *Kupinsky v. Ukraine*, 2022.

43 CJEU [GC], C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, para. 68.

not exclude granting the accused the benefit of a more lenient sentence, prescribed by legislation subsequent to the offence.⁴⁴

In *Parmak and Bakir v. Turkey* (2019), the Court held that the principle of retroactive application of the more lenient criminal law applied to the rules related to the definition of the offences as well. In *Maktouf and Damjanovic v. Bosnia and Herzegovina* (2013), the Court analysed the effects of each successive criminal law and did not decide *in abstracto* on the application of one or the other. The Government argued that the new law was more lenient because it decriminalised the death penalty. However, the Grand Chamber of the Court found that the old law was more lenient:

‘Since there exists a real possibility that the retroactive application of the 2003 Code operated to the applicants’ disadvantage as concerns the sentencing, it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Art. 7 of the Convention.’⁴⁵

The importance of the specific circumstances of the applicants in the case was highlighted in a more recent case law, such as the

‘Advisory Opinion concerning the use of the ‘blanket reference’ or ‘legislation by reference’ technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law (2020).’

Continuing offences present a special situation. These are offences whose commission is spread over a longer period, under successive criminal legislations. The ECtHR defined continuing offences as ‘a type of crime committed over a period of time’, held that ‘the principle of legal certainty required that the acts which went to make up that offence, and which entailed his criminal liability, be clearly set out in the bill of indictment’⁴⁶ and required that the elements of the continuing offence result from the decision of the domestic court. Thus, it is the domestic court’s task ‘to interpret the provisions of substantive criminal law in order to determine, by reference to the structure of each offence, the date on which, all the requirements of the offence being present, a punishable act was committed’. In *Ecer and Zeyrek v. Turkey*, these conditions were not met; therefore, the Court found a violation of Art. 7(1). In another case, the Court had to decide if the conviction of a person under the new law for a crime introduced by the new law and classified as a ‘continuing offence’ was contrary to the principle of non-retroactivity. The Court stated that the national law considered ‘continuing offence’ as a single act. Hence, it was assessed under the criminal law

44 ECtHR, *Scoppola v. Italy* (no.2.) [GC], 2009, paras. 106–107.

45 ECtHR, *Maktouf and Damjanovic v. Bosnia and Herzegovina* [GC], 2013, para. 70.

46 ECtHR, *Ecer and Zeyrek v. Turkey*, 2001, para. 33.

applicable at the time when the last element of the offence was committed. Therefore, it did not amount to a retroactive application of the new criminal law and did not breach Art. 7(1).⁴⁷

The foreseeability of the law can be an issue in cases concerning continuing offences. Thus, if the conviction and the penalty were not foreseeable at the material time of the commission of the last act of the offence and the change of the law increased the penalty imposed, this was considered by the Court a violation of the principle of non-retroactivity of the more severe criminal law.⁴⁸

1.2.2. *Special Situations Issued Due to the Application of International Law*

Art. 7(1) includes international law in the concept of ‘law’ to establish the legality of offences and penalties, which could lead to situations resulting from the specificity of the application of international law: definition of crimes under international law and the effect of the change of constitutional regime (without changes in the nature of the State) and the situation of state succession (crimes committed under a national regime of a state that was dismantled and the prosecution occurred under the legal regime of the successor state).

1.2.2.1. Definition of International Crimes Under Different National Legal Regimes
In *Korbely v. Hungary* (2008), the ECtHR found that, at the time of the commission of the crimes against humanity – the violent events in 1956 in Hungary – it was not foreseeable for the applicant that the impugned acts constituted such crimes and the conviction was considered contrary to Art. 7. However, this was not a general standard set by the Court and was decided strictly according to the circumstances of the case.

However, in *Kononov v. Latvia*, the applicant, who was convicted for war crimes, contested the conviction on the grounds of retroactive application of more severe criminal law. Nevertheless, the Court reminded that, when the offences were committed, war crimes were clearly defined in international law. Therefore, the applicant’s conviction had a sufficiently clear basis in the international law in force in 1944.⁴⁹ The Court concluded that, from the international legal rules at the time of the commission of the offences, it cannot be deduced that the crimes were statute-barred:

‘Firstly, that any prescription provisions in domestic law were not applicable (...) and, secondly, that the charges against the applicant were never prescribed under international law (...). It therefore concludes that the prosecution of the applicant had not become statute-barred.’⁵⁰

47 ECtHR, *Rohlena v. Czech Republic*, 2015, para. 62.

48 ECtHR, *Puhk v. Estonia*, 2004, para. 34.

49 ECtHR, *Kononov v. Latvia*, 2007, para. 222.

50 Ibid, para. 233.

Thus, the principle of imprescriptibility of war crimes was applied in the case. A similar approach was taken in *Jorgic v. Germany* (2007) regarding the genocide committed during the war in the former Yugoslavia.

1.2.2.2. The Case of State Succession

This special situation derives from major changes in the political regime or changes regarding the state sovereignty over a territory. The CJEU ruled that it was legitimate for a state and, in accordance with the principle of legal certainty, to bring criminal charges against persons who committed crimes under a former regime, especially when these crimes were against the right to life and were considered as such under international law as well. The leading case in this matter was *Streletz, Kessler and Krenz v. Germany* (Grand Chamber, 2001), where the Court found that the convictions of political leaders of the former ‘German Democratic Republic’ and of a former border guard (for murders of persons from East Germany attempting to leave the country between 1971 and 1989) were foreseeable under domestic and international law. Thus, it noted:

‘Irrespective of the GDR’s responsibility as a State, the applicants’ acts as individuals were defined as criminal by Art. 95 of the Criminal Code [StGB-DDR] (...) Any person whose conduct violates human or fundamental rights ... may not plead statute law, an order or written instructions in justification; he shall be held criminally responsible (...) There is accordingly no doubt that the applicants bore individual responsibility for the acts in question.’⁵¹

Hence, from the international law perspective, the Court held that, ‘If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned’.⁵² In the case of new States or restored States, the Court decided that a conviction based on the legislation of such a State for crimes under international law was foreseeable and in conformity with Art. 7.⁵³

1.3. Conclusion

Art. 7 of the ECHR and its principle – no punishment without law, in a broad sense – is an essential part of the rule of law in general and of legal certainty in particular. The development of this principle through the interpretations of the ECtHR is important to the States Parties to the ECHR and to the entire European legal system for a high degree of integration and the principle of ‘mutual trust’ developed by the CJEU within the EU.

51 ECtHR, *Streletz, Kessler and Krenz v. Germany* [GC], 2007, paras. 75–76.

52 Ibid, para. 104.

53 See, for example: *Vasiliauskas v. Lithuania* [GC], 2015, *Kuolelis, Bartasevicius and Burokevicius v. Lithuania*, 2008.

The ECtHR defined the key concepts in Art. 7 and identified and imposed the standards of respect for the rights. The interpretation of the core notion of ‘law’ is particularly important, considering the diversity of the legal systems in the States Parties. The European standards of the quality of the law were applied and extended regarding the salient principle of legality in establishing offences and penalties. Alongside the case law on the right to a fair trial, this work of the Court on Art. 7 contributed to the development of the domestic legislations and practices towards the general standards of the rule of law and legal certainty, which are important for Europe, especially in the Central and Eastern European countries.

2. *Non Bis in Idem* – The Right Not to Be Tried and Punished Twice – Art. 4 of Protocol No. 7

The right to not be tried and punished twice for the same offence – *non bis in idem* – is set forth by Art. 4 of Protocol no. 7 to the ECHR. The text was inspired by Art. 14(7) of the International Covenant on Civil and Political Rights. This principle guarantees a fair trial in criminal proceedings, which was excluded from Art. 6 ECHR. This means that only claims against a State that is a party to Protocol no. 7 will be admissible before the ECtHR.

Art. 7 Protocol 7 reads:

‘1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding Para. shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Art. shall be made under Art. 15 of the Convention. This text highlights several conditions of application of this principle:

1. The *non bis in idem* principle only applies to criminal proceedings. If a person is subjected to proceedings of a different nature (civil, disciplinary) for the same offence, the principle will not apply.

2. The *non bis in idem* principle only applies to the jurisdictions of the same State, for the same offence for which the person concerned was acquitted or convicted. Therefore, the Court will declare complaints as inadmissible regarding duplication of proceedings involving more than one State.⁵⁴

54 ECtHR, *Krombach v. France* (decision), 2018.

3. The *non bis in idem* principle allows the reopening of cases when there is evidence of newly discovered facts that would influence the outcome of the trial, or if there has been a fundamental error in the proceedings, which could affect the outcome.

4. The *non bis in idem* principle is an inderogable right according to Art. 15 ECHR.

Beyond these express provisions, it was for the Strasbourg authorities – the former Commission and the Court – to define the main terms used in the text and make the necessary clarifications regarding their application.’

2.1. Criminal Proceedings

2.1.1. Meaning of ‘Criminal Proceedings’

For Art. 4 Protocol 7 to be applicable, several conditions must be met, the main one being the ‘criminal’ nature of the duplicated proceedings. The CJEU applied, like in Art. 7, the principle of coherence for interpreting the Convention. Regarding Art. 4 Protocol 7, this applies to ‘criminal proceedings’, which has the same meaning, according to the Court, as ‘criminal charge’ used by Art. 6 ECHR, and must be interpreted in conformity with the jurisprudential criteria presented in *Engel and Others v. The Netherlands* (1976):

‘The concept of a ‘criminal charge’ within the meaning of Art. 6 para. 1 is an autonomous one. Its established case law sets out three criteria, commonly known as the ‘*Engel* criteria’, to be considered in determining whether or not there was a ‘criminal charge’.⁵⁵

The *Engel* criteria are the classification of the offence under domestic law, the nature of the offence and the degree of severity of the penalty that the concerned person risks incurring.

2.1.2. Do the Proceedings Have the Same Nature?

The case law of the ECtHR and the former Commission, regarding Art. 4 Protocol 7, frequently concerned the determination of whether the various proceedings conducted in relation to a specific applicant were criminal or not. For example, the prohibition to remain on the territory of a State because of committing an offence is not a ‘criminal charge’ under Art. 6. Therefore, the conviction of a foreign citizen to an imprisonment penalty and prohibition to remain on the national territory does not breach Art. 4.⁵⁶

Disciplinary proceedings pursued simultaneously with criminal proceedings determine the non-applicability of Art. 4. For example, administrative proceedings

⁵⁵ ECtHR, *Mihalache v. Romania*, 2019, para. 54.

⁵⁶ ECtHR, *Maaouia v. France*, 2000

against one of the applicants for non-compliance with safety regulations, in parallel with criminal proceedings for deliberately setting fire to items of value, did not breach Art. 4.⁵⁷ Similarly, the withdrawal of the driving licence following a criminal conviction for an offence related to driving did not entail the application of Art. 4.⁵⁸ However, if the withdrawal took place several months after the conviction and was a direct consequence of it, the Court could not consider it a safety measure and equated it with a criminal sanction. Nonetheless, no breach of Art. 4 was decided because the second penalty was considered accessory to the first one.⁵⁹ Generally, in the Court's case law, driving bans are considered preventive measures and not criminal penalties. The same goes for revocations of licenses and various permits.

Regarding administrative fines and other administrative sanctions, some of them are considered by the Court as 'criminal' penalties because of the degree of severity. For example, an administrative fine for refusing to provide a blood sample for determining the blood alcohol level of a driver amounted to a criminal penalty.⁶⁰ In other cases, the financial severity of the fine is essential for establishing its 'criminal' nature.⁶¹ Imprisonment proceedings for 'minor offences' are considered 'criminal' penalties, making Art. 4 applicable.⁶²

2.2. 'An Offence for Which S/he Has Already Been Acquitted or Convicted'

Another applicability issue is whether the person concerned was tried and convicted twice for the same offence.

2.2.1. The Same Offence (Idem)

When the same criminal behaviour gives rise to two distinct criminal offences, Art. 4 is not applicable. This condition was the most difficult to establish, from the point of view of uniformity.⁶³ In the landmark case *Sergey Zolotukhin v. Russia* (2009), the Grand Chamber of the Court acknowledged that the previous Commission and Court jurisprudence took different approaches to establish whether the 'same offence' was in question. In line with the principle of effective protection of rights, the Grand Chamber considered that the criterion of the legal classification of the two offences, used in previous case law,⁶⁴ was too restrictive. Therefore, the Court took the approach of identity of conduct⁶⁵ as a basis for the identity of offences:

57 ECtHR, *Kurdov and Ivanov v. Bulgaria*, 2011.

58 ECtHR, *Hangl v. Austria* (decision), 2001.

59 ECtHR, *Maszni v. Romania*, 2001.

60 ECtHR, *Mihalache v. Romania* [GC], 2019.

61 ECtHR, *Grande Stevens and Others v. Italy*, 2014, *C.Y. v. Belgium*, 2024; *Mihalache v. Romania*, 2019, *Sancakli v. Turkey*, 2018.

62 ECtHR, *Sergey Zolotukhin v. Russia* [GC], 2009. For other cases in which Art. 4 does not apply, see Guide on Art. 4 of Protocol No. 7 – Right not to be tried or punished twice, 29 February 2024, pp. 10–12.

63 See also: Harris et al. 2023, p. 986.

64 For example, in *Gradinger v. Austria* (1995) or *Ponsetti & Chesnel v. France*, 1999.

65 See Gauthier et al. 2017, p. 326.

‘Art. 4 of Protocol No. 7 should be understood as prohibiting the prosecution or trial of an individual for a second offence, insofar as it arose from identical facts or facts which were ‘substantially’ the same as those underlying the first offence.’⁶⁶

For example, the Court found, in its case law concerning the withdrawal of driving licenses, that although different sanctions (criminal sanctions and withdrawal of driving licences) concerning the same matter (drunken driving or driving in excess of the speed limit) had been imposed by different authorities in different proceedings, there had been a sufficiently close connection between them, in substance and time, to make Art. 4 applicable.⁶⁷

In *Vasile Sorin Marin v. Romania* (2024), the duplication of proceedings concerned a socially offensive conduct that disturbed public order, for which the applicant had to pay an administrative fine and was prosecuted. However, the Court found that the criminal charges brought against the applicant comprised the administrative offence, which did not contain any elements that were not present in the criminal offence, with which the applicant was charged. Thus, the facts constituting the two offences had to be regarded as the same for Art. 4 Protocol 7 ECHR.⁶⁸

In *Johannesson and Others v. Iceland*, the Court stated:

‘The applicants’ conviction and the imposition of tax surcharges were based on the same failure to declare income and that tax proceedings and the criminal proceedings concerned the same period of time and essentially the same amount of evaded taxes.

Therefore, the criminal offences for which the applicants were prosecuted and convicted were considered ‘the same’ as those for which the tax surcharges were imposed. Thus, Art. 4 applied.’⁶⁹

Concerning the identity of the offence, the principle of *non bis in idem* has been interpreted by the CJEU.⁷⁰ An interesting approach was the one in the joint cases *Menci and Garlsson Real estate and Others*,⁷¹ where the Court, in its competence to answer preliminary rulings requests, accepted that, in view of the obligation of the EU Member States to take all legislative and administrative measures for collecting VAT and preventing fraud, it is acceptable to have a ‘dual approach’ regarding penalties, that is, a criminal and an administrative penalty. However, several other criteria should apply for such a dual approach to be consistent with *non bis in idem*.

66 ECtHR, *Sergey Zolotukhin*, 2009, para. 82.

67 ECtHR, *Boman v. Finland*, 2015.

68 ECtHR, *Vasile Sorin Marin v. Romania*, 2024, para. 50.

69 ECtHR, *Johannesson and Others v. Iceland*, 2017, para. 47.

70 For a more detailed account: Rosano, 2019, pp. 39–57.

71 CJEU, Case C-524/15 *Menci*, Case 537/16 *Garlsson Real Estate and Others*.

For instance, in the Menci case, the Court accepted the duplication of criminal and administrative proceedings, if the amount of the penalties together did not ‘exceed the seriousness of the offence identified’ (para. 55).⁷² The CJEU referred to the ECtHR case law regarding Art. 4 Protocol 7 and acknowledged:

‘In so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, Art. 52(3) of the Charter provides that their meaning and scope are the same as those laid down by that convention. It is therefore necessary to take account of Art. 4 of Protocol No 7 to the ECHR for the purpose of interpreting Art. 50 of the Charter.’⁷³

2.2.2. *Final Acquittal or Conviction (Bis)*

For Art. 4 to be applicable, there must be a duplication of proceedings, followed by a final decision of acquittal or conviction. Both situations were strictly interpreted by the CJEU. In *A. and B. v. Norway* (2016), the Grand Chamber of the Court ruled on the compatibility of the Norwegian system of proceedings in tax-related offences with Art. 4 Protocol 7. This system entailed a dual set of proceedings – administrative and criminal – regarding incorrect information in tax statements. In its case law, the Court established a standard of ‘sufficiently close connection in substance and in time’ between the dual proceedings and ‘the surest manner of ensuring compliance with Art. 4 Protocol 7’ was to provide a unique procedure enabling both parts of the legislation regarding tax offences to be dealt with together. If the respondent State managed to demonstrate that the dual proceedings were sufficiently connected to form an integral ‘scheme of sanctions’, this situation could be considered in accordance with Art. 4.⁷⁴ This was considered a ‘relaxation’ of *non bis in idem*.⁷⁵ Although a connection ‘in time’ is required to apply *idem*, the two sets of proceedings must not have occurred simultaneously, over the same time span.

In *Nodet v. France* (2019), the close connection in substance and time could not be proven by the State. Therefore, the parallel proceedings (administrative and criminal) for market manipulation were considered a breach of Art. 4(1) Protocol 7. The same approach was taken in *Mihalache v. Romania* (2019), where no sufficiently close connection between the two procedures was demonstrated: the applicant was prosecuted in both proceedings for a single offence, punishable once according to the law.

Regarding the terms ‘acquittal’ and ‘conviction’, the Court held that the terms of the national decision in question must be considered. The Court considered that ‘the deliberate choice of the words ‘acquitted or convicted’ implies that the accused’s ‘criminal’ responsibility has been established following an assessment of the circumstances of the case’,⁷⁶ which means that the merits of the case have been examined by

⁷² Clifford, 2018, p. 584.

⁷³ Art. 4 of Protocol 7 para. 60.

⁷⁴ ECtHR, *A. and B. v. Norway* [GC], 2016, para. 132.

⁷⁵ Sudre et al., 2023, p. 705.

⁷⁶ ECtHR, *Mihalache v. Romania*, 2019, para. 97.

the national jurisdiction. This jurisdiction must be, according to the Court, ‘vested by domestic law with decision-making power enabling it to examine the merits of a case’ and must then study or evaluate the evidence in the case file and assess the applicant’s involvement in one or all of the events prompting the intervention of the investigative bodies, for the purposes of determining whether ‘criminal’ responsibility has been established.⁷⁷

Furthermore, the national decision on ‘acquittal’ or ‘conviction’ must be ‘final’, that is, to acquire the force of *res judicata*. If the applicant still has other ways of appeal, Art. 4 Protocol 7 will not apply. For example, the decision of a prosecutor not to prosecute could not be considered a final decision within Art. 4⁷⁸ and neither can a discontinuation of criminal proceedings by a prosecutor.⁷⁹ In *Mihalache v. Romania*, the Court emphasised that domestic law and the existing remedies are taken into account in assessing whether an acquittal or conviction is final. However, these remedies must be in accordance with the principle of legal certainty:

‘A law conferring unlimited discretion on one of the parties to make use of a specific remedy or subjecting such a remedy to conditions disclosing a major imbalance between the parties in their ability to avail themselves of it would run counter to the principle of legal certainty.’⁸⁰

2.3. Reopening of Proceedings

Art. 4(2) Protocol 7 provides an exception to *non bis in idem*. However, it is only apparently an exception, because the situation in which it applies is exceptional: ‘there is evidence of new or newly discovered facts, or there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case’. These completely new situations can impact the outcome of the case and reopen the proceedings, even when a final decision of acquittal or conviction has been pronounced.

This is the only permissible limit to the principle of legal certainty in criminal justice. The ECtHR’s case law highlights several rules regarding the application of this limit. The States are free to establish their own conditions for the reopening of proceedings. However, the reopening shall not be prevented by the opening of a new investigation based on newly discovered facts or evidence on grounds of Art. 4(1).⁸¹ The reassessment of some of the circumstances of the first decision, such as the applicant’s mental state, could be considered a ‘newly discovered fact’ under Art. 4(2).⁸² However, reopening in the absence of any new facts or evidence is contrary to Art. 4(1). By ‘new’ circumstances, the Court understands any circumstances related

⁷⁷ Ibid.

⁷⁸ ECtHR, *Sundqvist v. Finland* (decision), 2005.

⁷⁹ ECtHR, *Smirnova and Smirnova v. Russia* (decision), 2002.

⁸⁰ ECtHR, *Mihalache v. Romania*, para. 115.

⁸¹ EComHR, *Korpoo v. Finland*, 1995.

⁸² ECtHR, *Kadusic v. Switzerland*, 2018.

to the case, which existed during the trial, yet remained hidden or unknown from the judge, and became known only after the trial.⁸³

The notion of ‘fundamental defect’ is vaguer than ‘newly discovered’ facts. However, it mainly covers serious violations of procedural rules, which significantly affect the previous proceedings. For example, simple reassessments of evidence are not considered fundamental defects if the outcome is detrimental to the convicted person. If the outcome were in favour of the convicted person, then the interpretation of the notion of fundamental defects is wider. However, ‘the need to harmonise prosecutorial practice’ cannot be considered a fundamental defect under Art. 4(2).⁸⁴ Nonetheless, the failure to properly investigate a hate crime was included in ‘fundamental defects’ to justify the reopening of the proceedings against the accused.⁸⁵

3. Right To Appeal in Criminal Cases – Art. 2 of Protocol No. 7

Art. 2 Protocol 7 is a guarantee of fair trial in criminal cases, which adds to the express and implicit guarantees in Art. 6 ECHR:

‘(1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. (2) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.’

3.1. The Main Notions: Criminal Offence, Convicted, Tribunal and Higher Tribunal

Art. 2 Protocol 7 extends the fair trial guarantees in criminal cases by requesting the States to provide ways of appeal against a conviction sentence. However, its scope is limited: only conviction sentences can be subject to this right. The other notions used by Art. 2(1) may be challenging. Hence, the ECtHR has clarified their meaning in its case law, which must be complemented by the definitions in the Explanatory Report to the Protocol No. 7.⁸⁶ Nevertheless, the States Parties have a wide margin of appreciation in establishing the ways of appeal and the respective proceedings.⁸⁷

‘Criminal offence’ and ‘tribunal’ have the same meanings as used by Art. 6 ECHR. ‘Conviction’ refers to any decision finding guilt or imposing a penalty. No right to

83 ECtHR, *Mihalache v. Romania*, 2019, para. 132

84 Ibid, para. 138. See: Harris et al., 2023, p. 989.

85 ECtHR, *Sabalic v. Croatia*, 2021.

86 Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984.

87 ECtHR, *Krombach v. France*, 2001, para. 96.

appeal against acquittal decisions is guaranteed by Art. 2(1).⁸⁸ However, according to the Explanatory Report, ‘if the person convicted has pleaded guilty to the offence charged, the right may be restricted to a review of his sentence’.⁸⁹ The concept of ‘higher tribunal’ is more sensitive due to the diversity of judicial systems in the States Parties to the Protocol. According to the Court, the higher tribunal must exercise full jurisdictional control.⁹⁰ Applications against some prosecutorial acts to the chief prosecutor or other applications to court presidents are not considered for review by a higher tribunal. The extraordinary appeals that can only be initiated by the prosecution or the motion of a president of a higher court do not enter the scope of Art. 2. In *Grecu v. Romania* (2006), the Court found that the applicant did not have any way of appealing against the decisions of the court of first instance, which meant that he was deprived of his right to appeal under Art. 2 Protocol 7:

‘A potential appeal of the applicant against the mentioned decision seemed meant to fail: as the Government acknowledges, at the time of the facts there was no legal provision on any way of appeal against the decisions of courts of first instance regarding decisions of the prosecutors, to be judges by higher courts; (...) from the relevant national practice it results that the national review courts, especially the supreme court of justice, declared inadmissible any appeal against such a decision of the courts of first instance.’⁹¹

The higher court must have jurisdiction over all matters of the case, which is why the *amparo* appeal to the Spanish Constitutional Tribunal was not considered as meeting the requirements of Art. 2: the tribunal was confined to examining the matter as regards matters of constitutionality or compatibility with fundamental rights guaranteed by the Constitution.⁹² However, it is irrelevant if the higher tribunal can examine the case on all issues (of fact and law, or only on points of law).⁹³

3.2. The Contents of the Right to Appeal

No restrictions on the right to appeal are compatible with Art. 2 if they deprive this right of its effectiveness. For example, in *Kamburov v. Bulgaria* (2009), the appeal procedure was not directly accessible to the applicant and was not considered compatible with Art. 2 Protocol 7. A similar decision was taken in *Galstyan v. Armenia* (2007) and *Gurepka v. Ukraine* (2005).

In *Rostovsyev v. Ukraine* (2017), the Court held that, although formally, the applicant had the right to appeal, the interpretation of the relevant domestic legal provisions adopted by the domestic courts was not ‘foreseeable’ and, by adopting it, the domestic

88 Explanatory Report, para. 22.

89 Ibid., para. 17.

90 ECtHR, *Grecu v. Romania*, 2006, para. 83.

91 Ibid, para. 84.

92 ECtHR, *Saqueti Iglesias v. Spain*, 2020, para. 57.

93 ECtHR, *Krombach v. France*, 2001.

courts infringed the applicant's right to appeal.⁹⁴ Another reason for declaring domestic ways of appeal incompatible with Art. 2 was the lack of suspensive effect of the appeal by referring to the execution of the sentence.⁹⁵

3.3. The Limits on the Right to Appeal

Para. 2 of Art. 2 Protocol 7 sets forth three kinds of cases where the right to appeal may be limited: offences of a minor character, when the person concerned was tried in the first instance by the highest court and when the person was convicted following an appeal against acquittal.

3.3.1. Offences of a Minor Character

As in the case of other vague notions used by the Convention, 'offence of a minor character' was clarified with the help of the Explanatory Report and further developed by the Court. The main criterion to assess whether an offence is of a minor character is the penalty. If the offence is punishable by imprisonment, it will not meet the requirement, making the right to appeal compulsory.⁹⁶ However, in a recent case, the Court considered an offence as being of a minor character, punishable by a maximum of two weeks of imprisonment for default of payment of a financial penalty. The applicant was convicted of a fine for breaching road traffic regulations and, in default of payment, sentenced to four days' imprisonment. The Court considered that the actual enforcement of the alternative imprisonment penalty was an exception in domestic law. Therefore, the offence met the requirements of Art. 2(2).⁹⁷ In a recent case law, the Court assessed this concept on a more case-by-case basis. For example, in *Saqueti Iglesias v. Spain* (2020), the Court emphasised that the absence of the imprisonment penalty cannot lead to an offence being considered of a minor character.

3.3.2. Person Tried in the First Instance by the Highest Tribunal and Conviction Following an Appeal Against Acquittal in the First Instance

The first situation applies to persons who occupy a higher position in the State – ministers, magistrates, Presidents, etc. or for high-profile offences. If the appeal is denied because the high value of the claim demands the examination of the case by the highest tribunal, the exception does not apply.⁹⁸ Regarding the second situation, in *Fortum Oil and Gas OY v. Finland* (2002), the Court stated that the sanction imposed by the higher court can be considered a conviction: 'The Supreme Administrative Court's conclusion that a fine should be imposed on Neste can be equated with a 'conviction' 'following an appeal against acquittal'.⁹⁹

94 ECtHR, *Rostovskyev v. Ukraine*, 2017, para. 36.

95 ECtHR, *Shvydka v. Ukraine*, 2014. See: *Ruslan Yakovenko v. Ukraine*, i2015.

96 ECtHR, *Grecu v. Romania*, 2006, para. 82, *Zaicevs v. Latvia*, 2007, para. 55.

97 ECtHR, *Kindlhofer v. Austria*, 2021, paras. 41–42.

98 ECtHR, *Saqueti Iglesias v. Spain*, 2020, para. 46.

99 ECtHR, *Fortum Oil and Gas OY v. Finland* (decision), 2002.

4. Compensation for Wrongful Conviction – Art. 3 of Protocol No. 7

Art. 3 Protocol 7 sets forth that:

‘When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.’

This complements the fair-trial guarantees regarding miscarriage of justice in criminal matters. The case law is quite scarce regarding this Art.; therefore, the Explanatory Report in Art. 7 is the most comprehensive source of interpretation. The right provided by Art. 3 applies only to persons convicted of a criminal offence who have suffered a punishment as a result of a final decision of justice. According to the Explanatory Report, which quoted the Explanatory Report of the European Convention on the International Validity of Criminal Judgments, ‘final conviction’ means a decision that:

‘Has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.’¹⁰⁰

Furthermore, the definition of ‘final decision’, present in the subsequent case law, must be considered.¹⁰¹ If the applicant/accused person has been acquitted by a superior court, Art. 3 Protocol 7 does not apply.

The second condition is that the conviction was overturned or the convicted person was pardoned due to ‘new or newly discovered facts’ that led to the conclusion of a miscarriage of justice. Any other grounds for changing the final decision of conviction do not apply under Art. 3. For example, in *Bachowski v. Poland* (2010), the Court held that Art. 3 would not apply to a conviction overturned due to the superior court’s evidence reassessment. The third condition concerns the convicted person’s behaviour. Thus, if the convicted person was wholly or partly responsible for not disclosing the new facts, the right to compensation will not apply.

¹⁰⁰ Explanatory Report, *supra*, note 83, para. 22.

¹⁰¹ ECtHR, *Mihalache v. Romania*, 2019, para. 88.

The States have a wide margin of appreciation in setting forth the procedure and means of establishing such miscarriages of justice. In *Poghoshian and Baghdasaryan v. Armenia* (2012), the Court found, for the first time, a violation of Art. 3 Protocol 7 because the national legislation did not provide a system of compensating the applicant for serving an imprisonment penalty for five-and-a-half years before acquittal:

‘The Court considers that the purpose of Art. 3 of Protocol No. 7 is not merely to recover any pecuniary loss caused by a wrongful conviction but also to provide a person convicted as a result of a miscarriage of justice with compensation for any non-pecuniary damage such as distress, anxiety, inconvenience and loss of enjoyment of life. No such compensation, however, was available to the applicant in the present case.’¹⁰²

According to the Explanatory Report, the right to compensation only exists when the convicted person is considered innocent after the determination of the miscarriage of justice. Hence, casting a reasonable doubt over the convicted person’s guilt will not give rise to the right provided by Art. 3.¹⁰³

5. The Right Not to Be Imprisoned for Debt – Art. 1 of Protocol No. 4

Art. 1 of Protocol no. 4 reads: ‘No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation’. However, the scope of its application is limited to the ‘inability to fulfil a contractual obligation’, which can be any non-delivery or non-payment of a debt resulting from a contract. If another element, other than a contractual obligation, is present, the prohibition provided by Art. 1 Protocol 4 will not apply. As there is very little reference in the ECtHR’s case law regarding this Art., the Explanatory Report to Protocol No. 4¹⁰⁴ provides examples and explanations of the core notions.

The Explanatory Report states that ‘this Art. does not apply to obligations arising from legislation in public or private law’.¹⁰⁵ Furthermore, ‘inability’ is a situation when ‘the individual had not the material means to fulfil his contractual obligations’,¹⁰⁶ which cannot be the sole reason for the deprivation of liberty. Additionally, the report provides examples of situations when ‘inability’ is supplemented by other reasons, where Art. 1 does not apply: ‘ – if a debtor acts with malicious or fraudulent intent;

102 ECtHR, *Pogoshyan and Baghdasaryan v. Armenia*, 2012, para. 51.

103 *Explanatory Report*, para. 25.

104 Explanatory Report to the Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 16 November 1963.

105 *Ibid.*, para. 4.

106 *Ibid.*, para. 5.

– if a person deliberately refuses to fulfil an obligation, irrespective of his reasons therefore; – if the inability to meet a commitment is due to negligence’.¹⁰⁷

The ECtHR referred to Art. 1 Protocol 4 in some judgments, without finding a violation. For example, it held that ‘the imprisonment in default system, (...) [is] constituting an archaic custodial measure available only to the Treasury (in the French system)’. The case concerned an applicant who was imprisoned for not paying a fine; therefore, Art. 1 was not applicable. A similar situation was found in *Gatt v. Malta* (2010). However, according to the Explanatory Report, Art. 1 would be applicable in situations when the law provided:

Deprivation of liberty of an individual who: – knowing that he is unable to pay, orders food and drink in a cafe or restaurant and leaves without paying for them; – through negligence, fails to supply goods to the army when he is under contract to do so; – is preparing to leave the country to avoid meeting his commitments.¹⁰⁸

‘Deprivation of liberty’ stems from the interpretation of Art. 5(1) ECHR. However, reading Art. 1 Protocol 4 in conjunction with Art. 5(1)(b) ECHR, it must be interpreted as prohibiting the States Parties to Protocol 4 from sentencing persons to imprisonment who were unable to comply with a court’s contractual obligation.¹⁰⁹

6. Final Remarks

This Chapter showed how the provisions of the ECHR and its Protocols, along with the interpretation of the ECtHR in its case law, created a codification of important criminal law principles within the European legal order. The Court’s case law on the principles of no punishment without law, non-retroactivity of more severe criminal law and the procedural rights included in the subsequent Protocols to the ECHR (the right not to be tried and punished twice, the right to appeal in criminal matters, the right to compensation for wrongful conviction and the prohibition of imprisonment for debt or breach of contractual obligations) have become a source of inspiration to national courts and the CJEU.

¹⁰⁷ Ibid., para. 5.

¹⁰⁸ Explanatory Report, *supra*, note 102, para. 6.

¹⁰⁹ See: Harris et al., 2023, p. 963.

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Right to Respect for Private and Family Life

Agnieszka WEDEŁ-DOMARADZKA

ABSTRACT

The subject of this study is the protection of the right to private and family life guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in relation primarily to the countries of Central and Eastern Europe. This work analyses the understanding of the right to protect private and family life and the travaux préparatoires concerning Article 8 ECHR. The scope and context of the protection of the right to private and family life provided by the ECHR and other legal acts in the human rights field are also analysed. A separate part of the study consists of considerations concerning changes in the interpretation of the right to family and private life and the creation of standards for the scope of its protection in the case law of the European Court of Human Rights (ECtHR). The issues addressed in the study also include an analysis of the most critical cases related to protecting the right to private and family life. This analysis covers the protection of the right to private life and the standards of protection of the right to family life. In terms of aspects concerning private life, the analysis focuses on three aspects, i.e. the physical, psychological or moral integrity of individuals, the privacy and the protection of personal autonomy and identity. Regarding the right to family life, the analysis covers relations between spouses or persons in a stable or a casual relationship, relations between parents and their children, and issues relating to adoption and assisted procreation. The same analysis pattern also covers cases decided upon based on Article 8 ECHR, concerning Central and Eastern European countries.

KEYWORDS

human rights, Europe, privacy, family life, ECHR

1. Introduction

The protection of an individual's private and family life is a fundamental right, enshrined in both international and national legal frameworks. This right is regarded as being among those subject to the broadest interpretation, at least in the context of the European regional human rights protection system. In examining the right to private and family life, it is essential to consider two distinct but frequently

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intertwined rights, which are often interpreted separately¹ despite their significant overlap. Furthermore, the European Court of Human Rights (ECtHR)² has not always clearly delineated this boundary in its case law. Additionally, the boundary is often fluid, potentially due to the ECHR's status as a "living instrument," which allows for a dynamic interpretation of its provisions.

The issue of the right to privacy appears to be a broader concept than the right to family life. The modern understanding of the right to privacy encompasses the autonomy of the individual, control over his or her personal data and the absence of interference by state authorities as well as natural and legal persons in his or her personal affairs. The first considerations related to the need to protect privacy were conducted within the legal system of the United States of America and the Fourth Amendment provided for in the Constitution.³ Over time, the concept began to evolve and was introduced into all major documents related to the sphere of human rights.⁴ Today, this right is present both in universally accepted international agreements protecting the individual and finds its recognised place in national constitutions. It is recognised as one of the more fundamental rights, without which the individual, especially in a state identified as democratic, could not function.

The issue of the right to family life for which the protection of privacy is both a first step and a further necessary protection has emerged in the national sphere in the constitutions of states, particularly those that drew their models from the Roman tradition and the Judeo-Christian worldview.

The purpose of this study is to examine and present how the right to private and family life has developed on the European continent, with a particular focus on the achievements within the Central and Eastern European states in this regard. The right to family and private life will be contextually analysed within the ECHR. A historical outline indicating the development of this right will also be presented. The analysis will also include a comparative aspect related to the identification and discussion of universal and regional human rights instruments. The most extensive part of the work will be the elements related to the jurisprudential *acquis* of the ECtHR. This *acquis* will be analysed from two aspects. As a first aspect, the analysis will focus on selected fundamental (key-cases) judgements that have been delivered in relation to the right to family and private life over the years of the court's operation and in relation to all Council of Europe (CoE) Member States. As a second aspect, a selection of the court's jurisprudence related to human rights violations that took place in Central and Eastern European countries will be analysed.

1 Kil Kelly, 2003, p. 6.

2 Schabas, 2015, p. 366.

3 National Archives, n.d.

4 Council of Europe, 1950; United Nations, 1948, 1966; 1989; American Convention on Human Rights, 1969; African Union, 1981; European Union, 2000; League of Arab States, 2004.

2. Contextual Analysis of the Relevant Substantive Right(s) Under the Convention

The right to private and family life is provided for in the ECHR in Article 8. The content of this article is strongly inspired by the provisions of the Universal Declaration of Human Rights (hereinafter: UDHR)⁵. In 1949, when work began on the content of Article 8⁶ Pierre-Henri Teitgen proposed that the text of the Convention should regulate ‘natural rights deriving from marriage and paternity and those pertaining to the family, the sanctity of the home’⁷. The version prepared mentioned the “inviolability” “of private life” as well as that of the home, correspondence and family, as stated in Article 12 of the UDHR.⁸ Another version, amended as a result of the position of Belgium and France, provided for ‘immunity from arbitrary interference in his private life, his home, his correspondence and his family’.⁹ Eventually, the Committee preparing the text of the Convention ended up replacing the term “immunity” with “freedom”. The report presented to the Consultative Assembly indicated that the list of rights and freedoms should include rights relating to the family, which included: freedom from all arbitrary interferences in family life, the right to marry and to found a family and the prior right of parents to choose the kind of education to be given to their children.¹⁰ Towards the end of 1949, the Committee of Experts on Human Rights presented a version of Article 8 that drew heavily on the UDHR, specifically revisiting the version that included the term “privacy”: ‘no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference’.¹¹ The discussions of early 1950 were determined by the possible relationship between the provisions of the future ECHR and those of the ICCPR.¹² Further work was dominated by the debate on the form of the regulation presented by the British delegation with the wording

‘No restrictions shall be placed on the exercise of this right other than such as are in accordance with law and are necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime or for the protection of health or morals.’¹³

5 Czubik, 2009, p. 113; Preparatory work on Art. 8 of the European Convention of Human Rights, p. 2.

6 More: Schabas, pp. 359–366.

7 Council of Europe, 1975, p. 46.

8 Preparatory work on Art. 8 of the European Convention of Human Rights, point 3.

9 Preparatory work on Art. 8 of the European Convention of Human Rights, p. 3.

10 Ibid.

11 Preparatory work on Art. 8 of the European Convention of Human Rights, p. 2.

12 Schabas, pp. 362–363.

13 Proposal submitted by the United Kingdom Delegation, Doc. CM/WP 4 (50) 14, A 1377, IV TP 202.

Ultimately, the plenary Conference of Senior Officials reverted to the use of the term “private and family life”.¹⁴ Further work on the content of Article 8 took place mainly within the Committee of Ministers. The aim of this work was to clarify the content of this article.¹⁵

The main element requiring consideration was the aspect relating to the possibility of state interference. The final version of Article 8 was adopted in 1950 at a meeting of the Committee of Ministers. The content is as follows:

‘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.’

According to the provisions made by the creators of the ECtHR, Article 8 covers the protection of four elements: the right to private life, the right to family life, home and correspondence. However, they do not appear in the court’s case law to the same extent. It should be noted that considerations concerning the right to private and family life dominate over violations concerning the protection of home and correspondence. It is also significant that the ECtHR, when deciding upon cases and conducting considerations, often analyses the right to private and family life together without making a clear distinction between them.¹⁶ Article 8 itself is also one of the most frequently invoked to determine a violation of individual rights. It is also an article protecting rights whose protection may require limitations on other rights protected under the Convention. This may apply to the right to private life and the freedom of the press under Article 10 of the Convention.¹⁷ The ECtHR also tends to conduct considerations based mainly on Article 8, even when the basis for the complaint is a violation of another right. This applies particularly to violations of Article 9.¹⁸

Article 8 also contains permissible restrictions on its application. 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.

It is important to note that not all aspects are utilised equally in case law. Initially, the emphasis was on the last two aspects: the protection of health or morals and

14 Draft Convention annexed to the Report, Doc. CM/WP 4 (50) 19 annex, CM/WP 4 (50) 16 rev., A 1452, IV TP 274–295, p. 278.

15 Preparatory work on Art. 8 of the European Convention of Human Rights, p. 2.

16 Schabas, p. 366.

17 Harris et al., 2009, pp. 362–363, also: Seibert-Fohr, Villiger and Baden-Baden, p.175.

18 For example, the last case: *Pindo Mulla v. Spain*, application no. 15541/20, 17 September 2024.

the protection of the rights and freedoms of others. However, modern case law is increasingly acknowledging the necessity of restrictions related to national security and public safety.

3. A Brief Historical Outline of the Development of a Given Right/ Substantive Rights

The right to private and family life is one of those rights whose scope of respect, within the scope guaranteed by the ECtHR, is in constant development. The sphere of what is considered private life and what falls within the scope of family life evolves and adapts to changing values in a given society while maintaining a specific common European approach to these rights.

When analysing the historical aspect of the development of the right to private and family life, it is necessary to separate these two rights, even though the ECtHR case law itself does not always make such a separation.

Over the years, the issue of the right to private life has evolved from quite apparent violations related to blatant state interference (e.g. illegal searches)¹⁹ to complex cases concerning data protection, including sensitive data. The ECtHR has not defined the concept of the “right to private life” itself because this term was considered so broad that such a definition cannot be developed. This right encompasses a broad term²⁰ that cannot be exhaustively defined.²¹ The extensive case law that has covered cases related to the protection of the right to private life over the years allows us to determine specific elements that will fall within the scope of this right.

In the initial period, cases related to ECHR violations were still dealt with by the European Commission of Human Rights (hereinafter: ECmHR). In the first period of its activity, issues related to the right to private and family life were determined by considerations related to the state’s interference in the sphere of individual freedom. In the next period, which can be identified as the beginning of the seventies, commences a broader perspective on the right to private and family life. This aspect starts to encompass not only the physical sphere and the home but also transfers to aspects of personal identity, including relationships that an individual enters into with others. At that time, the *Marckx v. Belgium*²² judgement was issued, in which the court (after the case had been referred by the ECmHR) found that the situation, in which children born in wedlock and children born out of wedlock were treated differently violated Article 8. The reason for finding this violation was the lack of a legal bond between the child and her mother’s family, insufficient protection of inheritance rights and the mother’s freedom to dispose of her property. In this case, considerations were

19 *Klass and Others v. Germany*, Application no. 5029/71, 6 September 1978.

20 *Niemietz v. Germany*, Application no. 13710/88, 16 December 1992, para. 29; *Pretty v. the United Kingdom*, application no. 2346/02, 29 April 2002, para. 61. Also: Aleca and Duminićă, 2012, p. 112.

21 Dijk and Hoof, 2006, p. 664.

22 *Marckx v. Belgium*, Application no. 6833/74, 13 June 1979.

conducted regarding the scope of protection of private and family life. As the court itself indicated, it was necessary to clarify the meaning and sense of the words ‘respect for ... private and family life’.²³ In resolving this issue, the ECmHR asked itself whether the natural bond existing between the applicants gave rise to private and family life protected by Article 8. In response, it indicated that it agreed with the ECmHR’s position on the lack of distinction between “legitimate” and “illegitimate” families because the existence of such a distinction would be contrary to the prohibition of discrimination. Article 8 will therefore apply here, especially since the applicant, the mother of the child, showed concern for her daughter and her upbringing right from the beginning, so family life did exist between them.

Attention was also drawn to the existence of negative (ordering the state to refrain from specific actions) and positive (assuming state action) in the sphere of protection of rights arising from the ECtHR. This interpretation indicates the distance with which the issue of defining private and family life was approached at the time and how the requirements imposed on the state within the scope of protection of these rights evolved (from passivity to activism). This period was also characterised by the formation of the understanding of the concept of private life, within which sexual life was also considered to be protected.²⁴ During this period, migration cases related to family reunification also gained importance. In the case *Abdulaziz, Cabales, and Balkandali v. United Kingdom*²⁵, the ECtHR ruled on the case of three women whose husbands were refused the right to enter the United Kingdom based on migration law. This factor, giving rise to the finding of a violation of Article 8 here was the diverse practice in treating migration applications by spouses, depending on whether women or men filed them. This case, initially decided at the Commission on Human Rights level, also shows that the Commission viewed family relations in the context of migration more narrowly than the ECtHR does.²⁶

The next period of jurisprudential development was in the 1990s. It was then that new challenges to privacy began to emerge for the ECtHR. Issues consequently arose relating to the broadening interpretation of the right to privacy, the development of new technologies, including procreative methods, changes in the situation and structure of the family, or the protection of environmental or social rights. It was during this period that a decision was made in the case of *Pretty v. United Kingdom*²⁷. In her complaint, Mrs Diane Pretty alleged, among other things, violations of her right to private life by not having been provided with a guarantee of non-prosecution for her husband assisting her in committing suicide. In this case, the ECtHR made clear the need for a broad understanding of the concept of private life, which encompasses

23 *Marckx v. Belgium*, para. 30.

24 *Dudgeon v. The United Kingdom*, Application no. 7525/76, 22 October 1981, p. 41.

25 *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Application nos. 9214/80; 9473/81; 9474/81, 28 May 1985.

26 Storey, 1990, p. 343.

27 *Pretty v. United Kingdom*.

both the physical and psychological integrity of the person²⁸, aspects of an individual's physical and social identity²⁹, gender identification, name, sexual orientation and sex life³⁰, personal development establishing relationships with other persons and the outside world.³¹ The *Pretty* ruling also saw inclusion as protected by Article 8 of the concept of the right to self-determination, for which personal autonomy is the basis for interpreting its guarantees.³² In the *Copland*³³ case, the ECtHR made a ruling in the field of new technologies. It indicated that monitoring telephone calls, emails and internet use without the employee's knowledge violates the right to privacy. In particular, the exceptions to the authorities' interference with exercising this right and whether they applied to Ms Copland³⁴ were taken into consideration here. The case gave rise to a further extension of the understanding of the right to privacy about employees' actions and their relationship with their employers, as well as the need for proportionality when interfering with the right to private life.

The scope of the right to family life has also expanded to include new situations covered by the term relating to the diversification of aspects concerning family life and the extension of protection under this right to family members other than just spouses and children. Attention is drawn here, for example, to the case of *Kroon and Others v. Netherlands*³⁵. In this case, the ECtHR dealt with a violation of Article 8 in the context of the failure of the Dutch legal system to recognise the parental relationship between a child and its father, who was the mother's long-term partner (though not the husband). This period also saw an interpretation of the understanding of protecting the "home". In *Loizidou v. Turkey*³⁶, it was pointed out that it was not possible to consider a home a property on which it was only planned to build a house for residential purposes, nor could the concept be interpreted as covering the area of the country where a person grew up and where he or she has roots, but no longer resides³⁷. Environmental and social issues were also an aspect that was subject to the ECtHR's expanding activity. During this period, the ECtHR issued the decision *Botta v. Italy*³⁸, which concerned a man with a disability who was prevented from using certain public facilities during his holidays because they were unsuitable for people with disabilities. Despite not finding a violation of Article 8, the ECtHR found that

28 *X and Y v. The Netherlands*, Application no.8978/80, 26 March 1985, para. 22.

29 *Mikulić v. Croatia*, Application no. 53176/99, 7 February 2002, para. 53.

30 *B. v. France*, Application no. 13343/87, 25 March 1992 para. 63; *Burghartz v. Switzerland*, Application no. 16213/90 22 February 1994 r., para. 24; *Dudgeon v. The United Kingdom*, para. 41; *Laskey, Jaggard and Brown v. the United Kingdom*, Application nos. 21627/93; 21628/93; 21974/93, 19 February 1997, para. 36.

31 *Burghartz v. Switzerland*, para. 47; *Friedl v. Austria*, Application no. 15225/89, 31 January 1995, para. 45.

32 *Pretty v. United Kingdom*, para. 61.

33 *Copland v. United Kingdom*, Application no. 62617/00, 3 April 2007.

34 More: Salami, 2017.

35 *Kroon and Others v. Netherlands*, Application no. 18535/91, 27 October 1994.

36 *Loizidou v. Turkey*, Application no. 15318/89, 18 December 1996.

37 *Ibid.*, para. 66.

38 *Botta v. Italy*, Application no. 153/1996/772/973, 24 February 1998.

the right to private life can apply to the accessibility and participation in society of persons with disabilities.³⁹ This is also the emergence of the first cases of the impact of the environment on human life⁴⁰ and the protection that follows from this under Article 8.⁴¹

The last period of ECtHR jurisprudence was the contemporary period. It has seen an intensification of case law on personal data. At the same time, data began to be understood broadly, with the scope of protection and the possible margin of appreciation of the state depending on the sensitivity of the data. The case of *S. and Marper v. the United Kingdom* should be considered an important decision.⁴² In this case, UK services took data (fingerprints and DNA profiles) from two individuals. One of these persons was a minor. This collection was carried out during the arrest. Although these individuals were not subsequently convicted, their prints and DNA profiles were stored for an indefinite period by the police. UK law permitted such storage even if the charges against the persons whose data had been taken were dropped or acquitted. The complainants in this case pointed out that such indefinite storage of their data violated their right to privacy. The ECtHR agreed with this position and pointed out that the UK's data retention rules violated Article 8 due to the disproportionality between data collection and the need to take action to prevent crime. The ECtHR recalled that national law should, in particular, ensure that the storage of data is not excessive for its intended purpose. It also pointed out that data should be kept in a form that permits the identification of data subjects but for no longer than is required for the purpose for which the data are kept.⁴³ As a consequence, the conduct of the UK services disrupted the balance between conflicting public and private interests while leading the state to exceed any permissible margin of appreciation.⁴⁴ Such conduct could not be considered necessary in a democratic society. In addition to data issues, balancing individual rights and the public interest was also an important sphere. In particular, this concerns security issues, including migration security, because of crises. In *Balogun v. United Kingdom*⁴⁵, the ECtHR considered the violation of the relationship of a Nigerian national. The applicant arrived in the UK at the age of three. Upon reaching the age of majority, he committed several offences, including being convicted of robbery. After serving his sentence, the UK authorities decided to deport him.

The applicant disagreed with this approach, indicating that separating him from the family who lived in the UK violated the right to private and family life. In analysing

39 Ibid., paras. 33–34.

40 Keller and Heri, 2022, pp. 153–74.

41 For example: *López Ostra v Spain*, Application no. 16798/90, 9 December 1994; *Powell and Rayner v. the United Kingdom*, Application no. 9310/81, 21 February 1990.

42 *S. and Marper v. the United Kingdom*, [GC], Application no. 30562/04 and 30566/04, 4 December 2008.

43 Ibid., para. 103.

44 Ibid., para. 125.

45 *Balogun v. the United Kingdom*, Application no. 60286/09, 10 April 2012.

the case, the court pointed out that the state must protect private and family life, but there are possible exceptions. It emphasised that interference with private life is possible when it can be justified as “following the law”, as pursuing one or more of the legitimate aims listed in Article 8(2) and when it qualifies as “necessary in a democratic society” to achieve the aim or aims in question. The court assessed whether there was interference based on the criteria formulated in *Üner v. the Netherlands*⁴⁶. In its decision, the court stated that when offences of such a severe nature are committed, we deal with a situation that outweighs family ties.⁴⁷

4. Comparison With Other Universal and Regional Human Rights Instruments Containing the Relevant Right(s) in Question

The right to private and family life has also found its place in universal and regional human rights protection systems. However, it has only occasionally appeared as a right considered collectively, as a right to private and family life. There have been and still are cases in which these rights appear as two separate rights, i.e., the right to privacy and the right to family life.

When it comes to the right to privacy and the right to family life considered together and constituting a human right, they appear in the primary document, the UDHR⁴⁸, adopted by the United Nations General Assembly. According to Article 12, ‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation’. Everyone has the right to the protection of the law against such interference or attacks. The Declaration thus singles out two elements not referred to (albeit considered under Article 8) in the ECHR, namely “honour and reputation”. In addition, elements relating to the right to family life as a human right can be found in the UDHR.

Article 16 indicates that on reaching the appropriate age, a man and a woman have the right, without discrimination on race, nationality or religion, to marry and to found a family (also adopted as a solution by Article 12 ECHR). In marriage, their rights are equal. It indicates that ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State’. The ECHR no longer replicates this indication.

In a similar vein to the solutions of the Declaration, the regulations of the International Covenant on Civil and Political Rights (hereinafter: ICCPR) adopted in 1966 were prepared. It devotes two articles to protecting privacy, family, home or correspondence altogether. The first indicates that the Covenant protects against arbitrary or unlawful interference that may affect the family.⁴⁹ The second, on the other hand,

46 *Üner v. the Netherlands*, [GC], Application no. 46410/99, 18 October 2006.

47 *Balogun v. the United Kingdom*, para. 53.

48 United Nations, 1948.

49 Art. 17. International Covenant on Civil and Political Rights.

refers only to the family and indicates the same as the UDHR: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.⁵⁰ The ECHR no longer replicates this indication.

Regulations dedicated to the issue of family rights can also be found in the International Covenant on Economic, Social and Cultural Rights (from now on: ICESCR). It contains the state's obligation to ensure that an individual's working conditions are such as to guarantee an adequate standard of living for his or her family.⁵¹ Regarding the standard of living, it also emphasises the right to have an adequate standard of living for the family, mainly when this refers to food, clothing, and housing, and it respects the need for continuous improvement of living conditions.⁵² Like the UDHR and the ICCPR, it identifies the family as the natural and fundamental group unit of society to which the broadest possible assistance should be provided, particularly the care and education of children. It also emphasises the freedom to marry.⁵³

The dominant aspect, however, was the emphasis on the family as society's foundation and the protection necessary for it. However, the separate regulation of the protection of the right to private life was not addressed under the ICESCR.

It is worth emphasising that the universal solutions prepared after the Second World War were inspired by national acts protecting individual rights. First, they were based on national constitutions, as we can find such regulations in the Norwegian Constitution (*Grunnloven*) of 1814⁵⁴ or the Weimar Constitution of Germany (1919).⁵⁵

As far as regional solutions are concerned, from a European perspective, the most relevant document is the ECHR. This Convention protects family life, including the family (although never defined and relatively infrequently referred to by jurisprudential practice). This regulation is contained in Article 8, discussed above. The European solution has inspired other regional human rights systems. The American Convention on Human Rights (hereinafter: ACHR)⁵⁶, which is the basis of the inter-American system, protects family life by prohibiting arbitrary and abusive interference with family life.⁵⁷ The right to privacy, the home and correspondence are also protected under this article. Following the model of the UDHR solutions, it was pointed out that everyone has the right to have their honour respected and dignity recognised. The ACHR's wording also indicates that the family is the basic unit of society and must be protected by both society and the state⁵⁸. This regulation is linked to the right to marry voluntarily and to find a family and for the state to ensure equality of rights and obligations for spouses both during and after the termination of marriage. The need

50 Art. 16. Universal Declaration of Human Rights; Art. 23. International Covenant on Civil and Political Rights.

51 Art. 7. International Covenant on Economic, Social and Cultural Rights.

52 *Ibid.*, Art. 11.

53 *Ibid.*, Art. 10.

54 Art. 102. Norwegian Constitution (*Grunnloven*) of 1814.

55 Art. 109. Weimar Constitution of Germany 1919.

56 Organization of American States, 1969.

57 Art. 11. American Convention on Human Rights.

58 *Ibid.*, Art. 17.

for the protection of children and consideration of their best interests in the event of the dissolution of marriage is unequivocal (which is not typical of the ECHR), as is the need for equality of rights for married and non-married children.

In the regional system of African states, the right to family life is regulated by the African Charter on Human and Peoples' Rights (hereinafter: ACHPR).⁵⁹ According to its provisions⁶⁰, the family is the basic unit of society. It is subject to the protection of the state as the place where a community's morals and traditional values are protected. The Charter gives special protection to women and children, emphasising that they should enjoy the protection standard guaranteed by international declarations and conventions. Also of interest is the solution providing special protection measures for the elderly and persons with disabilities. Also distinct from previous regional regulations is that the Charter also provides for duties, including the individual's duties towards the family⁶¹, particularly the duty to care for its harmonious development and to 'work for the cohesion and respect of the family'.⁶²

Also linked to the system created by the ECHR are the regulations of European Union law contained in the Charter of Fundamental Rights (hereinafter: CFR). Its Article 7 indicates that 'Everyone has the right to respect for private and family life, home and communications'.⁶³ The wording of this article is almost identical to that of Article 8; however, due to technological developments, it was decided to replace the term "correspondence" with "communication". The interpretation of Article 7 allows for legal restrictions to exercise the rights contained in Article 7 CFR analogous to those provided for in Article 8 ECHR.

5. A Very Detailed Case-Law Analysis of the ECtHR Respecting That Given Substantial Right/Rights

In analysing the issue of the protection of the right to private and family life, it is necessary to start with a broader view of what will be protected within both spheres.

Regarding the right to private life, the analysis should start by indicating what elements the ECtHR has considered to be within the limits of protection. Next, attention should be drawn to the most important matters within the scope of protection of the right to private life grouped into three spheres indicating how the right to private life should be understood and interpreted: the notion of private life is the physical,

59 Organization of African Unity, 1981.

60 Art. 18. African Charter on Human and Peoples' Rights.

61 Ibid., Art. 27.

62 Ibid., Art. 29.

63 Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 202/389.

psychological or moral integrity of individuals, privacy and the protection of personal autonomy and identity.⁶⁴

Individuals' physical, psychological, or moral integrity pertains to circumstances pertaining to the individual and their physical or psychological aspects, which are to be safeguarded or about which the individual has the prerogative to determine. The scope of decision-making in this context can be exceedingly expansive. The understanding and interpretation of the right to privacy accentuated as such should be moderate. It has been pointed out that the very concept of the right to privacy is not limited to the individual sphere but extends to creating and nurturing interpersonal relationships.⁶⁵ It is also important to note that privacy should refer to the individual's physical and psychological integrity⁶⁶, encompassing elements of his or her physical and social identity.⁶⁷ Finally, the ECtHR identified several elements that constitute the scope of the right to privacy. It included name, gender identity, sexual orientation, sexual life⁶⁸, the right to personal development, as well as the right to establish and develop relationships with other people and the outside world.⁶⁹ An exception to protecting the right to private life will be when the other person does not wish to be contacted.⁷⁰

The right to privacy also identifies the values held by the individual⁷¹, such as goodness and dignity⁷², the right to self-determination⁷³ or integrity of both the physical and psychological dimensions⁷⁴, aspects of personality development⁷⁵ and some aspects of social identity.⁷⁶ The right to privacy can also correlate strongly with aspects protected under the right to family life. The experience of the ECtHR points, for example, to the right to respect the decision of whether or not to have children⁷⁷ or the emotional ties that have been created and that are developed between an adult

64 Based on the division contained in: Council of Europe and European Court of Human Rights, 2024.

65 *Niemietz v. Germany*, Application no. 13710/88, 16 December 1992, para. 29 [Online]. Available at: <https://hudoc.echr.coe.int/?i=001-57887> (Accessed: 27 January 2026).

66 *X and Y v. the Netherlands*, Application no. 8978/80, judgement of 26 March 1985, para. 22.

67 *Mikulić v. Croatia*, para. 53.

68 *B. v. France*, Application no. 13343/87, 25 March 1992, para. 63; *Dudgeon v. the United Kingdom*, para. 41, *Laskey, Jaggard and Brown v. the United Kingdom*, para. 36; *Botta v. Italy*, para. 32.

69 *Friedl v. Austria*, Application no. 15225/89, 19 May 1994, para. 44.

70 *Evers v. Germany*, Application no. 17895/14, 28 May 2020, para. 54.

71 *Denisov v. Ukraine*, [GC], Application no. 76639/11, 29 September 2018, paras. 95, 96, 129.

72 *udorovič and others v. Slovenia*, Application nos. 24816/14 and 25140/14, 10 March 2020, paras. 112–116; *Beizaras and Levickas v. Lithuania*, Application no. 41288/15 14 January 2020, para. 117.

73 *Pretty v. United Kingdom*, para. 61.

74 *J.L. v. Italy*, Application no. 5671/16, 27 May 2021, para. 118; *Vavříčka and Others v. the Czech Republic*, [GC], Application nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15, 8 April 2021, para. 261.

75 *Von Hannover v. Germany* (no. 2), [GC], Application nos. 40660/08 and 60641/08, 7 February 2012, para. 95.

76 *Mikulić v. Croatia*, para. 53.

77 *A, B and C v. Ireland*, Application no. 25579/05, 16 December 2010, para. 212.

and a child in situations other than classic kinship situations.⁷⁸ Protecting the right to private life in the context of data is also an important aspect, especially in the current development of new technologies. Therefore, personal data⁷⁹, including images⁸⁰ and a person's home address⁸¹, is protected. Data protection also includes the guarantee of non-dissemination of data without persons' consent⁸² and may extend to post-mortem situations.⁸³ The protection of the right to private life is also relevant to more severe violations of this sphere falling within the scope of criminal law, such as verbal violence and related situations causing emotional suffering, damage to mental health, violations of dignity and moral integrity, as well as humiliation in the eyes of others.⁸⁴ Also linked to these spheres are possible attacks on a person's reputation, degradation or actions of a similar nature protected under the right to private life.⁸⁵ Violations related to protecting the right to private life may also concern violations of physical and mental integrity.⁸⁶ Separate violations may relate to sexual harassment⁸⁷ or the violation of individual psychological well-being and dignity.⁸⁸

When looking at the three spheres of the right to the protection of private life (the physical, psychological or moral integrity of individuals, privacy and the protection of personal autonomy and identity), it is necessary to take a broader look at some of them, which have been dealt with by the ECtHR and based on which there have been rulings that have been subsequently invoked in similar factual situations or when similar arguments have to be used.

As far as the sphere of analysis concerning individuals' physical, psychological or moral integrity is concerned, it should be stressed that the ECtHR case law in this area is prosperous and covers aspects relating to both beginning and end-of-life decisions. It also considers aspects of violence, the broader health issue and, more recently, environmental aspects. Attention should first be paid to reproductive rights related to the beginning of life. The ECtHR has mainly commented on issues related to access to abortion. In one of the best-known cases on this issue, *A, B and C v. Ireland*⁸⁹, there were three claimants seeking abortion. The first two based their claim on the reluctance to have another child due to social considerations, and the third claim

78 *Jessica Marchi v. Italy*, Application no. 54978/17, 27 May 2021, para. 62.

79 *M. L. and W.W. v. Germany*, Application nos. 60798/10 and 65599/10, 28 June 2018, para. 87; *Liebscher v. Austria*, Application no. 5434/17, 6 April 2021, para. 31.

80 *Reklos and Davourlis v. Greece*, Application no. 15 January 2009, 1234/05, para. 38.

81 *Alkaya v. Turkey*, Application no. 42811/06, 9 October 2012, para. 30.

82 *M. P. v. Portugal*, Application no. 27516/14, 7 September 2021, paras. 33–34.

83 *M.P. v. Portugal*, paras. 33–34.

84 *F.O. v. Croatia*, Application no. 29555/13, 22 April 2021, paras. 81, 59–61.

85 *Denisov v. Ukraine*, [GC], paras. 111–112, 115–117; *Vučina v. Croatia (dec.)*, Application no. 58955/13, 24 September 2019, paras. 44–50; *M. L. v. Slovakia*, Application no. 34159/17, 14 October 2021, para. 24.

86 *Nicolae Virgiliu Tănase v. Romania*, [GC], Application no. 41720/13, 25 June 2019, para. 128.

87 *C. v. Romania*, Application no. 47358/20, 30 August 2022, paras. 50–54.

88 *Beizaras and Levickas v. Lithuania*, Application no. 41288/15, 14 January 2020, paras. 109 and 117.

89 *A, B and C v. Ireland*, [GC] Application no. 25579/05, 16 December 2010.

was based on health issues. In respect of the first two applicants, the ECtHR found no violation of Article 8, indicating that it did not consider Ireland's ban on abortion on health and social grounds to exceed the margin of appreciation granted to the state. In the court's view, this prohibition is deeply based on the moral views of the Irish people on the nature of life and, consequently, the protection that life deserves, including the protection of unborn children⁹⁰. In addition, as the ECtHR points out, the challenged prohibition reflects the fair balance between the rights of the first and second complainants in this case and the rights of unborn children. The scope of physical, psychological or moral integrity of individuals also includes the end-of-life case, *Pretty v. the United Kingdom*⁹¹. In this case, a woman whose husband was denied guarantees of non-recurrence if he assisted her to commit suicide complained about this decision as violating her rights laid down in Article 8. In the ECtHR's view, in such a case, one can speak of interference with the right to private life because, although the right to self-determination has not been established anywhere, 'the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'⁹². In this particular case, despite the existence of this autonomy, interference with its scope constituted actions considered 'necessary in a democratic society'⁹³.

Interference in this respect would also relate to aspects relating to post-mortem situations. The applicant, given her move, wished to exhume the body of her deceased spouse⁹⁴, which was determined by the need to bury him in another place closer to her final residence. The purpose of the applicant's conduct was to exercise her right to venerate the deceased. In the Court's view, this situation falls within the scope of protection provided for by Article 8 but is subject to a wide margin of appreciation. Due to the balancing of interests carried out by the national authorities, it was held that there had been no violation of Article 8 and that the refusal to authorise the transfer of the urn was 'necessary in a democratic society'⁹⁵. Environmental aspects are also on the rise within individuals' considered scope of physical, psychological or moral integrity. While the Convention does not provide for a right to a clean environment⁹⁶, matters relating to the living conditions of individuals are appear before the ECtHR in increasing numbers. The environment in which people live and how this environment affects their lives and health gives rise to positive obligations on the part of the state to ensure that the right to private life is respected. In cases like *Cordella and Others v. Italy*⁹⁷, a violation of Article 8 fair balance is not struck between the applicants' interest in avoiding severe damage to the natural environment that

90 *A, B and C v. Ireland*, para. 241.

91 *Pretty v. the United Kingdom*.

92 *Pretty v. the United Kingdom*, para. 61.

93 *Pretty v. the United Kingdom*, para. 78.

94 *Ellli Poluhas Dödsbo v. Sweden*, Application no. 61564/00, 17 January 2006.

95 *Ellli Poluhas Dödsbo v. Sweden*, para. 25.

96 *Hatton and Others v. the United Kingdom*, [GC], Application no. 36022/97, 8 July 2003, para. 96.

97 *Cordella et autres c. Italie*, para. 174, Application nos. 54414/13 and 54264/15, 24 January 2019.

could affect their well-being and private life and the interest of society as a whole, Article 8 may be breached.

Regarding privacy, the ECtHR case law primarily protects a person's name, photo, or physical and moral integrity⁹⁸. First, it is necessary to have extensive experience in case law protecting personal data, including sensitive data such as biometric or genetic data.⁹⁹ The issue of data protection and collection was considered by the ECtHR in the case *Amann v. Switzerland*.¹⁰⁰ The applicant, in this case, was a Swiss businessman whose conversation with a member of the Russian embassy staff regarding products he offered as part of his professional activity was overheard, and his data was then entered into a database maintained by the Swiss intelligence services. In assessing this case, the ECtHR found that the concept of private life should be understood broadly.¹⁰¹ A situation in which the state authorities create documentation concerning a citizen and then, despite not meeting the conditions, keep it in a file interferes with the applicant's private life. Such an action cannot be considered "by the law" because Swiss law does not sufficiently specify the provisions concerning the collecting, recording, and storage of information.¹⁰²

As for aspects related to the protection of personal autonomy and identity. These issues may concern the sense of one's own identity in the context of assigned forms of identity, which ultimately leads to questioning the legal concepts of various roles, statuses, or institutions.¹⁰³ As to this, an attention should certainly be paid here to the British case concerning the situation of people who underwent a gender reassignment procedure.¹⁰⁴ The applicant in this case was Christine Goodwin, who underwent a gender reassignment operation. However, the effects of this operation were not reflected in all of the documents concerning her. Although in earlier judgements concerning the United Kingdom, the ECtHR ruled that there was no interference with the right to private life¹⁰⁵, such interference transpired in this case. The justification for the violation was the fact that the applicant, despite having undergone a gender reassignment operation for legal purposes, was still considered a man, which had consequences on her life. The existing discrepancy between social reality and the law placed her in a situation where she had to take additional actions and activities to have her status recognised, which required her to indicate the type of procedure she had undergone. According to the ECtHR, the United Kingdom, which allows such procedures to be carried out and supports them financially, is not consistent in regulating

98 *Vavříčka and Others v. the Czech Republic*, [GC], Application no. 47621/13, 8 April 2021, para. 261.

99 Referred to above: *S. and Marper v. the United Kingdom*.

100 *Amann v. Switzerland*, [GC], Application no. 27798/95, 16 February 2000.

101 *Ibid.*, para. 65.

102 *Ibid.*, paras. 79–80.

103 Trotter, 2022, p. 38.

104 *Christine Goodwin v. the United Kingdom*, [GC], Application no. 28957/95, Judgement 11 July 2002.

105 *Rees v. the United Kingdom*, Application no. 9532/81, 17 October 1986; *the Cossey v. the United Kingdom*; Application no. 10843/84, 27 September 1990; *the X, Y. and Z. v. the United Kingdom*, Application no. 21830/93, 22 April 1997.

the persons using these procedures.¹⁰⁶ Because of the changes in both legal systems and social awareness¹⁰⁷, emphasised in the ruling, including the recognition by the European Court of Justice (hereinafter: ECJ) that discrimination on grounds of sex also includes discrimination on grounds of gender reassignment¹⁰⁸, the ECtHR found that in this respect there had been a breach of the state's margin of appreciation and, consequently, a breach of the right to privacy protected by Article 8.

Regarding the protection of the second aspect under Article 8, the right to family life, this concept is also sometimes understood broadly by the ECtHR due to the ECtHR's approach to the right to family life as a right in which the understanding of family life must refer not to its *de jure* but to its *de facto* understanding¹⁰⁹. Consequently, this considerably broadens the catalogue of factual situations protected under the Convention, certainly not limited to relations between spouses and their children.¹¹⁰ An aspect to be examined when considering whether there is "family life", is close personal ties.¹¹¹ The ECtHR's jurisprudence to date indicates that relationships protected based on family life will be said to be affected when they concern relationships between parents in a *de facto* relationship only and not in marriage and their children¹¹², relationships between parents and their children after the end of the marriage¹¹³, relationships between children and their grandparents¹¹⁴, relationships between same-sex couples¹¹⁵, between siblings¹¹⁶, irrespective of their age¹¹⁷, relationships occurring between an uncle or aunt and his/her nephew or niece or nephew.¹¹⁸ According to case-law practice, it is also possible to extend the meaning of "family life" to relationships between parents and children born in a second relationship or between children born out of wedlock, particularly where paternity has been acknowledged and the parties have a close personal relationship.¹¹⁹ The concept also applies to adoptive or foster parents established for children deprived of their natural parents.¹²⁰ In the case of adoption, a familial relationship may also be considered to

106 *Christine Goodwin v. the United Kingdom*, paras. 77–78.

107 *Ibid.*, para. 92.

108 *P. v. S. and Cornwall County Council*, the European Court of Justice, 30 April 1996.

109 Dijk and Hoof, p. 690.

110 Schabas, 2015, p. 389.

111 *Paradiso and Campanelli v. Italy*, [GC], Application no. 25358/12, 24 January 2017, para. 140.

112 *X, Y and Z v. United Kingdom*, [GC], Application no. 21830/93, 22 April 1997, para. 34; *Johnston and others v. Ireland*, Application no. 9697/82, 18 December 1986, para. 56; *Van der Heijden v. the Netherlands* [GC], Application no. 42857/05, 3 April 2012, para. 50; *Keegan v. Ireland*, Application no. 16969/90, 26 May 1994, para. 44.

113 *Ilya Lyapin v. Russia*, Application no. 70879/11, 30 June 2020, para. 44.

114 *Marckx v. Belgium*, paras. 45–46.

115 *Schalk and Kopf v. Austria*, Application no. 30141/04, 24 June 2010, paras. 90–95.

116 *Olsson v. Sweden*, Application no. 10465/83, 24 March 1988, para. 59.

117 *Boughanemi v. France*, Application no. 22070/93, 24 April 1996, paras. 32–35.

118 *Boyle v. United Kingdom*, Application no. 16580/90, 28 February 1994, paras. 13–14, also *Lazoriva v. Ukraine*, Application no. 6878/14, 17 April 2018, para. 65.

119 *X v. the Netherlands*, Application no. 8427/78, 13 March 1980; *Moretti and Benedetti v. Italy*, Application no. 16318/07, 27 April 2010, para. 48.

120 *Jolie and others v. Belgium*, Application no. 11418/85, 14 May 1986.

exist where it has been decided in one legal system, although the other does not recognise it.¹²¹ In the case of the existence of “additional dependencies”, an interpretation of “family life” beyond childhood is also admissible.¹²² On the other hand, it should be borne in mind that the mere existence of a biological relationship between parents and child, which does not take account of any other aspect of the relationship, is not sufficient for it to be considered as a “family life” to be protected, factors often being necessary in order to have grounds for protection which point to its permanence.¹²³ The court consequently approaches the determination of the existence of family life on an individual basis, assessing the close personal ties between the parties, with full awareness of the difficulties in establishing all possible configurations of those ties.¹²⁴

The protection of the right to family life also has to be analysed based on certain elements linking the cases dealt with by the ECtHR. Consequently, a distinction can be made between considerations relating to this right, including relations between spouses or persons in a stable or casual relationship, relations between parents and their children, and issues relating to adoption and assisted procreation.¹²⁵

Regarding issues concerning relations between spouses or persons in a stable or casual relationship, attention should be paid to issues relating to family relationships and migration. In the case *Jeunesse v. the Netherlands*¹²⁶, the court could rule on the compatibility with Article 8 of the expulsion decision. In that case, the applicant was a Surinamese national who came to the country on a tourist visa, then remained there, married a Dutch national and gave birth to three children—residing in the Netherlands. She applied several times for a residence permit, but her applications were rejected. In deciding on this case, the ECtHR emphasised that although the applicant was in the Netherlands illegally, her situation was extraordinary. Firstly, she had lost her Dutch citizenship due to an agreement between the Netherlands and Suriname. Secondly, her stay in Dutch territory was tolerated for sixteen years; thirdly, she had no criminal history during her stay in Dutch territory. After balancing the personal interests of the applicant, her husband and their children in maintaining their family life against the interests of public order in controlling migration, the action of the Dutch authorities was found to be insufficiently justified and, therefore, in breach of Article 8.

121 *Wagner and J.M.W.L. v. Luxembourg*, Application no. 76240/01, 28 June 2007.

122 *Belli and Arquier-Martinez v. Switzerland*, Application no. 65550/13, 11 December 2018, para. 65; *Emonet and Others v. Switzerland*, Application no. 39051/03, 13 December 2007, para. 80; *Bierski v. Poland*, Application no. 46342/19, 22 October 2022, para. 47.

123 *Katsikeros v. Greece*, Application no. 2303/19, 21 July 2022, para. 43.

124 Roagna, 2012, pp. 27–28.

125 Partly based on the division contained in: Council of Europe and European Court of Human Rights, 2024.

126 *Jeunesse v. the Netherlands*, [GC], Application no. 12738/10, 3 October 2014.

The ECtHR also considered issues relating to relationships between persons in unmarried relationships. In the case *Vallianatos and Others v. Greece*¹²⁷, the issue at stake was whether the introduction of a regulation allowing civil partnerships, but only for different-sex couples, violated the right to family life. According to the court, the Greek government's regulation violated the applicants' rights. Although the Greek government argued that the purpose of the introduction of the regulation was to provide legal security for children born out of wedlock, this reasoning did not, in the ECtHR's view, justify the exclusion of same-sex couples from the catalogue of those who could enter into a civil partnership. The court pointed out that cases concerning the situation of same-sex couples in the context of the right to private and family life were coming up with increasing frequency. It pointed out that issues concerning the different age of consent in criminal law for homosexual relations on the one hand and heterosexual relations on the other¹²⁸, the attribution of parental responsibility¹²⁹, the authority to adopt a child¹³⁰, the right to inherit a deceased partner's lease¹³¹, the right to social security¹³², access by same-sex couples to marriage or another form of legal recognition¹³³ and the exclusion of same-sex couples from the adoption of a child by the other parent had already been analysed.¹³⁴

In the court's view, the fact that the applicants are individuals who form stable couples and that their relationship falls within the concept of "private life", and, as a result of the evolution contained in the *Schalk and Kopf* case¹³⁵, also in a significant number of states, it would be artificial to maintain the view that such couples cannot enjoy protection for family life. In the court's view, there is no basis for making a distinction in terms of protection here, and same-sex couples are in the same position in terms of the legal need to recognise their relationship and grant them protection. The last element that could be regarded as justifying a difference in treatment is guiding children's interests from informal unions. In that context, the court points out that it is indeed the case that, while the protection of the family in the traditional sense is regarded as a valid and legitimate reason towards a difference in treatment, the protection of the interests of the child is also regarded as a legitimate reason.¹³⁶ However, an essential element which must be analysed in such a case is the question of proportionality. In the court's view, this is of particular relevance when the case involves issues that justify the court's own application of the "living instrument"

127 *Vallianatos and Others v. Greece*, [GC] Application nos. 29381/09 and 32684/09, 7 November 2013.

128 *L. and V. v. Austria*, Application nos. 39392/98, 39829/98, 9 January 2003.

129 *Salgueiro da Silva Mouta v. Portugal*, Application no. 33290/96, 21 December 1999.

130 *Fretté v. France*, Application no. 36515/97, 26 February 2002; *E.B. v. France*, [GC], Application no. 43546/02, 22 January 2008; *Gas and Dubois v. France*, Application no. 25951/07, 15 March 2012.

131 *Schalk and Kopf v. Austria*, Application no. 30141/04, 24 June 2010.

132 *P.B. and J.S. v. Austria*, Application no. 18984/02, 22 July 2010.

133 *Schalk and Kopf v. Austria*.

134 *X and others v. Austria*, [GC], Application no. 19010/07, 19 February 2013.

135 *Schalk and Kopf v. Austria*.

136 *Vallianatos and Others v. Greece*, para. 84.

concept in its case law. This means that the state, in choosing and applying measures to protect the family, must take into account the development of society and changes in the perception of social issues and relationships, and that there is not just one way or one choice when it comes to the conduct of the family as well as the conduct of private life¹³⁷. Consequently, concerning proportionality, the ECtHR concludes that the margin of appreciation states should have for differences in treatment based on sex or sexual orientation is narrow. Not only must the measures justifying the restrictions be appropriate from the perspective of the objective to be achieved, but it is also necessary to demonstrate that, in order to achieve that objective, it was necessary to exclude specific categories of persons from the scope of the legislation on – as in this case – civil partnerships. The ECtHR noted that the contested provisions do not refer only to the regulation of the origin of children but provide for the regulation of social relations in a broader sense (property, maintenance, or related to inheritance). Thus, the Greek legislator introduced the regulation of partnerships, allowing for the regulation of relations between persons of different sexes, while excluding same-sex couples from this scope.

According to the ECtHR, these couples had a particular interest in being able to enter into a civil partnership since there was no other alternative to their recognition by law. It was also pointed out that there was a growing trend in the Member States of the Council of Europe to recognise same-sex unions by law, as done by seventeen states as of date. Over time, the number of states increased to over twenty. The ECtHR, in its judgement in the case of *Oliari v. Italy*¹³⁸ and later in the case of *Fedorova v. Russia*¹³⁹, indicated that there was a need to create a legal framework for the functioning of same-sex couples without indicating to all Member States what kind of framework this should be.

Within the perspective of family life, considerations also relate to the relationship between parents and child/children. The parent-child relationship, in the simplest case, involves the relationship between a child and their biological parent. The issue of establishing the relationship is, as a general rule, reflected less frequently in national law than in ECtHR case law. However, it is possible to identify cases where the way of establishing the relationship will be relevant. Such cases include, for example, those concerning determining the parent-child relationship.

In this respect, attention should be drawn to the findings of the ECtHR in the case *Marckx v. Belgium*.¹⁴⁰ The case concerned a woman who gave birth to a child out of wedlock. According to Belgian law at the time, to be registered as the child's mother, she had to acknowledge the child or have court proceedings establishing maternity. At the same time, making an acknowledgement would have restricted the right to inheritance, and the court proceedings would have been lengthy and risked separating the

137 *X and others v. Austria*, para. 139.

138 *Oliari and others v. Italy*, Application nos. 18766/11 36030/11, 21 July 2015, para. 185.

139 *Fedorova and Others v. Russia*, [GC], Application nos. 40792/10, 30538/14 and 43439/14, 17 January 2023, para. 224.

140 *Marckx v. Belgium*, more: Mowbray, 2004, pp. 151–152.

child from its mother. The court found that there had been a violation of the right to family life due to unjustified legal obligations imposed on unmarried mothers. The court also pointed to the violation of Article 8 in the context of the distinction made between the rights of children born in and out of wedlock, stressing that this procedure frustrates and impedes the normal development of family life.¹⁴¹ Admittedly, as indicated, at the time of the preparation and adoption by the ECHR, there was a distinction in the legal systems of states between children of “married” and “unmarried” parents. Nowadays, it is necessary to take into account the evolving interpretation of the ECHR¹⁴², to ensure that a child is not discriminated against based on his or her origin. This judgement has significantly affected the past regulation of children and the review of the legal situation in the context of possible discriminatory provisions against children from the perspective of the rights guaranteed by Article 8.

Concerning the relationship between parents and the child, the case of *Neulinger and Shuruk v Switzerland* deserves attention.¹⁴³ This case deliberates a situation in which the mother of a child fled with her child from Israel to Switzerland on the grounds of security. The father of the child claimed the return of the child under the Hague Convention on the Civil Aspects of International Child Abduction.¹⁴⁴ The courts in Switzerland granted this request. Thus, the mother was forced to bring the case before the ECtHR. In the opinion of the ECtHR, the national courts in Switzerland did not adequately weigh the interests in the case. They have not adequately analysed the impact on the child’s situation and have not properly balanced the interests to ensure that the child’s best interests are pursued. Two elements must be considered regarding the child’s interests in the context of contact with the parents. The first is the need to maintain the child’s connection and personal contact with his or her family, except where that family is unsuitable. The second is to ensure that the child develops in a suitable environment without any authority under Article 8 of the parent’s rights to take actions that may harm the child’s health and development.¹⁴⁵ Therefore, it is necessary to analyse the whole situation that concerns the family and the factual, emotional, psychological, material and medical factors, as well as to consider each person’s interests while keeping in mind the priority of the child’s interests. Several circumstances had to be taken into account in order to make the correct findings. Attention was drawn to the fact that the child’s father had an unstable family situation, as well as the fact that he had not fulfilled his child maintenance obligations towards his other child. It was also necessary to consider the situation of the boy, who had Swiss nationality, attended a nursery there and communicated in French. It should also be taken into account that the child would return to Israel alone, without the mother, who wanted to continue to remain in Switzerland and feared criminal

141 *Ibid.*, para. 36.

142 *Ibid.*, para. 41.

143 *Neulinger and Shuruk v. Switzerland*, Application no. 41615/07, 6 July 2010.

144 Hague Convention on the Civil Aspects of International Child Abduction, 1980.

145 *Neulinger and Shuruk v. Switzerland*, para. 136, also: *Elsholz v. Germany*, [GC], Application no. 25735/94, 13 July 2000, para. 50.

proceedings against her related to the child's kidnapping. As a result, the ECtHR found that the child's return to Israel would not be in the child's best interests.

It is worth emphasising that when analysing this case, the ECtHR emphasised that it is necessary to consider – as it results from the Vienna Convention on the Law of Treaties of 1969 – ‘any relevant rules of international law applicable in the relations between the parties’. This will also apply to references to human rights norms other than the ECHR itself. The ECtHR uses this solution often and very willingly.¹⁴⁶ When faced with cases of a nature that require the weighing of different values, always achieving a consensus at the European level ensure better decision-making, especially when established practices are not always present.

In relations between parents and children, specific standards of case law can also be found about relations with children subject to adoption. In particular, it is necessary to remember the rights of natural parents. In the case *Johansen v. Norway*¹⁴⁷, the ECtHR considered the situation a violation of rights arising from Article 8 in the context of a woman whose daughter was taken away after birth and placed in adoption procedures. The domestic courts also decided that all ties between the child and the mother must be severed. When considering possible violations, the ECtHR indicated that in situations where the subject of the case is childcare issues, the state's margin of appreciation may be wide. However, the court will review the restrictions imposed by national authorities on exercising parental rights and issues related to contact between parent and child.¹⁴⁸ Analysing the entire situation, the ECtHR concluded that the deprivation of access rights to the daughter was a decision the national authorities took based primarily on the previous negative upbringing experiences that the applicant had with her son. Therefore, this decision was not sufficiently justified, as it did not directly concern the situation of deprivation of contact with the daughter's mother, and there was no indication that the solution applied was in the child's best interests. Such actions constituted an overstepping of the margin of appreciation by the national authorities.¹⁴⁹ It should be emphasised that this decision does not mean, however, an approach that would favour the mother of the child, as the ECtHR has already clearly indicated in its previous case law that in the absence of marriage, the father's role in raising the child is also of significant importance.¹⁵⁰

A definite challenge concerning the standards related to Article 8 are issues regarding assisted procreation, especially in the context of surrogacy procedures.

146 *Golder v. the United Kingdom*, Application no. 4451/70, 21 February 1975, para. 29; *Streletz, Kessler and Krenz v. Germany*, [GC], Application nos. 34044/96, 35532/97 and 44801/98, 22 March 2001, para. 90; *Al-Adsani v. the United Kingdom*, [GC], Application no. 35763/97, 21 November 2001, para. 55.

147 *Johansen v. Norway*, Application no. 17383/90, 7 August 1996.

148 *Johansen v. Norway*, para. 64.

149 *Ibid.*, paras. 78, 84.

150 *Keegan v. Ireland*, Application no. 16969/90, para. 55, 26 May 1994.

The ECtHR has had to deal with the issue of surrogacy several times so far.¹⁵¹ In most cases, the main problem that arose in the context of violations of Article 8 was the recognition of the relationship between the intended parents and the child born under surrogacy procedures. When these children were genetically derived from the intended parents, the national courts recognised this relationship, at least concerning the parent who provided the genetic material. The parent-child relationship was not recognised in the case where the other parent did not have a genetic relationship with the child¹⁵². The issue of motherhood, which in most legal systems is regulated based on the fact of the child's birth, was also a challenge.¹⁵³ In such cases, national systems also did not want to recognise the relationship between the intended mother, who transferred genetic material but did not give birth to the child¹⁵⁴, and the child. Subsequently, as in the *Mennesson*¹⁵⁵ and *Labasse*¹⁵⁶ cases, taking steps to protect the child's best interests became necessary, stabilising family relations. The ECtHR also expressed its views in this spirit, issuing its first advisory opinion at the request of the state, precisely in the context of the increasingly frequent doubts regarding the effects of surrogacy procedures carried out outside France, but by French nationals¹⁵⁷. In its advisory opinion, the ECtHR dealt with two questions submitted by the French Government. The first question concerned whether, if a child is born under a surrogacy procedure abroad and its intended father is also the biological father, is it possible to request the establishment of a parent-child relationship with the intended mother, who is not the biological mother. It should be emphasised that the data of the intended mother appears on the birth certificate, although the child was conceived from the genetic material of another woman. The second question concerned whether, in the event of the recognition that there is an obligation to establish a parent-child relationship also with the intended mother, would it be necessary, in order to respect the rights arising from Article 8, to make an entry in the register of births, marriages and deaths. It will also be important whether the entry of the data contained should be an entry in a birth certificate established following the law of a third country or whether it is possible to use other mechanisms to establish relationships, for example, the adoption of the child by the intended mother. In answering the first question, the ECtHR indicated that there is a need, based on Article 8, to guarantee recognition of the legal relationship between the child and the intended father, who is also the biological father. At the same time, the court indicated that the lack of recognition of the legal relationship between a child born under surrogacy procedures and the

151 *K.K. and Others v. Denmark*, Application no. 25212/21, 22 February 2023; *Paradiso and Campanelli v. Italy*, Application no. 25358/12, 24 January 2017; *D. v. France*, Application no. 11288/18, 16 July 2020.

152 More: Wedeł-Domaradzka, 2019, pp. 64–83.

153 Wedeł-Domaradzka, 2017.

154 *D. v. France*.

155 *Mennesson v. France*, Application no. 65192/11, 26 June 2014.

156 *Labasse v. France*, Application no. 65941/11, 26 June 2014.

157 Request for an Advisory Opinion under Protocol no. 16, 23 October 2018.

intended mother may have a negative impact on the rights of the child guaranteed by Article 8, in particular, at this stage, the right to private life.

On the other hand, threats were indicated, such as a threat to the possibility of knowing one's origins and the risk of abuse related to the implementation of surrogacy procedures. As to the second question, the ECtHR indicated that it is up to the state – exercising its margin of appreciation – to choose the means of recognising the legal relationship between the child and the intended parents. It does not need to be an obligation on the part of the state to register the foreign birth certificate together with the data contained therein. A satisfactory result from the perspective of protecting the child's best interests can also be achieved through other solutions, such as adoption. The most important thing is that the procedure that will allow for recognising this relationship is implemented quickly and effectively.

6. An Analysis, as Detailed as Possible, of the Case-Law of the ECtHR in Terms of the 16 Central and Eastern European Countries

Central and Eastern European Countries joining the ranks of the Council of Europe Member States after the political changes of the 1990s also brought their challenges to protecting human rights. The emergence of so many new actors as Member States has definitely increased the jurisprudential dynamics and pointed to new problems and new directions in developing human rights in Europe. Violations and efforts to restore respect for the rights guaranteed by Article 8 have also contributed to this development.

Analysing the situation in Central and Eastern Europe from the perspective of the right to private life should also be carried out on the basis of the three basic elements falling within the scope of this right: the physical, psychological, or moral integrity of individuals, privacy, and the protection of personal autonomy and identity.

Concerning the first of the scopes to be protected, i.e. the physical, psychological or moral integrity of individuals, attention may first be drawn to cases relating to the inadequacy of state protection for women who experience domestic violence. In the case *Kalucza v. Hungary*¹⁵⁸, the situation at issue was the failure of the judicial authorities to grant the applicant adequate protection against attacks of violence by her former partner. The applicant had experienced repeated acts of violence. However, the proceedings initiated could not provide her with adequate protection, including in terms of the length of the proceedings intended to protect the applicant from attacks by her cohabiting partner.¹⁵⁹ There was also a failure to comply with the state's fundamental obligation to secure the restriction of contact because the applicant was also violent, without having examined whether the aggression was

158 *Kalucza v. Hungary*, Application no. 57693/10, 24 April 2012.

159 *Ibid.*, para. 64.

part of self-defence.¹⁶⁰ The national courts also failed to comply with their obligations to adjudicate disputes concerning the cohabitation of the applicant and her violent partner promptly. A similar picture of the ineffectiveness of the protection of the woman's situation emerges from the case *Eremia v. Moldova*¹⁶¹, in which a comparable lack of adequate response by the state authorities could be observed. In this case, the positive obligations of the state in terms of protection were violated by the conduct of both the police and the judicial authorities, which failed to process the applicant's divorce application in time.

Separate cases of violation of individuals' physical, psychological or moral integrity may involve medical procedures. From the perspective of the right of access to medical procedures, a frequently cited case is the case of *Tysiāc v. Poland*.¹⁶² This case concerned a woman who was denied the right of access to an abortion procedure despite the existence of a serious visual impairment. Although Ms Tysiāc had a certificate indicating that her eyesight was at risk as a result of the pregnancy, this was issued by an internal medicine doctor and not an ophthalmology specialist. Consequently, the hospital refused to carry out the legal abortion procedure. In examining this case, the ECtHR focused not on the right to abortion, but on the failure of the state to comply with its positive obligation to secure adequate respect for the applicant's private life. The failure was due to the lack of clear procedures that allowed the doctor to satisfy himself of the necessity of a legal abortion and allowed the applicant to review the doctor's decision.¹⁶³ Therefore, the case had more of a procedural aspect, and it was the procedure and not the substantive law resulting from the judgement that would have to be changed to become effective and not illusory.¹⁶⁴

The ruling in the cases *Petrova v. Latvia*¹⁶⁵ and *Elberte v. Latvia*¹⁶⁶ is also relevant regarding medical issues. These cases were interesting because the first one by the ECtHR concerned the issue of transplantation. The rights of the applicant, in this case, were violated by not informing her about the removal and retention of organs of a deceased family member, which resulted from the obligation of the coordinator of the transplantation centre to inform her relatives about the issues concerning organ transplantation. However, at the same time, the law did not formulate the obligation to obtain their consent.¹⁶⁷ In the second of the *Latvian cases*¹⁶⁸, also based on the absence of an obligation to obtain consent for organ donation, a violation of Article 8 was found to have occurred because of the failure of the national authorities to provide legal and practical conditions to enable the applicant to express her wishes regarding

160 Ibid., para. 66.

161 *Eremia v. Moldova*, Application no. 3564/11, 28 May 2013.

162 *Tysiāc v. Poland*, Application no. 5410/03, 20 March 2007.

163 Ibid., para. 122.

164 Kondratiewa-Bryzik, 2009.

165 *Petrova v. Latvia*, Application no. 4605/07, 24 June 2014.

166 *Elberte v. Latvia*, Application no. 61243/08, 13 January 2015.

167 *Petrova v. Latvia*, para. 96.

168 *Elberte v. Latvia*.

the donation of her deceased husband's tissue.¹⁶⁹ Medical issues may also relate to the failure of patients to obtain relevant information relating to their medical condition and treatment. In *Csoma v. Romania*¹⁷⁰, the applicant had a pregnancy termination procedure for medical reasons. However, after the surgery, she was not subjected to proper treatment procedures and her health deteriorated to such an extent that her life was at risk. In the ECtHR's view, the doctors violated her right to private life by failing to involve the applicant in the choice of treatment and by failing to properly inform her of the risks associated with the medical procedure.¹⁷¹

Regarding the second right to the protection of private life, i.e. privacy, cases in this area may concern issues related to securing the privacy of communications and personal data, including data of a sensitive nature. Regarding issues related to the right to privacy, attention should be paid to ensuring such privacy in the workplace. The issue of ensuring privacy at the workplace was decided upon by the ECtHR in the case *Bărbulescu v. Romania*.¹⁷² This case concerned an employee whose communications were monitored at work. His employer informed the complainant that he was prohibited from using the Internet for personal purposes. However, he should have previously been informed about the extent and nature of the employer's monitoring activities and that the employer could have access to the actual content of his communications. The national courts should have considered that the Applicant was not adequately informed of the nature or extent of the monitoring to safeguard the respect for the right to private life.

Regarding the protection of sensitive data, a case concerning Lithuania¹⁷³ was relevant, in which a Lithuanian daily newspaper quoted hospital employees indicating which of the patients were HIV-positive. In both cases, this information was not published intentionally, and compensation proceedings were conducted in both cases, but the complainants nevertheless received meagre compensation at the national level. Consequently, they decided to take their case to the court, which clearly underlined the importance of national law protecting patient confidentiality. In this case, there was an abuse of the freedom of the press and, thus, a serious interference with private life. Aspects of privacy were also present in the Hungarian context¹⁷⁴, including publishing the complainant's data on a list of tax debtors. In this case, the ECtHR found a violation of the Applicant's private life due to the failure to strike the right balance between improving fiscal discipline and ensuring transparency and business credibility and the interests of private individuals. Publishing data, especially so extensively as to include a home address, is not justified, even posing the danger of its use by third parties.¹⁷⁵

169 More: Wedel-Domaradzka, 2015.

170 *Csoma v. Romania*, Application no. 8759/05, 15 January 2013.

171 *Ibid.*, para. 68.

172 *Bărbulescu v. Romania*, Application no. 61496/08, 5 September 2017.

173 *Biriuk v. Lithuania*, Application no. 23373/03, 25 November 2008.

174 *L. B. v. Hungary*, Application no. 36345/16, 9 March 2023.

175 *Ibid.*, para. 98.

Regarding privacy, the cases dealt with by the ECtHR concerning Central and Eastern European countries concerned various aspects of regime change. In the first case worth noting, a Romanian citizen¹⁷⁶ found out that the intelligence services kept his file containing false information collected during the communist era. He considered that this information could be used in the future and affect his personal life. In deciding upon the case, the Grand Chamber pointed out that storing such data in a manner likely to promote its disclosure and not adequately protect against unwarranted access violated Article 8 obligations. In the second of the Moldovan cases *Iordachi and Others v. Moldova*¹⁷⁷, the Applicant challenged the tapping practices, which were carried out based on outdated Soviet-era legislation. He further argued that the lack of judicial oversight of wiretapping operations violated the right to privacy. The court shared the complainant's view of the violation, emphasising the lack of transparent practices and adequate safeguards against unwarranted state interference.

Regarding the third aspect of the right to private life, i.e., the protection of personal autonomy and identity, it should be pointed out that this includes issues where the victims more clearly identify violations. A case to which attention should certainly be drawn in the context of identity is *Mikulić v Croatia*.¹⁷⁸ This case involved the situation of an unmarried child who brought a paternity suit with his mother. At the level of national proceedings, the courts repeatedly ordered DNA tests to establish paternity. The defendant himself did not appear for these tests. The basis of the complaint to the ECtHR was the inefficiency of the Croatian courts to establish paternity. In deciding the case, the court emphasised how important it is for one's identity to know one's origins, in this case, to establish who the father is. It stated that merely being able to bring an action for such an establishment is too little to speak of effectiveness. It will only be effective if an examination can be carried out to establish or exclude the paternity of the man in question. Thus, on procedural grounds, a violation of Article 8 was determined.

In another case related to personal autonomy, the ECtHR examined the issue of forced sterilisation Roma women were subjected to. The complainant in this case was a woman¹⁷⁹ who had been sterilised while in hospital for childbirth. The information she was given was not provided in a way that would allow her to understand the term “sterilisation” and its consequences for her future procreation plans. In the court's opinion, the Slovak legal arrangements did not contain adequate safeguards for the performance of sterilisation procedures and did not guarantee reliable information on the facts of their performance and their consequences. This case has a broader context relating to the use of sterilisation practices against Roma women in Slovakia.¹⁸⁰

176 *Rotaru v. Romania*, Application no. 28341/95, 4 May 2000.

177 *Iordachi and Others v. Moldova*, Application no. 25198/02, 10 February 2009.

178 *Mikulić v Croatia*.

179 *V. C. v. Slovakia*, Application no. 18968/07, 8 November 2011.

180 *I. G. and Others v. Slovakia*, Application no. 15966/04, 13 November 2012.

Concerning the identity issue, attention may also be drawn to a case involving Poland¹⁸¹, the so-called ‘exhumation of Smolensk crash victims’ case. The subject of the complaint was the prosecutor’s decision to carry out the exhumation, against which the applicants had no right to lodge any appeal. Here, the court shared the applicants’ view that there had been a violation of Article 8, with the violation relating to procedural aspects, namely the impossibility of appealing against the prosecutor’s decision and the impossibility of requesting a judicial review of his decision.

In analysing the second aspect of Article 8, the right to family life, it is also necessary to focus on the three thematic areas considered earlier, namely relations between spouses or persons in a stable or casual relationship, relations between parents and their children, issues relating to adoption and assisted procreation.

In the context of cases concerning relationships between spouses or persons in a stable or casual relationship, attention to the case *Babiarz v. Poland* concerning the pronouncement of divorce¹⁸² must be emphasised. In this case, the Court addressed the issue of divorce in the context of protecting marriage in Poland, particularly when one of the spouses does not want the divorce. The applicant in this case was a man who got married, and then his marriage started experiencing problems. The two spouses stopped living together, and the man entered into a new relationship in which they were expecting a child. The applicant’s wife refused to consent to the divorce. According to Polish law, the resistance of one of the spouses results in the impossibility of declaring the dissolution of the marriage. The applicant brought the case before the court, indicating that the refusal to divorce violated his right to respect for his private and family life. The court did not find that there had been a violation, arguing that Polish law aims to protect the institution of marriage and that the state itself has a wide margin of appreciation in this regard. Since Polish law protects marriage and family stability, there is no violation of Article 8, as it is justified by public interest. The context of the present case shows that based on the ECHR, the absolute right to divorce does not exist.

Another aspect that the Court has dealt with in the context of relationships between persons in a relationship, this time in a *de facto* relationship, is the case of *Buhuceanu and Others v. Romania*.¹⁸³ The applicants in this case were persons in same-sex partnerships who were denied the status of co-insured by the Romanian legislator. They brought the case before the court, indicating that the state had failed to fulfil its positive obligation to recognise and protect their relationships, particularly in the context of the decisions previously made in the *Fedotova and Others v. Russia*¹⁸⁴ case. In assessing the state’s fulfilment of its positive obligations, the court found that Romanian law sanctioned a marriage reserved only for persons of different sexes. Nor did it appear from the government’s position that this state of affairs would be

181 *Solska and Rybicka v. Poland*, Application nos. 30491/17 and 31083/17, 20 September 2018.

182 *Babiarz v. Poland*, Application no. 1955/10, 10 January 2017.

183 *Buhuceanu and Others v. Romania*, Application nos. 20081/19, 20108/19, 20115/19, 23 May 2023.

184 *Fedotova and Others v. Russia*.

changed. Same-sex couples were nothing more than *de facto* unions under Romanian law, and the partners in such unions were unable to regulate fundamental aspects of their lives, including property, mutual maintenance or inheritance. The court, therefore, indicated that the applicants had a particular interest in entering into a *de facto* partnership or establishing another form to which the law would grant protection. The government's arguments about the Romanian community's lack of acceptance of this type of union and the argument of the state's absence of any prior commitment to its willingness to establish legal regulations for same-sex couples were not accepted positively by the ECtHR. Consequently, the court found that the government did not enjoy a wide margin of appreciation in this respect. While it was free to determine the legal nature, it could not exclude the recognition of the legal relationship of same-sex couples. Thus, it was held that the state still needed to fulfil its positive obligation to protect the rights under Article 8 of the Convention.

Concerning the issue of the relationship between parents and their children, one can point, for example, to the judgement rendered in the case *Popadić v. Serbia*.¹⁸⁵ The court had to deal with the situation of the father of a child for whom the Serbian authorities did not grant adequate contact with his child after his divorce from the mother. Although the right to contact was granted, in practice it was constrained and, in many cases, needed to be put into effect appropriately. The Serbian authorities had been unable to effectively enforce court judgements allowing regular contact between the father and the child. In his application, the applicant claimed that the Serbian authorities had thus violated his right to respect for family life guaranteed by Article 8 of the Convention. The court agreed with the applicant's position and pointed out that the Serbian authorities had failed to take measures that could be considered sufficiently effective and had not adequately enforced previous court orders. It was emphasised that it was the authorities' task to take appropriate measures so that the father could regularly maintain contact with his son. It was also clearly indicated that the length of time taken to determine the contact issue between father and son was excessive and not based on legitimate or exceptional circumstances. The ECtHR stressed that an important aspect, in the case of contact issues, is the particular sensitivity related to the child's sense of stability and his young age. The longer it takes to establish parent-child contact, the more complex the relationship will actually be and the more difficult it will be for it to develop properly.

An essential example of the protection of family relationships that may be relevant in cross-border aspects is the case of *I.V. v. Estonia*¹⁸⁶, in which a biological father residing in Latvia contested that another man in Estonia had adopted his son. The applicant in this case was a Latvian national trying to establish his biological paternity in Latvia. At the same time, the child resided in Estonia and was adopted there by a man who was in relationship with the child's biological mother. In the applicant's view, the Estonian courts violated his right to family life by failing to consider his

185 *Popadić v. Serbia*, Application no. 7833/12, 20 September 2022.

186 *I.V. v. Estonia*, Application no. 37031/21, 10 October 2023.

potential paternity, which could consequently affect his subsequent relationship with the child. In the court's view, family life is not limited solely to marital relationships, it may also include a potential relationship in which a child born out of wedlock may develop between the child born out of wedlock and its biological father, therefore the man is entitled to the protection of his rights. The breach of Article 8 by the Estonian authorities also consisted in their failure to examine the particular circumstances of the case and to correctly balance the different rights and interests of the persons involved.

The third aspect of the right to respect for family life concerns adoption and assisted procreation. The issue of adoption in the context of the relationship between adopted children and adoptive parents was addressed by the ECtHR in the case of *Pini and Others v. Romania*.¹⁸⁷ The complainants in this case were two Italian couples who had received a ruling authorising them to adopt Romanian children who were previously living in a private care home. These rulings generated an amendment to the children's birth certificates. The adoption procedure was found to comply with national law and the Hague Convention of 29 May 1993 on the Protection of Children and International Cooperation. The national courts obliged the care homes to hand over the children together with their birth certificates; however, the care homes obtained a stay of the adoption orders. The applicants made several attempts to gain access to the children and to have them surrendered, but this was unsuccessful. Over time, the children stated that they did not want to join, and proceedings were initiated to have the adoption orders removed from the law. In the court's view, Article 8 of the Convention was not violated. Although the adoptive parents had obtained final court decisions and made attempts to obtain the children, the minors' refusal had some weight, mainly as it had been expressed consistently, and their integration into the new family was consequently considered unlikely. It was held that the Romanian authorities had no obligation to ensure that the children leave the country against their will and could not ignore the pending proceedings in which the legality and legitimacy of the original adoption arrangements were questioned.

An interesting procreative aspect in the context of the possibility of assisted procreation was contemplated by the ECtHR in a case *Pejřilová v. the Czech Republic*.¹⁸⁸ The facts concerned a situation in which the applicant's husband had frozen his sperm prior to starting oncological treatment while agreeing to store it. The document he signed at the time of semen collection stated that a separate consent would be required before each use and that, unless otherwise agreed, storage would be discontinued in the event of the donor's death. Subsequently, the applicant and her husband decided to have an IVF procedure and sperm multiplication. Unfortunately, the applicant's husband's condition deteriorated, and he died before any further steps were taken about the IVF procedure. After her husband's death, the applicant applied for fertilisation of her ova with her deceased husband's sperm. The infertility treatment centre

187 *Pini and Others v. Romania*, Application no. 78028/01 and 78030/01, 22 June 2004.

188 *Pejřilová v. the Czech Republic*, Application no. 14889/19, 8 December 2023.

refused. Subsequently, the applicant filed a lawsuit with the national court, which was dismissed because, as a single woman without a partner, she was not eligible for assisted reproduction. By referring her complaint to the court, she alleged a violation of her right to private and family life. In deciding the case, the court noted that states are granted a wide margin of appreciation in assisted reproduction matters. In its considerations, the ECtHR pointed out that Czech law allows artificial insemination only based on a written request from a woman and a man jointly, treating each other for infertility. In the court's view, it does not go against the rights provided by Article 8 for the state to enact legislation regulating artificial insemination within the said wide margin of appreciation. In the case of Czech law, the solutions adopted were only available to couples and between living persons. The court emphasised that by prohibiting the use of reproductive material, the Czech authorities protected not only the free will of the man who consented to assisted reproduction but also the right of the unborn child to know its origin. It also pointed out that, although neither the unborn child nor the deceased person is a holder of Convention rights as such, the ECtHR sees no reason why the law could contain solutions that take their interests into account. The court pointed out that the domestic legislation was clear and had been presented to the applicant, as well as to her husband, who had signed the form with this content and not a subsequent one. Consequently, it was pointed out that the applicant's right to decide to have a child should not outweigh the legitimate protection of general interests.

7. Summary

In Central and Eastern Europe, human rights protection issues, substantially similar to those faced by Western European countries, are escalating. This is particularly true for protecting private and family life, including equality. One can note a growing number of cases concerning the possibility of recognising same-sex relationships, which the case of *Fedotov v. Russia* has undoubtedly influenced. As evident from the case law, the court allows states a certain degree of discretion regarding the forms in which they will recognise these relationships. When deciding on these cases, it interprets the manner of regulation through the prism of anti-discrimination legislation, which narrows the margin of appreciation.

The specific challenges in this part of Europe stem from the post-communist legacy, where protecting private life also includes protecting the data of those repressed by previous regimes.

It is worth emphasising that the countries of Central and Eastern Europe are confronted with new ethical problems related to medically assisted procreation. In the absence of consensus and ethical differences in this area, the acceptability and scope of regulations adopted within the framework of national orders are assessed from the perspective of the wide margin of appreciation accorded to states. The ethical challenges to be faced by the CEECs over time also include issues that have

been regulated fragmentarily or not at all, such as surrogacy. This issue is particularly relevant for economically weaker countries such as Ukraine, where there is a lack of uniform standards regulating surrogacy services and where there is a high risk of institutionalisation of such practices.¹⁸⁹ On the other hand, it should not be forgotten that a consequence of globalisation is that legal situations under one set of laws conflict with others.

Ultimately, there still needs to be standardised relationships between the right to family and private life and other Convention rights in Central and Eastern Europe, leading to various interpretations and human rights challenges.¹⁹⁰

189 Mikluszka, 2010, p. 322.

190 Ramskold and Posner, 2013, p. 118.

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Freedom of Thought, Conscience, and Religion

Dalibor ĐUKIĆ

ABSTRACT

This chapter analyses the protection of freedom of thought, conscience, and religion under the European Convention on Human Rights, with a special focus on violations of religious freedom in Central and Eastern European states. In general, states have been granted a wide margin of appreciation in regulating their relationship with religions, including the legal status of religious organisations. Most countries in the region have adopted a cooperationist model of state-religion relations, which appears to be consistent with their obligations under Article 9. However, registration systems in some countries breach the Convention, as they create disparities in the treatment of religious organisations and violate the communal aspect of religious freedom. On the other hand, individuals have faced challenges in manifesting their religion in special institutional settings, such as hospitals and prisons. The chapter argues that while a significant portion of judgments in which the European Court of Human Rights has identified violations of Article 9 involves countries in Central and Eastern Europe, there is no evidence of systematic violations of the right to manifest one's religion in this region.

KEYWORDS

History of religious freedom protection, Freedom of thought and conscience, Freedom of religion or belief, European Convention on Human Rights, European Court of Human Rights, Central and Eastern European Countries, Recognition of religious organisations.

1. Introduction

Freedom of religion is undoubtedly one of the oldest human rights and was the first to draw the attention of the international state system. This is because religious persecution, unfortunately, is as old as religion itself. However, even in ancient times, there are instances of religious tolerance. For example, the Egyptian King Amasis (569–527 B.C.) allowed Greeks living in the self-governing settlement of Naucratis to practice their religion and live under Greek law.¹ Similarly, the Old Testament provides exam-

| 1 Nussbaum, 1954, p. 3. |

| Dalibor Đukić (2026) 'Freedom of Thought, Conscience, and Religion' in Paczolay, P. (ed.) *The European Convention on Human Rights A Central and Eastern European Perspective*. Miskolc-Budapest: Central European Academic Publishing, pp. 327–362. https://doi.org/10.71009/2026.pp.tecchr_11 |

ples of tolerance towards Jews in the ancient Near East. Persians and Alexander, the Great recognised that successful empires must rely on tolerance of their inhabitants' beliefs rather than their destruction. The Roman Empire likely achieved the greatest success in implementing such policies. As Gibbon aptly noted, 'The various modes of worship which prevailed in the Roman world were all considered by the people as equally true; by the philosophers as equally false; and by the magistrate as equally useful. And thus, toleration produced not only mutual indulgence, but even religious concord.'² This tolerance ceased when religion became a threat to the unity of the Empire and Roman rule. Such was the fate of the Jews in the 1st century and the Christian Church during the periods of persecution, which continued until the Edict of Toleration was issued by Galerius in 311. This marked the failure of the Roman emperors' persecution policy.³ With the Christian Church established as the official religion, internal doctrinal disputes among Christians emerged as a new source of tensions within the Roman Empire.

The evolution of religious freedom protection in Europe can be divided into three broad stages. The first stage saw religious tolerance and freedom employed as mechanisms to resolve the religious wars of the sixteenth and seventeenth centuries. The second stage was characterised by efforts to protect religious freedom through minority treaties during the interwar period. Finally, the third stage emerged after World War II, when freedom of religion became recognised as a fundamental human right protected by international human rights law.

The events that had catalytic influence on the evolution of religious liberty in Europe were the Protestant Reformation and religious wars that followed. The 1555 Peace of Augsburg guaranteed personal and legal security of Catholics and Lutherans, providing to Lutheran minority the right to exercise their religion. Sovereignty over religion was transferred to secular rulers under the principle *Ubi unus dominus, ibi una sit religio* ('where there is one ruler, there should be only one religion'), which was later reformulated as the well-known phrase *cuius regio, eius religio* ('whose realm, his religion'). These provisions were a step towards the abandonment of the universalist assumption that a single empire should be based upon a common religion, even though the Peace itself was founded on those very assumptions. This is evident from the provision that identified the unification of the Church as the desirable goal of the treaty, viewing it as the only way that religious issues would be finally settled.⁴ A general freedom of religion was not established, even though the Peace granted Catholics and Lutherans the right to move to territories of their religious allegiance (the *ius emigrandi*).⁵ Nonetheless, the Peace of Augsburg paved the way for new settle-

² Gibbon, 1776, p. 29.

³ Malcolm, 1997, p. 19.

⁴ Geoffrey, 1990), p. 195.

⁵ Article 24 of the Augsburg Peace reads as follows: 'In case our subjects whether belonging to the old religion or the Augsburg Confession should intend leaving their homes with their wives and children in order to settle in another place, they shall be hindered neither in the sale of their estates after due payment of the local taxes nor injured in their honour.' Reich, 1905, p. 232.

ments of religious freedom in Europe, which were necessary for the peaceful coexistence of Catholics and Lutherans and affected the history of these denominations in Central and Northern Europe.

The next significant milestone in the evolution of religious freedom in Europe was the 1648 Westphalia Treaties, concluded in Münster and Osnabrück.⁶ These treaties ended the Thirty Years' War, which was the culmination of broader conflicts among Catholics, Lutherans, and Calvinists across the countries of Central and Northern Europe. As M. Evans observed, the treaties emphasised 'the religious freedom of the State rather than of the individual.'⁷ Once again, general freedom of religion was not established. However, the Reformed (Calvinist) Church was recognised as a permitted religion, and basic guarantees of freedom of worship were introduced. The Treaty of Osnabrück affirmed the dominance of the state in matters of religious governance and set the stage for future interstate treaties to move away from regulating religious differences. During this period, religious liberty and tolerance were not seen as ends in themselves but rather as instruments for eliminating religious conflicts or achieving strategic and even commercial goals.

The emergence of new nations in Southeastern Europe was formally acknowledged by the provisions of the 1878 Treaty of Berlin.⁸ This treaty recognised the independence of Montenegro, Serbia, and Romania, subject to conditions that, among other matters, addressed specific religious issues. These conditions stipulated that, within the newly recognised states, religious differences could not be used as a ground for exclusion from 'the enjoyment of civil and political rights, admission to public employments, functions, and honours, or the exercise of the various professions and industries, in any locality whatsoever.' The Treaty required these states to guarantee freedom of all forms of worship and to ensure that no obstacles would hinder the hierarchical organisation of different religions or their relations with their spiritual leaders.⁹ The provisions of the Treaty of Berlin safeguarded religious minorities not only in exercising their rights, such as freedom of worship and the ability to maintain relationships with religious centres abroad, but also by protecting them from discrimination in secular matters.¹⁰

After World War I, the focus shifted to the protection of ethnic and national minorities in the newly established states of Central and Eastern Europe. As the provisions of the Berlin Treaty guaranteeing the rights of Jews in Romania proved ineffective, efforts to create new, more effective mechanisms were introduced through the Polish Minority Treaty. This treaty served as a model for minority treaties later imposed on

6 Treaty of Peace between France and the Empire, signed at Munster 14 /24 October 1648 and Treaty of Peace between Sweden and the Empire, signed at Osnabriick 14/24 October 1648. Parry, 1969, pp. 119 and 271.

7 Malcolm, 1997, p. 50.

8 Treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia, and Turkey for the Settlement of Affairs in the East, signed 13 July 1878 at Berlin. Parry, 1969, p. 171.

9 Articles 27, 35, and 44 of the Peace of Berlin.

10 Evans, 2004, p. 9.

the Serb-Croat-Slovene State, Czechoslovakia, Romania, and Greece. Article 2 of the Polish Minority Treaty stated: 'Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion. All inhabitants of Poland 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.'¹¹ This provision applied to all inhabitants and represented a step towards bringing international treaties closer to the general protection of religious freedom. However, each of these minority treaties included special clauses addressing the needs of specific religious organisations deemed to require special protection. As M. Evans noted, the association of these treaties with minorities limited their broader impact, leading him to conclude that 'The interwar system was designed to protect either the religious rights of minorities or the rights of religious minorities.'¹² The tragedy of the Holocaust proved the failure of the minority-based system of human rights protection.

It was only after World War II that the protection of minority rights gave way to the recognition of individual human rights. Following the establishment of the United Nations, the protection of individual rights was enshrined in the International Bill of Rights, which consists of the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966 and in force since 1976), and the International Covenant on Civil and Political Rights (ICCPR, adopted in 1966 and in force since 1976). The UDHR protects religious freedom in Article 18, which underwent significant changes and revisions during its drafting process. The initial 'Humphrey Draft,' prepared by the Division of Human Rights, simply stated in Article 14: 'There shall be freedom of conscience and belief and of private and public religious worship.'¹³ The Third Committee Draft in Article 16 read, '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 teaching, practice, worship and observance.'¹⁴ The same wording exists in Article 18 of the Declaration as it is today.¹⁵

The UDHR is a non-binding document, although it is often regarded as having the force of customary international law.¹⁶ In contrast, the ICCPR and the ICESCR are binding law and the Vienna Convention on the Law of Treaties requires from state parties compliance with the terms of these covenants. The freedom of thought,

11 Woolsey, 1920, p. 393.

12 Evans, 2004, p. 10.

13 Glendon, 2001, p. 272.

14 Glendon, 2001, p. 205.

15 Universal Declaration of Human Rights, A Res. 217(III).

16 Durham, Scharffs, 2019, p. 84.

conscience and religion is protected under Article 18 of the ICCPR.¹⁷ As a legally binding treaty, the ICCPR incorporates various enforcement mechanisms, including the establishment of the Human Rights Committee, which oversees the reporting system created by the Covenant. Due to international political complexities and the nature of religious issues, consensus has never been achieved regarding the creation of a legally binding treaty solely concerning religion. Instead, in 1981, the United Nations General Assembly adopted the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.¹⁸

One notable distinction between the UDHR and ICCPR on the one hand, and the 1981 Declaration on the other, lies in the scope of religious freedom. While the UDHR and ICCPR guarantee the freedom to “change” or “adopt” religion or belief, the 1981 Declaration omits these words and guarantees the freedom to have a religion or whatever belief. The words “change” or “adopt” were not acceptable for Muslim countries given that the Koran forbids Muslims to change religion.¹⁹ The right to ‘have a religion or belief of his choice’ was acceptable to Muslim countries even though ‘the phrase implies the right to change from any religion and the right to adopt a different religion from that previously held or to adopt a religion for the first time.’²⁰ The countries opposed to a different version from that in Article 18 of the ICCPR agreed to this change, believing that the Declaration would win wider acceptance throughout the Islamic world. However, to avoid any interpretation that restricted or derogated from the rights enshrined by ICCPR and ICESCR, Article 8 was added to reaffirm the right to “change” or “adopt” religion by emphasising the continued force of the twin Covenants.²¹ This article ‘underlines the validity of the rights defined in the Universal Declaration and the Covenants.’²² The European Convention on Human Rights explicitly protects the freedom to change religion or belief. This protection

17 Article 18 of the ICCPR read as follows: 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), UN Doc A/RES/2200A(XXI).

18 Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, GA Res. 36/55, UN Doc A/RES/36/55.

19 An-Na'im, 1987, p. 8.

20 Taylor, 2005, pp. 35–36.

21 Article 8 of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief read as follows: ‘Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.’

22 Walkate, 1983, p. 155.

has given rise to only a limited number of cases before the European Court of Human Rights (ECtHR), primarily involving issues of proselytism or the administrative consequences of leaving a particular religion.²³ These cases will be analysed in the following sections of this chapter.

Two provisions of the European Convention on Human Rights (ECHR) explicitly protect rights related to religion or belief. The first is Article 9, which is the main provision of the Convention addressing freedom of religion or belief. The second is Article 2 of Protocol No. 1 to the Convention, which protects the parental right to ensure their children's education aligns with their religious convictions. Together, these provisions offer protection comparable to that provided by Article 18 of the ICCPR.

2. The Scope of Article 9

The terminology used in Article 9 indicates that its scope is potentially wide and covers different forms of religious and non-religious beliefs. The beginning of paragraph 1, as well as the heading of the provision, explicitly refer to freedom of thought, conscience, and religion. The link between these three concepts has been highlighted by the Court in *Eweida* case: 'Religious freedom is primarily a matter of individual thought and conscience.'²⁴ However, the remainder of the Article employs the phrases "religion or belief" and "religion and beliefs." Additionally, Article 2 of Protocol No. 1 to the Convention refers to 'religious and philosophical convictions'. It is evident that, by protecting freedom of thought and conscience and by using terms such as "belief" and "philosophical convictions", the Convention goes beyond being solely a rationale for the protection of religious freedom.

Much of the jurisprudence is about religion, even though significant protection has been provided by Article 9 to non-religious beliefs and other expressions of freedom of thought and conscience. In some cases, the Court had to assess whether a particular belief, conviction, or even opinion qualifies as a "belief" within the meaning of Article 9. The Court's jurisprudence leaves no doubt that traditional religions and their denominations fall within the scope of the protection provided by the mentioned article. In *Eweida* the Court noted that

'It was not disputed in the proceedings before... this Court that Ms Eweida's insistence on wearing a cross visibly at work was motivated by her desire to bear witness to her Christian faith... the Court considers that Ms Eweida's

23 ECtHR, *Kokkinakis v. Greece*, Application nos. 14307/88 and 32782/03, Judgment of 25 May 1993; ECtHR, *Darby v. Sweden*, Application no. 11581/85, Judgment of 23 October 1990.

24 ECtHR, *Eweida and Others v. the United Kingdom*, Application nos. 48420/10, 59842/10, 51671/10, and 36516/10, Judgment of 15 January 2013, para. 80.

behaviour was a manifestation of her religious belief, in the form of worship, practice and observance, and as such attracted the protection of Article 9.²⁵

In the case of *Leyla Şahin v. Turkey*, the Court acknowledged that restricting the applicant's right to wear an Islamic headscarf constitutes an interference with her freedom to manifest her religion.²⁶ The Court has recognised that ritual slaughter performed in accordance with the religious prescriptions of the Jewish faith falls under the right to manifest one's religion through observance, as protected by Article 9.²⁷ Among non-Abrahamic long-standing world religions, Buddhism, Hinduism, and Sikhism are also found by the Court to fall within the scope of the religious freedom protection.²⁸

It is significantly more challenging for the Court to determine whether newly established groups and movements qualify for protection under Article 9. The Court has deliberately refrained from offering a definitive interpretation of what constitutes a "religion," stating 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" within the meaning of Article 9 of the Convention.'²⁹ This cautious approach is sensible, as defining religion requires striking a balance: the definition must be sufficiently inclusive to encompass the diversity of world religions while also precise enough to be practically applicable in specific cases.³⁰ Over-inclusiveness risks recognising as religions groups that should not qualify, whereas under-inclusiveness risks excluding groups that should be recognised as religions.³¹ Furthermore, the use of the term "belief" in Article 9 enables the Court to avoid defining the term "religion".³² Be that as it may, there is a general tendency towards adopting broader definitions of religion, along with expanding the protection afforded by Article 9 to cover various secular worldviews.

In the case of *Kimlya and others v. Russia* the Court had to determine whether the Church of Scientology qualifies to be recognised as a "religion". Considering its subsidiary role, the Court assessed whether a consensus exists among Council of Europe

25 ECtHR, *Eweida and Others v. the United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10, and 36516/10, Judgment of 15 January 2013, para. 89.

26 ECtHR, *Leyla Şahin v. Turkey*, Application no. 44774/98, Judgment of 10 November 2005, para. 78. Article 9 of the ECHR and Article 2 of Protocol No. 1 are found to be applicable in cases involving Alevi faith in Turkey. ECtHR, *Hasan and Eylem Zengin v. Turkey*, Application no. 1448/04, Judgment of 9 October 2007, para. 66; ECtHR, *İzzettin Doğan and Others v. Turkey*, Application No. 62649/10, Judgment of 26 April 2016, para. 68.

27 ECtHR, *Cha'are Shalom Ve Tsedek v. France*, Application no. 27417/95, Judgment of 27 June 2000, para. 74.

28 ECtHR, *Jakóbski v. Poland*, Application no. 18429/06, Judgment of 7 December 2010; ECtHR, *Genov v. Bulgaria*, Application no. 40524/08, Judgment of 23 March 2017; ECtHR, *Phull v. France*, Application no. 35753/07, Decision of 11 January 2005.

29 ECtHR, *Kimlya and Others v. Russia*, Applications nos. 76836/01 and 32782/03, Judgment of 1 October 2009, para. 79.

30 Harris et al., 2023, p. 576.

31 Durham, Scharffs, 2019, p. 41.

32 Harris et al., 2023, p. 576.

member states regarding the religious nature of specific groups and their teachings. In the absence of such consensus, the Court relies on the position of domestic authorities. In this case, Russian authorities had consistently expressed the view that Scientology groups are religious in nature, which the Court deemed sufficient for the application of Article 9.³³ In a case concerning the Osho movement, the Court examined their activities, which included operating Osho meditation centres, organising seminars, celebrating religious events, and engaging in joint work projects. The ECtHR recognised these activities as manifestations of belief falling within the scope of Article 9.³⁴ However, the Court refrained from determining whether these activities constituted manifestations of religion. Among religious groups of more recent origin that have been recognised are the Church of Jesus Christ of Latter-Day Saints,³⁵ the Secular Order of Druids,³⁶ Jehovah's Witnesses,³⁷ the Divine Light Zentrum,³⁸ the Unification Church,³⁹ etc.

The protection provided by Article 9 has been extended by the Court to cover a wide range of non-religious beliefs, non-beliefs and secular worldviews,⁴⁰ such as pacifism,⁴¹ atheism,⁴² opposition to abortion,⁴³ and veganism.⁴⁴ In the landmark *Lautsi* case the Court emphasised that the views of the supporters of secularism must be considered as “convictions” within the meaning of Articles 9 of the Convention and 2 of Protocol No. 1.⁴⁵ It should be noted here that the “principle of secularism” has gained importance in the Court's jurisprudence and has been invoked in numerous cases concerning the role of religion in the public sphere.⁴⁶ However, secularism itself, as a worldview, qualifies for protection under Article 9 of the Convention. Similarly, political ideologies, such as communism, have been afforded the same

33 ECtHR, *Kimlya and Others v. Russia*, Applications nos. 76836/01 and 32782/03, Judgment of 1 October 2009, paras. 79–81.

34 ECtHR, *Leela Förderkreis e.V. and others v. Germany*, Application no. 58911/00, Judgment of 6 November 2008, para. 81.

35 ECtHR, *The Church of Jesus Christ of Latter-Day Saints v. The United Kingdom*, Application no. 7552/09, Judgment of 4 March 2014.

36 ECtHR, *Chappell v. the United Kingdom*, Application no. 12587/86, Decision of 14 July 1987.

37 ECtHR, *Jehovas Zeugen in Österreich v. Austria*, Application no. 27540/05, Judgment of 25 September 2012.

38 ECtHR, *Omkarananda and the Divine Light Zentrum v. Switzerland*, Application no. 8118/77, Decision of 19 March 1981, p. 118.

39 ECtHR, *Nolan and K. v. Russia*, Application no. 2512/04, Judgment of 12 February 2009.

40 Murdoch, 2012, p. 16.

41 ECtHR, *Arrowsmith v. the United Kingdom*, Application no. 7050/75, Decision of 16 May 1977.

42 ECtHR, *Angelini v. Sweden*, Application no. 10491/83, Decision of 3 December 1986.

43 ECtHR, *Knudsen v. Norway*, Application no. 11045/84, Decision of 8 March 1985.

44 ECtHR, *C.W. v. the United Kingdom*, Application no. 18187/91, Judgment of 10 February 1993.

45 ECtHR, *Lautsi v. Italy*, Application no. 30814/06, Judgment of 18 March 2011, para. 58.

46 ECtHR, *Ebrahimian v. France*, Application no. 64846/11, Judgment of 26 November 2015. ECtHR; ECtHR, *Dogan and Others v. Turkey*, Application no. 62649/10, Judgment of 26 April 2016; ECtHR, *Dogru v. France*, Application no. 27058/05, Judgment of 4 December 2008. An exhaustive list of cases involving the principle of secularism can be found in: Gunn, 2019, pp. 465–466.

level of protection.⁴⁷ All of the above highlights why the Court, in its very first case on religious freedom, concluded that ‘Freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.’⁴⁸

Even though the terms belief and conviction have been interpreted broadly, not every belief, conviction, opinion, view, or idea qualifies for the protection under Article 9. In its jurisprudence, the Court has established the criteria for determining whether certain belief or conviction falls within the scope of the protection provided by the mentioned article. The view must ‘attain a certain level of cogency, seriousness, cohesion and importance,’ relate to a ‘weighty and substantial aspect of human life and behaviour,’ be ‘worthy of respect in a “democratic society,”’ and ‘not incompatible with human dignity.’⁴⁹ For example, the applicant’s request to have his ashes scattered on his own land was deemed not to fall under the scope of ‘practice’ as defined within the provisions of Article 9.⁵⁰ In a case where the applicant claimed that her views on assisted suicide constituted beliefs, the Court determined that these views ‘do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance.’⁵¹ In a case involving a member of the Wicca religion who was allegedly deprived of the right to manifest his religion by the prison authorities, the Commission observed that the applicant failed to present any evidence to substantiate the existence of the Wicca religion and therefore found the application to be ill-founded.⁵² In a case involving a “Pastafarian,” (a follower of the “Church of the Flying Spaghetti Monster”), the application for a new identity card and driving license was refused due to the fact that she submitted an identity photograph that showed her wearing a colander on her head. She insisted that her religion required her to wear a colander always and everywhere. However, the Court found that Article 9 does not apply to Pastarianism and that it cannot consider it as a religion within the meaning of that provision.⁵³

Three components of the freedom protected by Article 9 can be identified: the freedom of thought, conscience, and religion as such (or the freedom to hold any religious belief), the freedom to change one’s religion or belief and the freedom to

47 ECtHR, *Hazar and Açık v. Turkey*, Application no. 16311/90, Decision of 11 October 1991.

48 ECtHR, *Kokkinakis v. Greece*, Application no. 14307/88, Judgment of 25 May 1993, para. 31.

49 ECtHR, *Campbell and Cosans v. the United Kingdom*, Application nos. 7511/76 and 7743/76, Judgment of 25 February 1982, para. 36; ECtHR, *Jakóbski v. Poland*, Application no. 18429/06, Judgment of 7 December 2010, para. 44.

50 ECtHR, *X. v. Germany*, Application no. 8741/79, Decision of 10 March 1981.

51 ECtHR, *Pretty v. the United Kingdom*, Application no. 2346/02, Judgment of 29 April 2002, para. 82.

52 ECtHR, *X. the United Kingdom*, Application no. 7291/75, Decision of 4 October 1977.

53 ECtHR, *De Wilde v. The Netherlands*, Application no. 9476/19, Fourth Section Decision of 9 November 2021, para. 54.

manifest religion or belief.⁵⁴ In the following sections, these three components will be analysed in the context of the ECtHR jurisprudence.

3. Freedom of Thought and Conscience

In the General Comment on Article 18 of the ICCPR (Freedom of Thought, Conscience or Religion), the Human Rights Committee underscores the fact that ‘The freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.’⁵⁵ During the drafting of the provision of Article 9, Pierre-Henri Teitgen, who made his own proposal that included freedom of thought and conscience, explained to the plenary Consultative Assembly that

‘In recommending a collective guarantee not only of freedom to express convictions, but also of thought, conscience, religion and opinion, the Committee wished to protect all nationals of any member State, not only from breaches of obligation for so-called reasons of State, but also from those abominable methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and of conscience.’⁵⁶

Freedom of thought under Article 9 is recognised as an absolute right, as long as it is unmanifested. Thoughts and views are intangible as they belong to the inner sphere of each person – known as the *forum internum*, which represents ‘the inner realm of the mind.’⁵⁷ However, once manifested, they qualify for protection, although such expressions can be subject to limitations. These external manifestations of thought fall within the *forum externum*, described by Roberts as ‘the external realm of action.’⁵⁸ Despite criticism of the traditional distinction between the *forum internum* and the *forum externum*, the absolute nature of unmanifested freedom of thought, as enshrined by the Convention, remains uncontested. The once prevailing view that inner freedom of thought holds symbolic importance, with minimal practical significance, has evolved towards a greater recognition of its intrinsic value.⁵⁹ This freedom is expected to gain increasing importance due to emerging technologies that may threaten the inviolability of human inner space. Such technologies heighten the potential use of the right to freedom of thought as a practical tool to defend fundamental rights and liberties.⁶⁰ Furthermore, the scope of this right should be extended

54 Schabas, 2015, p. 420 and ECtHR, *Eweida and Others v. the United Kingdom*, Application nos. 48420/10, 59842/10, 51671/10, and 36516/10, Judgment of 15 January 2013, para. 80.

55 UN Human Rights Committee, 1993.

56 Council of Europe, 1975, p. 198.

57 Roberts, 2017, p. 35; Đukić, 2024, p. 102.

58 Roberts, 2017, p. 35.

59 Vermeulen, 2006, p. 752.

60 O’Callaghan, Shiner, 2021, p. 114.

to include the right to seek information,⁶¹ emphasising its vital role in safeguarding individual autonomy and dignity.

In practical terms, this freedom safeguards individuals against actions aimed at altering the human mind (such as “brainwashing”), or coercing them to change, express, or disclose their worldviews, opinions, and convictions. It also protects against any form of indoctrination. Moreover, it is important to emphasise that this right, along with its manifestations, is not solely protected under the provisions of Article 9. It is reinforced by the complex of rights enshrined in Articles 8–11 of the Convention.

There are two distinct approaches to understanding freedom of conscience: American constitutional law subsumes freedom of conscience into religious freedom, whereas international and European law subsume it into freedom of thought.⁶² Conscience is closer to religion than to thought, as religion is considered ‘a matter of individual conscience.’⁶³ The preference of the term “freedom of conscience” is justified by the fact that it covers not only religious beliefs, but also encompasses the positions of atheists, agnostics and those who are not affiliated with any religion but do possess ‘individual conscience.’⁶⁴

Paragraph 2 of Article 9 omits the term “conscience,” which suggests that while Article 9 protects manifestations of religion and belief, it does not extend the same protection to external expression of conscience. Scholarly explanations for this omission vary, and some are contradictory. Schabas attributes the distinction to the notion that religious prescriptions may be subject to limitations, whereas prescriptions of conscience may not.⁶⁵ Conversely, Vermeulen argues that external freedom of conscience is not protected because ‘It is clear that such freedom cannot be unlimited.’⁶⁶ Csink argues that ‘No free state can ensure the unrestricted enforcement of conscience, free from external limitations’.⁶⁷

To address this issue, differentiating between internal and external freedom can be useful. Article 9 protects freedom of conscience when it is confined to the internal realm (*forum internum*) of an individual but does not extend protection to its manifestations or expressions (*forum externum*). The primary reason for this differentiation lies in the “boundlessness of conscience,” which renders the formulation and implementation of limitation clauses impossible. This reasoning is supported by the fact that

‘Other human rights such as the freedom of speech or religion are concerned with certain specific areas of action, are connected with social institutions,

61 De Vergottini, 2017, p. 9.

62 Domingo, 2015, p. 177.

63 ECtHR, *Grzelak v. Poland*, Application no. 7710/02, Judgment of 15 June 2010, para. 93.

64 Schabas, 2015, p. 423.

65 Ibid., p. 424.

66 Vermeulen, 2006, p. 753.

67 Csink, 2024, p. 14.

and have to do with foreseeable patterns of behaviour; this makes it possible to define their restriction clauses in general terms. As the external freedom of conscience lacks such an identifiable object and scope, it is not possible to frame a satisfactory and workable provision containing restrictions.’

If the freedom to act according to conscience were protected as an absolute right, it could potentially undermine the entire legal order, allowing unlimited appeals to conscientious objections and personal convictions.

The above interpretation is aligned with the ECtHR case law. Most of the jurisprudence is about conscientious objection. The *Pichon and Sajous* case involved two pharmacists who refused to sell contraceptive pills due to their religious convictions. The Court confirmed that ‘The main sphere protected by Article 9 is that of personal convictions and religious beliefs, in other words what are sometimes referred to as matters of individual conscience.’ However, the Court insisted that not each act or practice that is closely linked or inspired by beliefs falls within the meaning of the term “practice” used in 1st paragraph of Article 9. It concluded that ‘The applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products.’⁶⁸

There is a consensus at the level of the Council of Europe that conscientious objection to military service falls within the scope of Article 9.⁶⁹ However, the European Commission of Human Rights had previously been reluctant to apply Article 9 to conscientious objectors, leaving this matter to be regulated by the Contracting States. *Bayatyan v. Armenia* was the first case in which the Court examined the applicability of Article 9 of the Convention to conscientious objectors. In this case, the Court acknowledged that although Article 9 does not explicitly mention a right to conscientious objection,

‘Where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of

68 ECtHR, *Pichon and Sajous v. France*, Application no. 49853/99, Decision of 2 October 2001.

69 Prior to the *Bayatyan* case, cases involving conscientious objection required interpreting Article 9 in conjunction with Article 4(3)(b) of the Convention, which stipulates: ‘Any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service extracted instead of compulsory military service’ is excluded from the Convention’s prohibition of ‘forced or compulsory labour.’ *Grandrath v. Germany*, Application no. 2299/64, Decision of 23. April 1965, Report of 12 December 1966. See also: CoE Parliamentary Assembly, Right of conscientious objection, Resolution no. 337 (1967): Persons liable for conscription to military service who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical, or similar motives, refuse to perform armed service shall enjoy a personal right to be released from the obligation to perform such service. This right shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States that are guaranteed in Article 9 of the European Convention on Human Rights.

sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.⁷⁰

This interpretation was supported by the Court's "living instrument" doctrine, which advocates for interpreting the Convention 'in the light of prevailing conditions and ideas in contemporary Europe.'⁷¹ Consequently, the ECtHR considered the overwhelming recognition of conscientious objection among Council of Europe member states and Armenia's failure to align with this trend, and found that the applicant's imprisonment constituted a violation of Article 9 of the Convention.

Interestingly, in the post-*Bayatyan* cases, the Court found violations of Article 9 due to the state's failure to provide alternative services to conscientious objectors and the absence of effective mechanisms to examine matters related to conscientious objection.⁷² The reasoning in *Bayatyan* has since been applied in various cases, including those concerning compulsory military service and the lack of civilian alternatives in Turkey.⁷³ However, this approach of the Court is not limitless. For instance, in a case involving a member of a pacifist religious organisation who refused to pay income tax without assurances that the funds would not be allocated to purposes conflicting with his conscience and beliefs, the Court held that 'Article 9 does not confer on the applicant the right to refuse, on the basis of his convictions, to abide by legislation, the operation of which is provided for by the Convention, and which applies neutrally and generally in the public sphere.'⁷⁴ In *Bayatyan* and the post-*Bayatyan* case law the Court reinforced the principle that the protection under Article 9 cannot be extended to encompass all forms of conscientious objection.⁷⁵ The Court's earlier reluctance to invoke Article 9 in such cases had drawn criticism for hindering the development of this right.⁷⁶ However, recent decisions reflect a significant shift, with the Court demonstrating greater willingness to apply Article 9 more effectively in conscientious objection cases.

Furthermore, when an individual seeks special treatment, exceptions, or privileges based on their religion, beliefs, or convictions, the state may require some level of substantiation of genuine belief; and, if such substantiation is not provided, may

70 ECtHR, *Bayatyan v. Armenia*, Application no. 23459/03, Judgment of 7 July 2011, paras. 102 and 110.

71 Harris, O'Boyle, Bates, Buckley, 2023, p. 585.

72 ECtHR, *Mammadov and Others v. Azerbaijan*, Application no. 52158/13 and others, Judgment of 4 June 2020; ECtHR, *Savda v. Turkey*, Application No. 42730/05, Judgment of 12 June 2012; ECtHR, *Adyan and Others v. Armenia*, Application no. 75604/11, Judgment of 12 October 2017; ECtHR, *Papavasiliakis v. Greece*, Application no. 66899/14, Judgment of 15 September 2016.

73 ECtHR, *Erçep v. Turkey*, Application no. 43965/04, Judgment of 22 November 2011; ECtHR, *Feti Demirtaş v. Turkey*, Application no. 5260/07, Judgment of 17 January 2012; ECtHR, *Buldu and Others v. Turkey*, Application no. 14017/08, Judgment of 3 September 2014.

74 ECtHR, *C. v. the United Kingdom*, Application no. 10358/83, Decision of 15 December 1983.

75 ECtHR, *Bayatyan v. Armenia*, Application no. 23459/03, Judgment of 7 July 2011, paras. 102 and 111. Furthermore: ECtHR, *Butan and Dragomir v. Romania*, Application no. 34644/02, Judgment of 5 January 2010.

76 Gilbert, 2001, p. 555.

reach a negative conclusion without violating freedom of conscience.⁷⁷ For example, in *Kosteski v. the former Yugoslav Republic of Macedonia*, the applicant was fined for being absent from work while celebrating a Muslim holiday. He claimed that the penalty interfered with the manifestation of his religious beliefs. During the proceedings, the applicant asserted that his faith belonged to his inner sphere of belief. However, the Government argued that he failed to prove his adherence to Islam, had no knowledge of its practices, did not follow its dietary rules, and had previously observed non-working Christian holidays. The ECtHR held that in the employment context, when an employee seeks a particular exception or privilege,

‘It is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion’.⁷⁸

Since the applicant was unable to produce any evidence to substantiate his claims, the Court concluded that there had been no violation of Article 9.

On the other hand, two similar cases involved prisoners in Romania who were denied pork-free meals after converting to Islam. In both cases, the ECtHR found violations of Article 9, as the authorities required the prisoners to provide proof of adhering to a specific faith. The Court determined that the state authorities ‘went beyond the level of substantiation of genuine belief that could be required.’⁷⁹ This conclusion was based on the fact that prisoners were permitted to declare their faith freely and without proof upon entering the prison system, as well as the unique circumstances and restrictions to which prisoners are subjected. The Court adopts a sensitive and balanced approach to issues concerning the substantiation of religious or other convictions as grounds for special treatment, thoroughly scrutinising the circumstances of each case to ensure fairness and proportionality. Therefore, when individuals seek specific privileges or exemptions based on their religion or belief, they might be required to substantiate their claims and provide evidence of their religious or conscientious convictions while this demand does not violate their freedom of conscience.

4. Freedom to Manifest Religion or Belief

Article 9 protects the freedom to manifest one’s religion or belief which may be exercised ‘alone or in community with others’ as well as ‘in public or private’. The

77 ECtHR, *Dyagilev v. Russia*, Application no. 49972/16, Judgment of 10 March 2020, para. 62.

78 ECtHR, *Kosteski v. the former Yugoslav Republic of Macedonia*, Application no. 55170/00, Judgment of 13 April 2006, para. 39.

79 ECtHR, *Neagu v. Romania*, Application no. 21969/15, Judgment of 10 November 2020 and ECtHR, *Saran v. Romania*, Application no. 65993/16, Judgment of 10 November 2020.

same article lists four forms of protected manifestations of religion or belief: worship, teaching, practice and observance. In the first case where the Court found violation of Article 9 (*Kokkinakis v. Greece*), it acknowledged that freedom to manifest one's religion includes the right to try to convince others and to share one's faith by preaching.⁸⁰ Closely linked to this right is the freedom of distributing religious literature. In the case of *Nasirov and Others v. Azerbaijan* the Court found that the detention of Jehovah's Witnesses due to the distribution of religious literature 'amounted to an interference with the exercise of their right to freedom of religion, as guaranteed by Article 9 of the Convention.'⁸¹ Additionally, religion might be manifested by wearing religious attires or religious dresses in public. Thus, for example, in *Eweida and Others v. the United Kingdom* and *Leyla Şahin v. Turkey*, the Court found that wearing a cross or Islamic headscarf were manifestations of religion or belief within the meaning of Article 9.⁸² There are countless other forms of manifestations of religion or belief that fall within the ambit of Article 9 of the Convention.

The issue arises when the Court has to establish whether certain practice or behaviour constitutes manifestation of religion. As it has repeatedly stated, 'Article 9 does not protect every act motivated or inspired by a religion or belief.'⁸³ The Court has linked the manifestation of religion with the motivation behind it that 'can bring the Court dangerously close to adjudicating on whether a particular practice is formally required by a religion.'⁸⁴ However, the jurisprudence indicates that in each case, the Court, in order to determine whether an act constitutes manifestation within the meaning of Article 9, must establish 'the existence of a sufficiently close and direct nexus between the act and the underlying belief' while 'there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.'⁸⁵ Instead of exploring the motivation behind the act in question, the Court should consider the nature of the act itself and the strength of its link to religion.

In a case involving a Buddhist prisoner who was denied a vegetarian diet, which he considered an essential aspect of his religious beliefs, the Polish Government argued that 'Vegetarianism could not be considered an essential aspect of the practice of the applicant's religion, since the strict Mahayana school to which the applicant claimed to adhere only encouraged vegetarianism but did not prescribe it.'⁸⁶ On the other hand, the Court held that 'The applicant's decision to adhere to a vegetarian

80 ECtHR, *Kokkinakis v. Greece*, Application no. 14307/88, Judgment of 25 May 1993, para. 31.

81 ECtHR, *Nasirov and Others v. Azerbaijan*, Application no. 58717/10, Judgment of 20 February 2020, para. 61.

82 ECtHR, *Eweida and Others v. the United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10, and 36516/10, Judgment of 15 January 2013, para. 91 and 96; ECtHR, *Leyla Şahin v. Turkey*, Application no. 44774/98, Judgment of 10 November 2005, para. 111.

83 ECtHR, *Arrowsmith v. United Kingdom*, Application no. 7050/75, Resolution of 12 June 1979.

84 Harris, O'Boyle, Bates, Buckley, 2023, p. H62.

85 ECtHR, *Eweida and Others v. the United Kingdom*, Application nos. 48420/10, 59842/10, 51671/10, and 36516/10, Judgment of 15 January 2013, para. 82.

86 ECtHR, *Jakóbski v. Poland*, Application no. 18429/06, Judgment of 7 December 2010, para. 43.

diet can be regarded as motivated or inspired by a religion and was not unreasonable' and concluded that this act of prisons authorities falls within the scope of Article 9 of the Convention.⁸⁷ As to the Court's jurisprudence, the state must remain neutral and has no power to assess the legitimacy of religious beliefs. Therefore, the state should refrain from exploring whether certain practices are mandatory according to the teachings of concrete religion. Even non-mandatory practices can constitute a manifestation of religion within the meaning of Article 9.

Freedom to manifest one's religion in democratic and pluralistic societies might be restricted 'to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.'⁸⁸ The legal accommodation of some manifestations of religion or belief might be challenging since the legislator has to reconcile different competing interests. For example, the religious duty of Sikhs to wear a turban contravene the duty of wearing protective headgear prescribed by the law.⁸⁹ Similarly, issues can arise about wearing Kirpan (a small dagger), which is an integral part of the Sikh faith and is carried by baptised Sikh children even in schools.⁹⁰ The legislator must strike balance and decide whether to uphold religious freedom or safety and rights of others. As noted previously, religion can be manifested in countless ways in different places and contexts.

The manifestation of religion or belief in the place of work or in the context of employment has given a rise to a number of cases. The traditional approach of the Strasbourg organs was that there is no interference with Article 9 if the applicant has the possibility to resign from his work and to find another employment (the "free to resign" formula). In a case involving a vicar of Norwegian State Church who decided not to perform his duties complaining that the adoption of the Norwegian Abortion Act violated his freedom of religion, the Commission held that

'If the requirements imposed upon him by the State should be in conflict with his convictions, he is free to relinquish his office as clergyman within the State Church, and the Commission regards this as an ultimate guarantee of his right to freedom of thought, conscience and religion.'⁹¹

However, since *Eweida*, the Court has abandoned this approach and acknowledged that

'Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing

87 Ibid., para. 45.

88 ECtHR, *Kokkinakis v. Greece*, Application no. 14307/88, Judgment of 25 May 1993, para. 33.

89 For example, in the UK regulations on protective headgear do not apply to followers of the Sikh religion while they are wearing a turban. Road Traffic Act 1988.

90 Karamvir, 2020, p. 308.

91 ECtHR, *Knudsen v. Norway*, Application no. 11045/84, Decision of 8 March 1985.

job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.’

In *Ivanova v. Bulgaria*, the applicant, who had been involved in the religious activities of the Word of Life religious community, was terminated from her employment on account of her religious beliefs. The Court found that there had been a violation of Article 9, without refereeing to a possibility of moving to a less hostile working environment and avoiding to employ the “free to resign” test.⁹² This important shift of the Court’s reasoning has been described as a positive development because: 1. it ensures consistency between Article 9 and other articles of the Convention where such a test has never been employed; 2. it is aligned with the situation in the workforce in Europe where high rates of unemployment do not allow the practical implementation of this test; and 3. it makes possible the provision of more detailed guidance on the lawful parameters of manifestations of religion or belief.⁹³

5. The Relationship Between Religion and the State

The freedom to manifest one’s religion or belief is not protected exclusively as an individual right, but it also has its collective dimension. In the early stages of the ECHR implementation, the Commission initially held that churches, as legal rather than natural persons, were incapable of possessing and exercising rights under Article 9 and, therefore, could not claim to be victims of its violation.⁹⁴ However, the Commission later revised this position, recognising that ‘When a Church body lodges an application under the Convention, it does so in real on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9(1) in its own capacity as a representative of its members.’⁹⁵ Nonetheless, this collective right to manifest religion or belief is not limited to churches. It extends to various types of religious organisations, groups, and

92 ECtHR, *Ivanova v. Bulgaria*, Application no. 52435/99, Judgment of 12 April 2007, para. 84.

93 Harris, O’Boyle, Bates, Buckley, 2023, p. 588.

94 ECtHR, *Church of X v. the United Kingdom*, Application no. 3798/68, Decision of 17 December 1968, p. 6.

95 ECtHR, *X. and Church of Scientology v. Sweden*, Application no. 7805/77, Decision of 5 May 1979, p. 70.

movements, including those not recognised as legal entities by their home states,⁹⁶ and, in some circumstances, even to limited liability companies.⁹⁷

One of the key factors influencing the legal status of religious organisations is the model of religion-state relations implemented in a specific country. The ECHR does not explicitly address the relationship between religion and the state in the state parties of the Convention. The Convention, however, ‘indirectly regulates the permissible forms of relationship between religious institutions and the state by reference to religious freedom.’⁹⁸ As R. Barker aptly noted, ‘A myriad of typologies have been suggested for the various ways that states have and can interact with religion.’⁹⁹ Without deeply analysing all possible configurations of state-religion relationships, it should be noted that neither the Convention nor its interpretation by the Court prohibits the establishment of a state religion or requires a specific degree of separation between state and religion. This flexibility explains why a wide range of configurations of state-religion relations can be found across Europe, all deemed compatible with the Convention. These range from established churches, such as in the United Kingdom, to strict separation models like *laïcité* in France. It should be highlighted that the Court has not dealt with certain model of state-religion relationship; rather, it examines whether particular aspect of this relation is permissible.

There are several underlying principles for the interpretation of the Convention that outline the position of the state towards religion within the CoE’s human rights protection system: state neutrality, religious autonomy, the margin of appreciation doctrine, and religious pluralism. The implementation of these principles is particularly complex because they protect not only individuals but also, and more prominently, groups and religious organisations.

The notion of pluralism has been described as the central principle defining the scope and impact of many rights,¹⁰⁰ including freedom of religion. As has been noted, ‘Religious freedom jurisprudence of the European Court of Human Rights most basically concerns the question of religious pluralism.’¹⁰¹ In the first religious freedom case, *Kokkinakis v. Greece*, the Court linked pluralism with the concept of a democratic society.¹⁰² In another landmark case, the Court emphasised that religious pluralism

96 ECtHR, *Canea Catholic Church v. Greece*, Application no. 25528/94, Judgment of 16 December 1997.

97 ‘Excluding the applicant company from its entitlement to freedom of religion on account of its corporate character would exclude the applicants from protection afforded to them by Article 9 (Article 9) merely because they chose to transfer some of their activities to that company. This would be an excessively formalistic approach.’ ECtHR, *Kustannus Oy Vapaa Ajattelijä AB and Others v. Finland*, Application no. 20471/92, Judgment of 15 February 1996. The opposite view can be found in: ECtHR, *Company X v. Switzerland*, Application no. 7865/77, Judgment of 27 February 1979.

98 Evans, Thomas, 2006, p. 699.

99 Barker, 2021, p. 8.

100 Nieuwenhuis, 2003, p. 368.

101 Calo, 2010, p. 261.

102 ECtHR, *Kokkinakis v. Greece*, Application no. 14307/88, Judgment of 25 May 1993, para. 31.

is ‘inherent in the concept of a democratic society.’¹⁰³ Some CEE countries preserve autochthonous religious pluralism, which is not a consequence of modern immigration but rather stems from the fact that their populations have been historically divided into several different religions or denominations.¹⁰⁴ The Court has repeatedly relied on religious pluralism in its jurisprudence, particularly in cases involving religious minorities. This approach has elevated religious pluralism to the status of ‘the cornerstone of a human rights regime and the norm by which other norms are to be assessed.’¹⁰⁵

State neutrality and impartiality are also important characteristics of state-religion relations in the Court’s jurisprudence. These principles prohibit arbitrary and unjustified state interventions.¹⁰⁶ The duty of state neutrality is ‘incompatible with any power on the State’s part to assess the legitimacy of religious beliefs, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group.’¹⁰⁷ When disputes arise between religious organisations or within factions of the same organisation, the state must maintain neutrality and refrain from evaluating the legitimacy of their claims or doctrinal positions. The state’s primary objective should be to uphold religious pluralism by fostering conditions for the peaceful coexistence of all religious organisations, rather than resolving conflicts by favouring or eliminating one of the parties involved.

The freedom of individuals to believe and practice their religion of belief cannot be exercised without the freedom of communal belief. In most cases, religious beliefs and practices are expressed collectively; within groups, communities, or among those who share similar views. The protection of religious autonomy of those groups and communities enables them to provide their original and authentic contribution to society. Typically, religious organisations enjoy substantial autonomy in their internal domains, including matters such as religious teachings (doctrines) and organisational structure. As Chopko defines it, religious autonomy is ‘the right of religious communities (hierarchical, connectional, and congregational) to decide upon and administer their own internal religious affairs without interference by the institutions of government.’¹⁰⁸ The Court has repeatedly emphasised that ‘The autonomous existence of religious communities is indispensable for pluralism in a democratic society

103 ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, Judgment of 13 December 2001, para. 119.

104 Đukić, 2021, p. 145.

105 Calo, 2010, p. 263.

106 ECtHR, *Hasan and Chaush v. Bulgaria*, Application no. 30985/96, Judgment of 26 October 2000, para. 62; ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, Judgment of 13 December 2001, para. 118.

107 ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, Judgment of 13 December 2001, para. 123. Furthermore, the state should foster substantive religious neutrality which, according to D. Laycock, requires the government to ‘minimise the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.’ Laycock, 1990, p. 1001.

108 Chopko, 2001, p. 96.

and is thus an issue at the very heart of the protection which Article 9 affords.¹⁰⁹ This organisational autonomy benefits not only the religious institutions as wholes but also their individual members. The Court's jurisprudence in this area can be broadly divided into two categories: cases involving the recognition or registration of religious organisations, and cases addressing state interventions in religious disputes.¹¹⁰

Traditional jurisprudence under Article 9 grants states a broad margin of appreciation in matters of state-religion relations. However, this flexibility primarily applies to the overall model of state-religion relationships. When dealing with specific issues, such as the legal status of religious organisations and the full enjoyment of their rights, the Court applies a higher level of scrutiny, thereby narrowing the state's margin of appreciation. Moreover, by relying on this wide margin of appreciation in general, the Court avoids becoming entangled in contentious debates about the historical status of churches and religious communities in European countries.

6. Interferences with Freedom of Religion or Belief

The freedom of religion or belief is often conceptualised as comprising two elements – dimensions or spheres: the *forum internum* and *forum externum*.¹¹¹ While the former is generally regarded as an absolute right that cannot be limited, the latter is considered a qualified right, subject to restrictions under the limitation clause of Article 9.¹¹² The first one therefore cannot be limited, whereas the second one can be limited according to the rules stipulated in the limitation clause of Article 9. This traditional binary distinction has been criticised on several grounds. Critics argue that the structure of Article 9 does not clearly reflect such a division, that the drafters did not intend it, and that it is not supported by the Court's jurisprudence. More recent approaches emphasise the interconnection between *forum internum* and *forum externum*, suggesting that the jurisprudence in this area should be understood 'in terms of a series of concentric circles, rather than as a binary framework.'¹¹³ Whilst this distinction holds importance in theory, its practical application is problematic.¹¹⁴ Most of the case law is about interferences and restrictions on the freedom to manifest one's religion or belief. Similar to other neighbouring rights (protected by Articles 8, 10, and 11) the limitations clause of Article 9 stipulates that justifiable restrictions must be 'prescribed by law,' pursue a legitimate aim, and be 'necessary in a democratic society.'

109 ECtHR, *Jehovah's Witnesses of Moscow and Others v. Russia*, Application no. 302/02, Judgment of 10 June 2010, para. 99; ECtHR, *Hasan and Chaush v. Bulgaria*, Application no. 30985/96, Judgment of 26 October 2000, para. 62; ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, Judgment of 13 December 2001, para. 118.

110 Minnerath, 2004, pp. 311-312.

111 Harris, O'Boyle, Bates, Buckley, 2023, p. H69; Głogowska-Balcerzak and Wasiński, 2015.

112 Roberts, 2020.

113 Ibid.

114 Evans, 2001, p. 77.

The first condition for a legitimate restriction is that it must be ‘prescribed by law,’ meaning that the interference must be ‘authorised by a rule recognised in the national legal order.’¹¹⁵ In the Court’s jurisprudence, the term “law” encompasses both written law including statutes and other lower ranking acts and unwritten law including judge made-law. Moreover, the Court holds that ‘the “law” is the provision in force as the competent courts have interpreted it.’¹¹⁶ Case law further requires such laws to be both adequately accessible and foreseeable, that is, formulated with sufficient precision to allow individuals, if necessary with appropriate advice, to regulate their conduct.¹¹⁷ The Court also acknowledges that states possess a ‘margin of appreciation’ in determining the legal mechanisms by which they may limit or restrict the rights outlined in the Convention.¹¹⁸ Another important basic principle of democratic society which should prevent the arbitrary interferences with the freedom of thought, conscience and religion is the rule of law, that requires the rules that provide a legal discretion to indicate ‘with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.’¹¹⁹

In most cases, the interferences meet this threshold, since state actions are typically based on some kind of regulation. Therefore, in the past, the Court avoided examining thoroughly whether interference fulfilled this requirement.¹²⁰ For example, in cases involving the punishment of Jehovah’s Witnesses for the offence of proselytism in Greece (cases *Kokkinakis* and *Larissis*), the Court did not examine the Greek proselytism legislation, emphasising that domestic authorities and courts have the responsibility to interpret and apply domestic law.¹²¹

The landmark case in which the Court found that the “prescribed-by-law” requirement in Article 9 had not been satisfied is *Hasan and Chaush v. Bulgaria*. The case arose around the dispute over the leadership of the Muslim community in Bulgaria. The dispute was initiated by the attempt of Bulgarian Muslims to replace the leadership inherited from the Communist era, due to their alleged collaboration with the communist regime. The state, through the actions of the Directorate of Religious Denominations, repeatedly intervened by removing or recognising the new leadership of the Muslim community in Bulgaria. The Court found, *inter alia*, that

115 Schabas, 2015, p. 435.

116 ECtHR, *Leyla Şahin v. Turkey*, Application no. 44774/98, Grand Chamber Judgment of 10 November 2005, para. 88.

117 ECtHR, *Hasan and Chaush v. Bulgaria*, Application no. 30985/96, Judgment of 26 October 2000, para. 84.

118 Schabas, 2015, p. 436.

119 ECtHR, *Hasan and Chaush v. Bulgaria*, Application no. 30985/96, Judgment of 26 October 2000, para. 84.

120 Harris, O’Boyle, Bates, Buckley, 2023, p. H63.

121 ECtHR, *Kokkinakis v. Greece*, Application no. 14307/88, Judgment of 25 May 1993, para. 31; ECtHR, *Larissis and Others v. Greece*, Application no. 23372/94, Judgment of 24 February 1998, paras. 41-42.

‘The interference with the internal organisation of the Muslim community and the applicants’ freedom of religion was not “prescribed by law” in that it was arbitrary and was based on legal provisions, which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability.’¹²²

In another case involving the disruption of a meeting of Jehovah’s Witnesses in Russia, the Court found that

‘The legal basis for breaking up a religious event conducted on the premises lawfully rented for that purpose was conspicuously lacking. Against that background the Court finds that the interference was not “prescribed by law” and that the Commissioner did not act in good faith and breached a State official’s duty of neutrality and impartiality vis-à-vis the applicants’ religious congregation.’¹²³

A similar case emerged in Bulgaria, where the police interrupted the meeting of members of the Unification Church.¹²⁴ Post the *Hasan and Chaush* case, the Court was not reluctant to thoroughly examine the compatibility of state actions with the “prescribed-by-law” requirement in Article 9.

Justifiable restrictions of freedom of religion or belief must pursue one of the legitimate aims or purposes enumerated in Paragraph 2 of Article 9, namely the interests of public safety, the protection of public order, health, or morals, or the protection of the rights and freedoms of others. The Court has insisted that these exemptions must be narrowly interpreted and that ‘their enumeration is strictly exhaustive and their definition is necessarily restrictive.’¹²⁵ Nevertheless, cases in which the Court has found that state actions do not pursue legitimate aims are rare. It is not uncommon for the Court to simply pass over the issue of the existence of legitimate aims and to proceed to the most important and controversial part of its analysis—assessing whether a limitation is ‘necessary in democratic society.’¹²⁶ It has been noted by the Grand Chamber that Court’s practice is ‘to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to 11 of the Convention.’¹²⁷ Finally, the Court has recognised that

122 ECtHR, *Hasan and Chaush v. Bulgaria*, Application no. 30985/96, Judgment of 26 October 2000, para. 86.

123 ECtHR, *Kuznetsov and Others v. Russia*, Application no. 184/02, Judgment of 11 January 2007, para. 74.

124 ECtHR, *Boychev and Others v. Bulgaria*, Application no. 77185/01, Chamber Judgment of 27 January 2011, para 48.

125 ECtHR, *Svyato-Mykhaylivska Parafiya v. Ukraine*, Application no. 77703/01, Judgment of 14 June 2007, para. 132.

126 Schabas, 2015, p. 436.

127 ECtHR, *S.A.S. v. France*, Application no. 43835/11, Grand Chamber Judgment of 1 July 2014, para. 175.

a range of different state interferences may be justified on pursuing legitimate aims such as protection of public order or public safety or health.¹²⁸ However, comparing to limitations clauses in neighbouring articles, Article 9 does not mention “national security” as a legitimate aim for an interference with freedom of religion or belief. As the Court emphasised, this is

‘Far from being an accidental omission, the non-inclusion of that particular ground for limitations in Article 9 reflects the primordial importance of religious pluralism as ‘one of the foundations of a ‘democratic society’ within the meaning of the Convention’ and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs’.¹²⁹

In general, states easily satisfy this requirement, and the Court rarely finds that states have failed to prove that their measures were pursuing legitimate aims.¹³⁰ Finally, a central part of the Court’s examination is assessing whether the impugned measure is ‘necessary in a democratic society’. It usually commences by exploring whether the measures respond to a “pressing social need”. The reasons adduced by the national authorities to justify the interference must be “relevant and sufficient”. In most cases, the “proportionality test” is employed, meaning that the impugned measures that restrict the right to manifestation of religion or belief are proportional to legitimate aim pursued.¹³¹ The Court also applies the “margin of appreciation” doctrine that reflects the subsidiarity of the protection provided by the Convention and the Court’s deference to states that allows them discretion in complex or controversial matters.¹³² Even though this doctrine has been widely criticised, it remains an important fixture in the ECtHR’s jurisprudence. The final objective is to consider whether the authorities have struck ‘a fair balance between the competing interests of the individual and of society as a whole’.¹³³

7. Concluding Remarks

Most cases in which the Court has found violations of the right to freedom of religion or belief involve states located in the eastern and southeastern parts of the European continent. From the case law, it is possible to identify certain areas in the protection

128 For examples of grounds on which states actions were justified, see: Harris, O’Boyle, Bates, Buckley, 2023, p. 590.

129 ECtHR, *Nolan and K v. Russia*, Application no. 2512/04, Judgment of 12 February 2009, para. 73.

130 Taylor, 2005, p. 305.

131 ECtHR, *Fernández Martínez v. Spain*, Application no. 56030/07, Grand Chamber Judgment of 12 June 2014, para. 124.

132 Berry, 2019, p. 105. More on the interconnection between the principle of subsidiarity and the concept of the margin of appreciation: Spano, 2014, pp. 490–492.

133 ECtHR, *Keegan v. Ireland*, Application no. 16969/90, Judgment of 26 May 1994, para. 49.

of freedom of religion or belief that are critical in the region of Central and Eastern Europe. When it comes to the collective aspect of freedom of religion, these include the registration of religious organisations (especially of those that are smaller and newly established), their access to the rights provided to traditional and historically established religious organisations, and the overall protection of religious autonomy. When it comes to the individual aspect of freedom of religion, breaches of the right have been identified in cases involving the provision of religious services and access to special diets in specialised institutional settings, as well as the wearing of religious clothing in public spaces.

Religious communities the of Central and Eastern European countries usually seek state recognition in order to obtain legal personality and access the benefits, favours, and privileges reserved for recognised churches and religious communities.¹³⁴ However, with regard to registration, state authorities are not always benevolent towards all religious organisations. Through the employment of different legal technics, they avoid recognising some of them. In cases that involve registration issues, the Court usually finds violations of Article 11 (freedom of association) in conjunction with Article 9. These cases can be divided into two groups using, as a criterion, the subjects of collective religious freedom.

The first group of cases involves new religious groups and movements that have been denied legal recognition or registration. The reasons for the refusal and the aim of state interferences usually were the protection of public order, public health, and the rights of others.¹³⁵ In addition to Jehovah's Witnesses, who have faced obstacles in obtaining official recognition throughout the region,¹³⁶ other new religious movements that encountered similar difficulties are the Church of Scientology,¹³⁷ the Word of the Life religious community,¹³⁸ and the Salvation Army.¹³⁹ However, in most cases,

134 Chaibi, 2022, p. 7.

135 ECtHR, *Church of Scientology Moscow v. Russia*, Application no. 18147/02, Judgment of 5 April 2007, para. 53.

136 *Association religieuse "Témoins de Jéhovah – Romania" and Others v. Romania*, Application nos. 63108/00 and nine others; the applicants reached a friendly settlement with the state. ECtHR, *Christian Religious Organisation of Jehovah's Witnesses in the NKR v. Armenia*, Application no. 41817/10; ECtHR, *Jehovah's Witnesses of Moscow v. Russia*, Application no. 302/02, Judgment of 10 June 2010; European Commission of Human Rights, *Khristiansko Sdruzhenie "Svideteli na Iehova" (Christian Association Jehovah's Witnesses) v. Bulgaria*, Application no. 28626/95, Decision of 3 July 1997; ECtHR, *Kimlya, Sultanov, and the Church of Scientology of Nizhnekamsk v. Russia*, Applications nos. 76836/01 and 32782/03, Judgment of 1 October 2009.

137 ECtHR, *Church of Scientology Moscow v. Russia*, Application no. 18147/02, Judgment of 5 April 2007; ECtHR, *Church of Scientology of St. Petersburg and Others v. Russia*, Application no. 47191/06, Judgment of 2 October 2014; ECtHR, *Sultanov and Church of Scientology Nizhnekamsk and 5 other applications v. Russia*, Applications no. 59470/11.

138 ECtHR, *Dimitrova v. Bulgaria*, Application no. 15452/07, Judgment of 10 February 2015, para. 7; ECtHR, *Ivanova v. Bulgaria*, Application no. 36207/03, Judgment of 14 February 2008, para. 9.

139 ECtHR, *Moscow Branch of the Salvation Army v. Russia*, Application no. 72881/01, Judgment of 5 October 2006.

the state failed to prove that the activities of these organisations posed a threat to public health, public order, or the rights of others.

The second group of cases concerns the denial of legal recognition to religious organisations that are either in conflict with already recognised organisations or have split from them. The justifications provided by state authorities include the prevention of religious conflicts and an ongoing dispute between competing denominations,¹⁴⁰ the risk of confusion arising from the existence of a recognised organisation with a similar name, the fact that applicants could continue their activities without registration,¹⁴¹ procedural shortcomings,¹⁴² and in some cases, even doctrinal reasons and the overlap between beliefs of the already recognised religious organisation and the one that seeks recognition.¹⁴³ Nevertheless, the Court has emphasised that in democratic societies, the state ‘does not need to ensure that religious communities remain under a unified leadership,’¹⁴⁴ and that ‘the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.’¹⁴⁵ While the Court has accepted that authorities may require a religious organisation to adopt a distinct name to avoid misleading believers or the general public,¹⁴⁶ the case law shows that in most cases, the Court finds this argument of the governments to be ill founded. Applicant organisations typically choose names that are sufficiently different from those of other recognised organisations and do not intend to associate themselves with them; state

140 ECtHR, *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, Applications nos. 48044/10, 75722/12, and 25176/13, Judgment of 12 April 2018, para. 73; ECtHR, *Fusu Arcadie and Others v. the Republic of Moldova*, Application no. 22218/06, Judgment of 17 July 2012, para. 27.

141 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. 58; ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, Judgment of 13 December 2001, para. 97; ECtHR, *Svyato-Mykhaylivska Parafiya v. Ukraine*, Application no. 77703/01, Judgment of 14 June 200, para. 122.

142 ECtHR, *Metodiev and Others v. Bulgaria*, Application no. 58088/08, Judgment of 15 Jun 2017.

143 ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, Judgment of 13 December 2001, para. 98.

144 ECtHR, *Hasan and Chaush v. Bulgaria*, Application no. 30985/96, Grand Chamber Judgment of 26 October 2000, para. 78; ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, Judgment of 13 December 2001, para. 117; ECtHR, *Supreme Holy Council of the Muslim Community v. Bulgaria*, Application no. 39023/97, Judgment of 16 December 2004, para. 96; ECtHR, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, Applications nos. 412/03 and 35677/04, Judgment of 22 January 2009, para. 120; ECtHR, *Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarch) v. The Former Yugoslav Republic of Macedonia*, Application no. 3532/07, Judgment of 16 November 2017, paras. 115-120.

145 ECtHR, *Serif v. Greece*, Application no. 38178/97, Judgment of 14 December 1999, para. 53.

146 ECtHR, *Genov v. Bulgaria*, Application no. 40524/08, Judgment of 23 March 2017, para. 43.

authorities have failed to provide reasons to justify the potential risk of confusion among believers.¹⁴⁷

In some eastern European countries, disputes arose over the registration of small dissident religious groups that had split from the Orthodox Church and identified themselves as either a “True Orthodox Church” or an “Old Calendar Church.”¹⁴⁸ The Court insisted that the interferences with the rights of these religious organisations were neither prescribed by law¹⁴⁹ nor necessary in a democratic society.¹⁵⁰ Therefore, in some cases, the parties reached friendly settlements, whereby the religious organisation was recognised and the state covered both pecuniary and non-pecuniary damages.¹⁵¹

In central and eastern Europe, individuals have faced difficulties in accessing the right to manifest their religion in special institutional settings such as prisons and hospitals. The Court has found violations of Article 9 in the cases that involved: a disciplinary punishment of a Muslim prisoner for conducting worship at nighttime in breach of prison schedule,¹⁵² the failure of the prison authorities to provide prisoners with meals in conformity with the prescriptions of their religion¹⁵³ and a denial of any visit from a priest.¹⁵⁴

In some cases, the Court has not found violations of Article 9 due to procedural reasons. In *Feldman v. Ukraine*, the impugned refusal took place more than six months before the particular complaint was raised for the first time. Therefore, the Court found that it was introduced out of time in accordance with Article 35 of the

147 *Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarch) v. The Former Yugoslav Republic of Macedonia*, Application no. 3532/07, Judgment of 16 November 2017, para 111; ECtHR, *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, Applications nos. 48044/10, 75722/12, and 25176/13, Judgment of 12 April 2018, para. 71.

148 ECtHR, *Église Orthodoxe Indépendante and Zahariev v. Bulgarie*, Application no. 76620/14; Stavropigijalen ECtHR, *Manastir ‘Sveti Jovan Zlatoust’ and the Church of Real Orthodox Christians and Kiril Ivanovski v. Macedonia*, Application nos. 52849/09, 35700/11.

149 ECtHR, *Biserica Adevărat Ortodoxă din Moldova and Others v. Moldova*, Application no. 952/03, Judgment of 27 February 2007, para. 36.

150 ECtHR, *Bulgarian Orthodox Old Calendar Church and Others v. Bulgaria*, Application no. 56751/13, Judgment of 20 April 2021, para. 64.

151 ECtHR, *Eparhia Moldovei de Est a Bisericii Ortodoxe din Ucraina and Others v. Moldova*, Application no. 46157/07, Decision of 7 December 2010.

152 ECtHR, *Korostelev v. Russia*, Application no. 29290/10, Judgment of 12 May 2020, para. 64.

153 ECtHR, *Vartic v. Romania (No. 2)*, Application no. 14150/08, Judgment of 17 December 2013, para. 54; ECtHR, *Jakóbski v. Poland*, Application no. 18429/06, Judgment of 7 December 2010, para. 54.

154 In two cases that involved applicants who were sentenced to death in Ukraine and who were denied any visit from a priest, the Court found that this interference with the applicants’ freedom to manifest their religion or belief was not “prescribed by law,” as it is required by the second paragraph of Article 9. ECtHR, *Kuznetsov v. Ukraine*, Application no. 39042/97, Judgment of 29 April 2003, para. 150; ECtHR, *Poltoratskiy v. Ukraine*, Application no. 38812/97, Judgment of 29 April 2003, para. 170.

Convention.¹⁵⁵ Prisoners have complained unsuccessfully of not being able to attend religious services or not being allowed any visits from a priest in Poland,¹⁵⁶ Bulgaria,¹⁵⁷ and Romania.¹⁵⁸ In *Erlich and Kastro v. Romania*, two Jewish prisoners were denied kosher meals. The Court found that a whole set of appropriate measures had been put in place by the prison authorities, such as the possibility to obtain, by their own means, foodstuffs to be cooked and prepared on the spot. Furthermore, they could apply for reimbursement of any expenses by lodging a civil action. Therefore, it found that there was no violation of Article 9.¹⁵⁹ Similarly, the Court ruled there was no violation of the same Article in a case where the applicant complained that the prison authorities had refused to allow him to read religious literature, meditate and pray in isolation from other prisoners, and burn incense sticks for religious purposes.¹⁶⁰

Issues concerning religious attire are more characteristic of Western countries and Turkey.¹⁶¹ In the landmark case *SAS v. France*, a Muslim woman complained about the Law that prohibited women from wearing a burka or niqab. The Court accepted

155 *Feldman v. Ukraine* (No. 2), Application no. 42921/09, Judgment of 12 January 2012, para 40. In another case, the Court found that the applicant had not exhausted domestic remedies regarding the refusal of visits by a priest but noted that the seizure of religious literature and items and refusals to allow visits to the prison chapel amounted to a violation of Article 9. ECtHR, *Moroz and Others v. Ukraine*, Application no. 36545/02, Judgment of 21 December 2006, paras. 101 and 109.

156 The application was submitted out of time or ‘more than six months after the date on which the relevant period to be considered under Article 9 came to an end.’ ECtHR, *Kawiecki v. Poland*, Application no. 15593/07, Judgment of 23 October 2012, para. 107. In *Zimny v. Poland* the Polish Government reached a friendly settlement with the applicant, who complained that he did not have access to an imam and food in conformity with the prescriptions of Islam. ECtHR, *Zimny v. Poland*, Application no. 41198/10.

157 The applicant was denied the right to attend church services during her stay in a psychiatric hospital. The Court struck the case from its list because she stopped to respond to the Court’s letters. ECtHR, *Alichkova v. Bulgaria*, Application no. 20255/05.

158 The complaint of the applicants that they had been prevented from practicing their religion by the prison authorities in violation of Article 9 was dismissed due to a failure to exhaust domestic remedies. They were denied a visit from a rabbi (in the case of the first applicant) and were served meals not in in conformity with the prescriptions of Islam (in the case of the second applicant). ECtHR, *Berghea and Turan v. Romania*, Application no. 7242/14, Judgment of 8 November 2016.

159 ECtHR, *Erlich and Kastro v. Romania*, Applications nos. 23735/16 and 23740/16, Judgment of 9 June 2020.

160 ECtHR, *Kovaļkovs v. Latvia*, Application no. 35021/05, Judgment of 31 January 2012, paras. 67 and 68.

161 The landmark case on the ban of religious attire in Turkey is ECtHR, *Leyla Şahin v. Turkey*, Application no. 44774/98, Grand Chamber Judgment of 10 November 2005. Other cases that involved a ban on religious attire or symbols are: ECtHR, *Köse and Others v. Turkey*, Application no. 26625/02, Judgment of 24 January 2006; ECtHR, *Kurtulmuş v. Turkey*, Application no. 65500/01, Decision of 24 January 2006; ECtHR, *Dogru v. France*, Application no. 27058/05, Judgment of 4 December 2008; ECtHR, *Dahlab v. Switzerland*, Application no. 42393/98, Decision of 15 February 2001; ECtHR, *Ahmet Arslan and Others v. Turkey*, Application no. 41135/98, Judgment of 23 February 2010; ECtHR, *Ebrahimian v. France*, Application no. 64846/11, Judgment of 26 November 2015; ECtHR, *Belcacemi and Oussar v. Belgium*, Application no. 37798/13, Judgment of 11 July 2017; ECtHR, *Lachiri v. Belgium*, Application no. 3413/09, Judgment of 18 September 2018.

the Government's argument that this restriction was legitimate because it promoted 'respect for the minimum requirements of life in society,' or 'living together,' as referred to by the Government. The Court linked this argument to the 'protection of the rights and freedoms of others' and found that there had been no violation of Article 9.¹⁶²

Recently, a case from the Central and Eastern European region has drawn significant attention. In *Hamidović v. Bosnia and Herzegovina*, the applicant was ordered by the court to remove his skullcap during courtroom proceedings. He refused, asserting that wearing it was a religious duty. As a result, he was fined for contempt of court; later, the fine was converted into imprisonment. He complained that the ban on wearing the skullcap amounted to an unjustifiable limitation on his right to manifest his religion. As in other cases involving religious attire, the Court acknowledged the wide margin of appreciation that states are afforded in such cases. However, the Court emphasised that

'Freedom to manifest one's religion is a fundamental right: not only because a healthy democratic society needs to tolerate and sustain pluralism and diversity, but also because of the importance to an individual who has made religion a central tenet of his or her life of being able to communicate that belief to others'.¹⁶³

Furthermore, the Court found that the applicant was inspired by his sincere religious beliefs 'without any hidden agenda to make a mockery of the trial, incite others to reject secular and democratic values or cause a disturbance.' It reiterated that domestic authorities should not eliminate pluralism to remove tensions; instead, they should ensure that competing groups tolerate one another.¹⁶⁴ A similar reasoning was employed in *Lachiri v. Belgium*, where the Court recognised that courts have limited powers to restrict religious freedom in courtroom settings, though it remains unclear if this signals a broader shift in the Court's stance on banning religious attire in public spaces.¹⁶⁵

Article 9 of the ECHR is interpreted broadly to encompass a wide range of religions, beliefs, convictions, worldviews, ideas, and opinions. The Court has established a test requiring 'a certain level of cogency, seriousness, cohesion, and importance' for ideas or views to qualify for protection under this provision. Long-established world religions, along with their branches or denominations, are readily recognised as beliefs within the meaning of Article 9. The same applies to many newly established groups and movements. Furthermore, the protection afforded by Article 9 also extends to

162 ECtHR, *S.A.S. v. France*, Application no. 43835/11, Grand Chamber Judgment of 1 July 2014, paras. 121 and 159.

163 ECtHR, *Hamidović v. Bosnia and Herzegovina*, Application no. 57792/15, Judgment of 5 December 2017, para. 41.

164 Ibid.

165 Harris, O'Boyle, Bates, Buckley, 2023, p. 594.

non-beliefs, secular worldviews, and even political ideologies. However, this inclusivist approach carries a potential risk: by broadly defining what qualifies for protection, the distinct status of religion itself may be diluted. If every kind of opinion, idea or worldview is treated as religion, the specific protection afforded to religion could be weakened, because the protection generally gets weaker as its range is broadened.

It can be concluded that while states in the CEE region have been found to violate the freedom to manifest one's religion in several cases, there is no evidence of systemic violations of this right. Moreover, progress has been observed in certain areas, including the accommodation of religious beliefs and practices in special institutional settings and the promotion of equality for all religious organisations. The case law of the Court has played a crucial role in these developments.

The Court has wisely been reluctant to engage in assessing the existing models of church-state relations across Europe. European states have a long history of traditional relations with certain religions, which over time have acquired unique constitutional and legal status. The Court should avoid any attempt to impose common standards on these relationships and focus instead on the protection of rights of particular religious groups and their members. By doing so, the Court can strike a balance between preserving the traditional and historical relationship between states and religions in Europe and ensuring the effective protection of Convention rights for religious organisations and their members.

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Freedom of Expression

Bojan TUBIĆ

ABSTRACT

Freedom of expression, protected by Art. 10 of the European Convention on Human Rights, is a cornerstone of democratic society. It guarantees the right to hold opinions, and to receive and share information without interference from public authorities. However, this right is not absolute; restrictions are permitted when they are prescribed by law, pursue a legitimate aim, and are necessary in a democratic society.

The European Court of Human Rights has developed extensive case law that balances freedom of expression with other rights and interests. In *Handyside v. United Kingdom*, the Court affirmed that freedom of expression protects not only agreeable ideas but also those that 'offend, shock, or disturb'. Yet, limits have been upheld in cases involving hate speech or incitement to violence, such as *Erbakan v. Turkey*. The margin of appreciation doctrine allows states some discretion, although it is narrower when political or public-interest speech is involved, as seen in *Lingens v. Austria*.

Overall, the jurisprudence of this court seeks to balance individual freedom with social responsibility. It continues to evolve in response to digital media, emphasizing that free expression remains vital to pluralism and democracy in Europe.

KEYWORDS

freedom of expression, restrictions, ECtHR

1. Introduction

Freedom of expression is a vital element of every modern society. Along with other human rights and freedoms, it forms the foundation of political life in democratic societies.

The right to freely express one's opinion is among the most widely recognized human rights across the world.

In a comparative review of the constitutions of all which was carried out in 1978, it was determined that out of 142 constitutions, 124 (or 87%) contained guarantee for freedom of expression. In the same research, only 66 constitutions (or 46.5) prohibited torture and inhuman treatment.¹

1 Janis, Kay and Bradley, 2000, p. 13.

Bojan Tubić (2026) 'Freedom of Expression' in Paczolay, P. (ed.) *The European Convention on Human Rights A Central and Eastern European Perspective*. Miskolc–Budapest: Central European Academic Publishing, pp. 363–389. https://doi.org/10.71009/2026.pp.tecohr_12

The origin of this right can be traced to the seventeenth century, when some documents, such as the Bill of Rights from 1688, guaranteed freedom of speech for that which is declared in the parliament. Variants of this right can be found in the earliest modern constitutions, including of a number of American states from the eighteenth century, Art. 11 of the French Declaration of the Rights of Man and of the Citizen, and the 1st Amendment of the US Constitution.

Freedom of expression, as a fundamental human right, is protected by the most significant international agreements in this field. It was accepted by the Universal Declaration of Human Rights, which was adopted by the United Nations (UN) General Assembly on 10 December 1948² (Art. 19), and subsequently guaranteed in the most important international treaties on the protection of human rights: Art. 19 of the International Covenant on Civil and Political Rights,³ Art. 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms,⁴ Art. 13 of the American Convention on Human Rights,⁵ Art. 9 Para. 2 of the African Charter on human and peoples' rights⁶ (adopted on 26 June 1981 within the Organization of African Unity) and Art. 11 of the Charter of Fundamental Rights of the European Union.⁷

This article discusses the meaning and significance of Art. 10 of the European Convention on Human Rights (hereinafter: European Convention, the Convention). The Art. then goes on to explain different types of freedom of expression using case law before the European Court of Human Rights (hereinafter: the Court). In the conclusion of the Art., special attention is given to restrictions on this right, particularly, its conditions.

2. The Notion of Freedom of Expression

Art. 10 of the Convention is composed of two parts: (1) A broad, positive guarantee (para. 1) that establishes a presumption in favour of expression. (2) A conditional limitation clause (para. 2) that allows restrictions under specific, narrowly construed conditions.

This two-tier structure is central to the Court's dogmatic reasoning: it creates a general right, then defines a legal test for permissible limitations.

In this regard, Art. 10 of the Convention states:

2 Universal Declaration of Human Rights, UN General Assembly, 10 December 1948.

3 International Covenant on Civil and Political Rights, UN General Assembly, 19 December 1966.

4 European Convention on the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14, Council of Europe, 4 November 1950.

5 American Convention on Human Rights, Organization of American States, 22 November 1969.

6 African Charter on human and peoples' rights, Organization of African Unity, 26 June 1981.

7 Charter on Human Rights and Fundamental Freedoms, Official Journal of the European Union 2012/C 326/02, Art. 11.

‘1. 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 Art. shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’⁸

The justification for the special protection of expression can be considered in two ways. First, speech is protected as something of importance in modern society, because public debate represents a useful tool for achieving other social values, such as the development of personality. On the other hand, the possibility for an individual to freely express his views is seen as an inherent human value. Freedom of expression was considered the best way to reveal the truth, through the constant exchange of views and ideas. The Court observed that even military secrets are not excluded from the protection of Art. 10, and stressed that freedom of expression is not confined to specific types of information, ideas, or forms of expression, since it is at the foundation of every democratic society.⁹

The term ‘expression’ is itself not fully defined. It includes artistic acts such as painting in the case of *Müller and others v. Switzerland*,¹⁰ publications,¹¹ video materials,¹² publication of photographs,¹³ films,¹⁴ and other ways of transmitting ideas and information. It is also related to information of a commercial nature.¹⁵

Today, the biggest challenge related to this freedom is the exceptionally high use of internet services. Information can be reproduced and transmitted at incredible speeds.¹⁶ This technology represents a challenge for human rights on an international

8 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 10.

9 Case 5493/72 *Handyside v. The United Kingdom*, Judgment of 7 December 1976, Separate Opinion of Judge Mosler.

10 Macovei, 2001, p. 43.

11 Case 38825/16 *Kotlyar v. Russia*, Judgment of 12 October 2022, paras. 41–42.

12 Case 63164/16 *Mandli and others v. Hungary*, Judgment of 12 October 2020, para. 72.

13 Case 39954/08 *Axel Springer AG v. Germany*, Judgment of 7 February 2012.

14 Case 59320/00 *Von Hannover v. Germany*, Judgment of 28 July 2005, para. 52.

15 Case 47881/11 *Prunea v. Romania*, Judgment of 8 April 2019, para. 36.

16 Jorgensen, 2000, p. 4.

level, especially on issues of jurisdiction and others such as incitement to racial and sexual hatred, and sexual exploitation of children.¹⁷

The Court held that the potential harm caused by online content and communication to the exercise and enjoyment of human rights and freedoms – especially the right to respect of private life – is undoubtedly greater than that posed by the press.¹⁸

Because of the inalienability of human rights, freedom of expression is linked with the freedom of thought (they are often mentioned together), freedom of assembly and association, freedom of the press, the right to privacy, and freedom from state interference in citizens' communication and private property.¹⁹ The state's duty to refrain from interfering with freedom of expression is especially emphasized when the information is of vital significance for the privacy or family life of citizens. It also intersects with minority rights and those concerning health and education. The link to freedom of speech and conscience is most evident in issues related to freedom of the press and religion.²⁰ In certain areas, it intersects with the right to participate in public life, to vote, and to stand for election. Although the freedom of expression is basically an individual right, there are examples wherein it is, by its nature, related to a group.

3. Types of Expression

3.1. Political Expression

One of the aims of Art. 10 is to guarantee unrestricted exchange of political ideas – a precondition of every democracy.²¹ The Court has repeatedly affirmed that freedom of political debate lies at the core of democratic society.²² In terms of the protection of Art. 10, there is no justification for the distinction between political discussions (e.g. on the suitability of politicians or public servants to carry out their function) and discussion of other public interest issues, such as information about the activities and possible irregularities in the work of the security services²³ (Spycatcher case); issues concerning the inherent health risks of taking medications, and questions of legal and moral responsibility for injuries caused²⁴ (the Sunday Times case); criticism of the police service²⁵ (the Thorgeirson); and published reviews regarding the lack of judicial impartiality²⁶ (Barfod case). A case that best illustrates this type of freedom of

17 Akdeniz, 2011, p. 19.

18 Case 64569/09 *Delfi AS v. Estonia*, Judgment of 16 June 2015, para. 133.

19 Council of Europe, 2019, p. 70.

20 Murdoch, 2012, p. 21.

21 Bychawska-Siniarska, 2017, p. 12.

22 Wildhaber, 2001, p. 20.

23 Case Comments, 1989, p. 423.

24 Case 6538/74 *The Sunday Times v. The United Kingdom*, Judgment of 26 April 1979.

25 Case 13778/88 *Thorgeir Thorgeirson v. Iceland*, Judgment of 25 June 1992.

26 Case 11508/85 *Barfod v. Denmark*, Judgment of 22 February 1989.

expression is that of *Lingens v. Austria*.²⁷ In this case, the prosecutor portrayed himself as a political journalist operating in a pluralistic society. He believed that, in this role, he was obliged to share his opinions on the judgments that Mr Krajski brought against Mr. Wiesenthal. He also maintained that a politician who is used to attacking his opponents must accept more criticism than others.

3.1.1. Case of *Lingens v. Austria*

The issue is whether restricting freedom of expression is justified in a democratic society. The term ‘necessary’ in Art. 10, Para. 2, implies the presence of a ‘social need’.²⁸ The contracting parties have some discretion in deciding whether such a need is present; however, the decision is under European supervision, including the legislation and decisions wherein the laws apply.

In its supervisory role, the Court is unable to observe the decisions of domestic courts separately; yet, it must consider them in the context of the case as a whole, including Arts. that are not in favour of the applicant, and the context in which they are written. The Court needs to evaluate whether the particular restriction on freedom of expression appropriately serves a legitimate purpose and if the justifications given by the Austrian courts are both relevant and sufficient.²⁹

Additionally, the Court must consider that freedom of expression, as guaranteed in Para. 1 of Art. 10 of the Convention is a basic principle of democratic society and a prerequisite for its development. According to Para. 2, it applies not only to information or ideas that are widely accepted, harmless, or deemed insignificant but also to those that offend, shock, or disturb. These requirements – pluralism, tolerance, and a broad range of opinions – are essential for the existence of a democratic society.³⁰

These principles hold special significance with regards to the press. While the press must not cross the boundaries established, among others, for the protection of people’s reputation, its duty is to disseminate information and ideas about political issues to the same extent as issues in other areas of public interest. The press is responsible for sharing information and ideas, and equally entitled to access them. In this context, the Court rejected the view expressed by the Vienna Appellate Court that the press’s role is limited to distributing information, leaving its interpretation solely to the readers.

There is no doubt that Art. 10 para. 2 ensures the protection of the reputation of other individuals and that this protection also applies to politicians, even when they are acting in an official or professional capacity. However, in these instances, the criteria for protection should be considered in light of the importance of open debate on political matters.

27 Case 9815/82 *Lingens v. Austria*, Judgment of 8 July 1986.

28 Ibid., para. 39.

29 Ibid., para. 40.

30 Ibid., para. 41; Case 5493/72 *Handyside v. The United Kingdom*, para. 49.

In the Lingens case, the prosecutor was convicted for using certain expressions such as ‘lowest opportunism’, ‘immorality’, and ‘unworthy’ when he spoke about Mr. Krajski, who was the federal chancellor at that time. The Arts. featured in the Vienna magazine *Profil* focused on political matters of public interest to the Austrian state. The position of the Austrians, especially of the Chancellor, on National Socialism and the participation of former Nazis in managing the country was discussed. Although the Arts. were generally balanced in both content and tone, the use of the previously mentioned expressions could harm the reputation Mr. Krajski.³¹

The Vienna Court of Appeal fined Mr. Lingens, ordered the seizure of specific issues of *Profil*, and mandated the publication of the judgment. As the government pointed out, the disputed Arts. were already widely distributed at that time, so the punishment imposed on the author did not prevent him from expressing himself. Nevertheless, it contributed to a kind of censorship, which could discourage him from making such criticisms in the future. In the case of political debates, the judgement could discourage journalists from participating in public discourse on matters that affect community life.

Austrian courts considered that there were different ways to measure the behaviour of Mr. Krajski, and that, logically, it cannot be proven that only one interpretation is right. In the end, they found the applicant guilty of defamation.

In the understanding of the Court, a clear difference must be made between facts and personal opinions. The existence of facts can be proved, whereas a statement of value in one’s opinion cannot be considered evidence. In that regard, the Court stated that the facts on which Mr. Lingens based his opinion are indisputable.³²

According to Art. 3 para. 3 of the Criminal Code of Austria, a journalist in a similar case cannot escape condemnation unless he can prove that his allegations are true. When it comes to personal opinion, such a requirement is impossible to meet and, in itself, undermines freedom of expression – a core element of the right protected under Art. 10 of the Convention.

For these reasons, the restriction of Lingens’ freedom of expression does not appear to have been necessary to protect the reputation of others in a democratic society, nor was it consistent with the legitimate aim pursued. The Court, therefore, reached a unanimous decision that Art. 10 of the Convention had been violated. As this case illustrates, speech involving a political issue has a central role in the functioning of a democratic society.

It is difficult to defend arguments in favour of limiting such discussions. For example, in the case of *Bowman v. United Kingdom*,³³ the Court found a violation of Art. 10 when Part 75 of the Act on Representation of Citizens from 1983 was applied to the applicant who had printed and distributed 25,000 leaflets outlining the candidates’ positions in parliamentary constituencies on issues related to abortion. The law

31 Case 9815/82 *Lingens v. Austria*, para. 43.

32 *Ibid.*, para. 46.

33 Case 141/1996/760/961 *Bowman v. The United Kingdom*, Judgment of 19 February 1998.

prohibited expenses of more than 5 pounds, which anyone but the candidate would have, with the aim of helping the candidate's election. The ban did not apply to print or electronic media. The Court determined that the restriction was disproportionate to the legitimate aim of promoting equality among the candidates, since it represents an obstacle to the publication of information with the aim to influence voters.

Whether certain behaviours can be considered political expression is not always clear. In the case of *Thorgeir Thorgeirson v. Iceland*, the Court ruled that a defamation conviction stemming from a publication accusing unnamed police officers of brutality constituted a violation of Art. 10.³⁴

'The government argued that the strict rule in *Lingens* case, applicable to restrictions on discussions, is not applicable to other matters of public interest, specifically issues that did not include the direct or indirect participation of citizens in the decision-making process. The Court rejected this distinction.'³⁵

On the other hand, in the case of *Janowski v. Poland*, the Court held that a defamation claim against a public official, made in relation to the performance of their duties, did not violate Art. 10 of the Convention. The applicant in this dispute publicly labelled the police officers, who he believed were abusing their authority, as 'stupid' and 'fools'. As his statements were aimed at the policemen, and since only a few heard them, they were not part of a public debate on issues of general interest. The Court concurred that in certain situations, the scope for criticism may be broader regarding public officials performing their duties than for private individuals. However, it cannot be claimed that public servants willingly expose every word and action to public scrutiny to the same degree as politicians do. Therefore, they must be approached in the same way as politicians when it comes to questioning their actions. Moreover, public officials need to maintain public trust to effectively perform their duties, and it is thus essential to shield them from abusive and malicious verbal attacks while in their professional capacity.³⁶

In the case *Worm v. Austria*, the applicant authored an Art. on the tax evasion trial of a public figure, explicitly implying the accused's guilt. The author was found guilty of attempting to sway the outcome of a criminal trial and fined. The Court held that the judgment was in accordance with Art. 10 para. 2 of the Convention. It did not explicitly differentiate in relation to its decision in the *Sunday Times* case, but stressed that public figures, like all individuals, are entitled to the fair trial guarantees set out in Art. 6, which, in criminal proceedings, include the right to an independent

34 Case 13778/88 *Thorgeir Thorgeirson v. Iceland*, para. 66.

35 Janis, Kay and Bradley, 2000, p. 171.

36 Case 25716/94 *Janowski v. Poland*, Judgment of 21 January 1999, para. 33.

tribunal. It held that such accusations are in the line with the Convention, even when the state had not established influence on a specific procedure.³⁷

The central piece in the political discussion about freedom of expression is the emphasized need to protect the press from restrictions and censorship. The Court often emphasizes the importance of the press in realizing the values of Art. 10. It was noted in the *Lingens* case, and in the *Spycatcher* case, when the Court stated that:

‘Although the press must not exceed the limits established to protect the interests stipulated in Art. 10 of the European Convention, it is nevertheless its obligation to spread information and ideas on issues of public interest. If it were different the press would not be able to play its basic role as a public watchdog.’³⁸

Thus, the Court made clear that limits on criticism of politicians must be narrowly construed, as open debate on matters of public interest is essential to democracy. The *Lingens* case sets a lasting precedent that value judgments in political discourse are protected under Art. 10, even when they offend or shock.

3.1.2. *Sunday Times v. the United Kingdom*

The most famous case related to the freedom of the press is that of *Sunday Times v. the United Kingdom*.³⁹ The Court concluded that the ruling on the ban on publication of a newspaper represents restriction on newspapers’ freedom of expression under Art. 10 para. 1 of the Convention. The Court then referred to the government’s allegations that this interference is justified by the provisions of Art. 10 para. 2 and established that, despite the criminal offense of ‘contempt of court being provided only by English common law, the legal norms in question are nevertheless ‘prescribed by law’ according to the Convention, because individuals could know about the content of the rules applicable to their behaviour and of the consequences of their violation.⁴⁰ The Court further observed that the primary aim of criminalizing ‘contempt of court’ is to uphold the authority and impartiality of the judiciary, which aligns with one of the explicit restrictions on freedom of expression permitted by Art. 10 para. 2.⁴¹ Such a solution can be considered to be within the scope of the legal aims referred to in para. 2.

However, establishing that the solution was in accordance with the request to be ‘prescribed by law’, the Court considered its compliance with the standard of the ‘need in a democratic society’. It established that the United Kingdom government failed to prove that the sentence on the ban corresponded to the ‘necessary social need’, that it is ‘proportional to the achievement of the desired legal aim’, or that the

37 Case 83/1996/702/894 *Worm v. Austria*, Judgment of 29 August 1997, para. 50.

38 Case 13585/88 *Observer and Guardian v. The United Kingdom*, Judgment of 26 November 1991, para. 59.

39 Case 6538/74 *The Sunday Times v. The United Kingdom*.

40 *Ibid.*, paras. 62–63.

41 *Ibid.*, para. 54.

reasons stated before the internal courts were ‘appropriate and sufficient according to Art. 10 para. 2’.⁴²

The Court further mentioned the government’s argument that a balance had been maintained between the public interests of freedom of expression and the effective operation of the judiciary, expressed as follows:

‘it is generally recognized that courts cannot act in a vacuum space. Although the courts are the place where disputes are settled, this does not mean that it is not possible to have a previous discussion about these disputes elsewhere, either in the competent journals, the press in general or in front of a wide audience. Additionally, while the means of mass communication must not exceed the limits imposed by the interests of the judiciary, they are obliged to provide information and convey ideas about things that come before the court, as well as on all other matters of public interest. Not only that the means of mass communication have the task of introducing others with such information and ideas, but the citizens have the right to receive them.’⁴³

In its practice, the Court also emphasized that the freedom of the press depends not only on the right to issue a publication. Safeguarding journalistic sources is a fundamental requirement for press freedom – a principle already enshrined in the regulations and professional codes of conduct of many countries. Without these protections, information sources might be deterred from assisting the press in informing the public on public interest issues. Consequently, the press’s role in contemporary society and its ability to deliver accurate and reliable information could be seriously compromised. Given the importance of safeguarding journalistic sources for press freedom in a democratic society, and the potential negative impact that requiring disclosure may have on this freedom, such a measure cannot be considered compatible with Art. 10 of the Convention unless it is justified by a legitimate public interest.⁴⁴

The concept of ‘responsible journalism’ is a professional activity safeguarded under Art. 10 of the Convention. It is not limited to the substance of the information gathered or shared through journalistic methods. However, the protection granted by Art. 10 does not relieve journalists of their obligation to comply with general criminal law.⁴⁵ A journalist cannot assert absolute immunity from criminal responsibility solely because the offence was committed in the course of their journalistic duties.⁴⁶ In the case *Stoll v. Switzerland*, the Court found that the restriction of journalists’ freedom of expression was proportionate to the legitimate objectives pursued in cases involving the publication of a confidential diplomatic document.⁴⁷ Additionally, in the case

42 Ibid., para. 62.

43 Ibid., para. 65.

44 Case 2614/65 *Ringeisen v. Austria*, Judgment of 16 July 1971, para. 97.

45 Case 69698/01 *Stoll v. Switzerland*, Judgment of 10 December 2007, para. 102.

46 Case 11882/10 *Pentikainen v. Finland*, Judgment of 20 October 2015, para. 91.

47 Case 69698/01 *Stoll v. Switzerland*, para 128.

Pentikainen v. Finland, the interference was proportionate in relation to the refusal to comply with police orders to disperse after a demonstration turned violent.⁴⁸

3.2. *Economic Expression*

In addition to political expression, there is also the so-called economic or ‘commercial’ expression that is related to the economic life of each state. In countries with a market economy, every company that wants to start a business inevitably goes public with its activity to a detailed analysis of its competitors.⁴⁹ Its business strategy and the way in which it performs its obligations can be subject to criticism of consumers and specialized press. To fulfil its role, the press must have the freedom to publish Arts. that may interest the public and thereby promote transparency in business activities. To support this goal, society must guarantee the free flow of information and ideas about products and services available to consumers.⁵⁰

There are at least two reasons why expression related to trade or economic interests should enjoy less protection than expressions that includes political decision-making. First, as a matter of social policy, such an expression is of less danger to the central values of every democratic society. Second, there is an established practice of regulating economic issues, which includes certain restrictions on freedom of speech related to economic transactions.⁵¹

3.2.1. *Barthold v. Germany*

It is not always clear when a statement must be understood as economic and not political. In the case of *Barthold v. Germany*,⁵² the applicant, a veterinarian, was subject to disciplinary proceedings for his statements about the shortcomings of the night veterinary service in Hamburg, which were quoted in a newspaper Art. According to the German court, the applicant violated established standards against professional advertising. Since the restriction imposed on him prevented him from expressing his opinion on a subject of general interest, the Court has decided that Art. 10 applies in this case and found both economic and political aspects to the prosecutor’s statement, bearing in mind the basic content of this Art. and the nature of the question presented to the public. The ruling by the German courts would have the effect of discouraging members of liberal professions from contributing to discussions on topics that affect the life of the community, if there was even the slightest probability that such statements will be treated as having an advertising effect. A statement cannot be treated as an economic statement if its primary purpose is to inform the public on a topic for which there is legitimate public interest. The Court has allowed governments wider discretion in restricting economic speech than other forms of expression. This was confirmed in the *Markt Intern* case, where the Court rejected arguments in favour of

48 Case 11882/10 *Pentikainen v. Finland*, paras. 111–112.

49 Redish, 2017.

50 Krzemińska, 2005, p. 3.

51 Voerman-Tama, Grimes and Watson, 2023, pp. 261–262.

52 Case 8734/79 *Barthold v. Germany*, Judgment of 25 March 1985.

broader protection of economic expression.⁵³ However, the Court's judgment in the *Markt intern* case has been criticized as unacceptable, since the suppression of the dissemination of truthful information constitutes a clear violation of Art. 10 of the Convention.⁵⁴

3.2.2. *Hertel v. Switzerland*⁵⁵

Hans Ulrich Hertel, a Swiss engineer and researcher, conducted a study in the early 1990s comparing the biological effects of food cooked in microwave ovens with food prepared conventionally. His results suggested that microwaved food could cause changes in human blood indicative of potential health risks. Hertel's findings were published both in a scientific paper and in the environmental magazine *Journal Franz Weber*. Following publication, the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances (MHEA) sought an injunction under the Swiss Unfair Competition Act, claiming that his statements were misleading and harmful to their commercial reputation. In 1993, the Bern Commercial Court prohibited Hertel from making or repeating claims about the dangers of microwaved food. The Federal Court upheld this ruling in 1994.

Hertel lodged an application with the Court, arguing that the injunction violated his right to freedom of expression protected by Art. 10 of the Convention. He maintained that his research addressed a topic of clear public importance – health and food safety – and that silencing his conclusions was unjustified. The Swiss Government contended that the measure was lawful and necessary to protect the economic and professional interests of appliance manufacturers, as permitted under Art. 10 para. 2.

The Court accepted that the restriction was based on national law and pursued a legitimate aim – protecting the rights of others – but held that it was not necessary in a democratic society. The Court stressed that Hertel's statements concerned a matter of general public interest and that open scientific and public debate should not be suppressed, even if his conclusions were controversial or insufficiently supported. The Court concluded that Switzerland had violated Art. 10. Hertel's claim for pecuniary damages was rejected because no direct causal link was found between the restriction and his alleged financial losses.

The Hertel judgment reinforced that scientific expression, particularly on issues affecting public health, merits strong protection under Art. 10. In instances wherein statements may impact commercial interests, authorities must ensure that restrictions are proportionate and do not unduly suppress public debate.⁵⁶ Moreover, according to the Court's reasoning, a key factor in defining the scope of the appreciation margin granted to national authorities is whether the expression in question meaningfully

53 Case 10572/83 *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, Judgment of 20 November 1989.

54 Ellger, 2001, p. 174.

55 Case 59/1997/843/1049 *Hertel v. Switzerland*, Judgment of 25 August 1998.

56 Barendt, 2005, p. 214.

contributes to a public debate. The principles formulated in *Hertel v. Switzerland* can be broadly applied when distinguishing between commercial and non-commercial aspects of expression. The first relevant factor is the presence of an ongoing public discussion on the issue addressed by the impugned statement. The second is the statement's capacity to make a substantial contribution to that discussion. These same considerations were relied upon by the Court in the Barthold judgment.⁵⁷

3.3. Artistic Expression

In the judgment of the *Müller and Others v. Switzerland* case, the term 'expression' from Art. 10 included artistic expression 'which gives people the opportunity to participate in public exchange of cultural, political and social information and ideas of every kind'.⁵⁸

Art. 19 para. 2 of the International Covenant on Civil and Political Rights confirms that the concept of freedom of expression encompasses artistic expression,⁵⁹ which involves freedom of expression of information and ideas in the form of artistic work.⁶⁰ Moreover, the Special Rapporteur in the field of cultural rights submitted the report 'The right to freedom of artistic expression and creativity' to the Human Rights Council in 2013, which addresses a wide array of matters related to artistic activity and includes a call for special protection of artistic expression and freedom as a whole.⁶¹ Additionally, the 2018 Report on Cultural Rights connected the right to artistic expression with the rights to culture and creativity.⁶²

3.3.1. *Otto-Preminger-Institut v. Austria*

Freedom of expression can be linked to attempts by the state to ban what it considers offensive artistic or literary work.⁶³ In the cases of *Handyside* and *Markt Intern*, the European Court applied Art. 10 to speech which is not political in any particular sense. It explicitly affirmed that Art. 10's protection includes artistic expression involved in the public sharing of cultural, political, and social information and ideas. Through their creative work, the artist conveys not only a personal perspective on the world but also their outlook on the society they inhabit. This Art., in particular, does not say that the freedom of artistic expression falls within its scope, nor that it differs from other forms of expression. It contains the right to receive and communicate cultural, political and all other information and ideas.⁶⁴ Confirmation for this can be found in the second sentence of para. 1 of Art. 10, which refers to 'the work of television or cinema companies', the media whose activity extends to the field of art.

57 Dedja, 2018, p. 80.

58 Case 10737/84 *Müller and Others v. Switzerland*, Judgment of 24 May 1988, para. 31.

59 International Covenant on Civil and Political Rights, Art. 19 para. 2.

60 Polymenopoulou, 2016, p. 529.

61 Report on the right to freedom of artistic expression and creativity, 14 March 2013.

62 Bennoune, 2018.

63 Djajic and Lazic, 2021.

64 European Court of Human Rights, 2011, p. 5, para. 3.

This was proven in the case of *Otto-Preminger-Institut v. Austria*,⁶⁵ wherein the Court maintained the policy of minimalistic protection of artistic expression.

This case concerned the seizure and forfeiture of a film entitled *Council in Heaven* (*Das Liebeskonzil*), which was scheduled to be shown by the Otto-Preminger-Institut, a cultural association in Innsbruck, Austria. The film depicted God, Christ, and the Virgin Mary in a satirical and sexualized manner. Before its screening, the public prosecutor – acting on complaints from local Catholic groups – ordered the film's seizure on the grounds that it insulted religious beliefs, in violation of Austrian criminal law. The Institute argued before the Court that this interference breached its right to freedom of expression under Art. 10 of the Convention.

The Court acknowledged that the seizure constituted an interference with Art. 10 rights, but held that it was prescribed by law, pursued a legitimate aim (the protection of the rights of others, namely the right of religious believers not to be gratuitously offended), and was necessary in a democratic society. The Court emphasized the state's margin of appreciation in balancing freedom of expression and respect for religious feelings, particularly given the deeply Catholic context of Tyrol. By six votes to three, the Court found no violation of Art. 10.

This judgment is one of the leading cases on the limits of artistic freedom under Art. 10. It illustrates how the Court allows states a wide margin of appreciation in cases where freedom of expression conflicts with religious sensitivities. The decision has been debated for prioritizing the protection of religious feelings over unrestricted artistic and cultural expression.

3.3.2. *Karatas v. Turkey*⁶⁶

The applicant, Yavuz Karataş, was a Turkish poet and writer convicted under Turkey's Anti-Terror Law for publishing a collection of poems titled 'The Songs of Rebellion' (*Isyan Türküleri*). The Turkish courts held that the poems incited hatred and promoted separatism by supporting the Kurdish cause and the Kurdistan Workers' Party (PKK). Karataş was sentenced to imprisonment and fined. He appealed to the Court, claiming that his conviction violated his right to freedom of expression under Art. 10 of the Convention. The Turkish government argued that the restriction was necessary to protect national security and public order during a period of ongoing violence in southeastern Turkey.

The Court acknowledged that the interference was prescribed by law and pursued legitimate aims – namely, the protection of national security and territorial integrity. However, it found that the poems, though politically charged and critical of state policies, did not incite violence or hatred directly. The Court emphasized that freedom of artistic and political expression is vital in a democratic society and that the use of metaphor, symbolism, and strong emotion in poetry must be tolerated. Suppressing such expression solely for its critical tone would endanger democratic debate.

65 Case 13470/87 *Otto-Preminger-Institut v. Austria*, Judgment of 20 September 1994.

66 Case 23168/94 *Karatas v. Turkey*, Judgment of 8 July 1999.

Therefore, the Court held by twelve votes to six that there had been a violation of Art. 10.

The Karatas judgment reaffirmed that artistic expression – even when provocative or politically sensitive – deserves robust protection under Art. 10. The decision formed part of a broader line of Turkish ‘freedom of expression’ cases in the 1990s, wherein the Court sought to limit excessive criminal sanctions against writers, journalists, and artists.

3.4. *Offensive Expression*

In recent years, examples of offensive speech referring to certain ethnic groups have become more frequent.⁶⁷ European experiences with racist regimes in the twentieth century has engendered an increased sensitivity to dangers of this kind of expression.

3.4.1. *Jersild v. Denmark*

The Court has faced the question of whether an expression that is punishable according to the laws that limit racist speech is protected by Art. 10 of the Convention. The Court’s decisions have clarified that the laws regulating hate speech are in line with the Convention. In the case of *Jersild v. Denmark*,⁶⁸ the applicant made and presented a television show about a young racist gang in Copenhagen. Part of the show is an interview wherein his interlocutors talk about minorities in a rude and malicious way. The applicant was convicted under the Danish Criminal Code for making public statements that threaten, insult, or demean a group based on race, skin colour, national or ethnic origin, or belief, which constitutes defamation. The Court highlighted the significance of combating racial discrimination, but stated that the applicant’s behaviour in including such statements in his program cannot be considered as promotion of racism. The Court was particularly aware of the need to protect the press – namely, the content and form of presentation of information – in its judgments. Penalizing a journalist for helping disseminate statements made by others during an interview would significantly undermine the press’s role in facilitating public debate on important issues.⁶⁹

This judgment of the Court has not remained without comment. The question is whether one interest – freedom of the press – prevails over the other, specifically, the prevention of the spread of racism. In regulating this issue, international law was developed and some important standards in this field were adopted on a global level. It was brought about the International Convention on the Elimination of All Forms of Racial Discrimination in 1965,⁷⁰ which today has 182 State Parties. Denmark has ratified it on 9 December 1971. This Convention establishes certain obligations that

67 Council of Europe, 2011, p. 82.

68 Case 15890/89 *Jersild v. Denmark*, Judgment of 23 September 1994.

69 Rytter and Wind, 2011, p. 482.

70 International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966.

each State Party must fulfil. In Art. 1, they commit to refraining from any acts of racial discrimination against individuals, groups, or institutions, and to ensuring that all public authorities and institutions at national and local levels comply with this obligation. Additionally, the state must not incite, defend or support racial discrimination conducted by any person or organization. Art. 4 of the Convention requires states to denounce and penalize any propaganda rooted in ideas or theories of racial superiority or hatred, and to prohibit organizations that advocate and incite racial discrimination.⁷¹

While this Convention does not specifically mandate the punishment of journalists accountable for such television programs, it nevertheless supports the position that the media is obliged to take a clear stance in the area of racial discrimination⁷² and spreading racial hatred.⁷³ In this case, the Court did not respect these rules, and it is obliged to consider all relevant international agreements when interpreting the European Convention. Safeguarding racial minorities is equally important as the right to disseminate information. Moreover, the rights of persons whose dignity has been violated must be protected, even if this means limiting freedom of expression.

3.4.2. *Savva Terentyev v. Russia*⁷⁴

The applicant, Savva Terentyev, a Russian musician and blogger, was convicted of inciting hatred or enmity under Art. 282 of the Russian Criminal Code for a comment he posted on a social media blog in 2007. In his post, Terentyev harshly criticized police officers, describing them using highly offensive and metaphorical language and suggesting that ‘bad policemen’ should be publicly punished. Russian courts found him guilty, ruling that his post incited hatred toward a social group (police officers) and sentenced him to a suspended prison term. Terentyev complained to the Court, arguing that his conviction violated his right to freedom of expression under Art. 10 of the Convention.

The Court held that Russia had violated Art. 10. The Court recognized that Terentyev’s post was provocative and contained strong language, but emphasized that it was a form of political and social criticism rather than a call for violence or hatred. The Court noted that the statement was published in a personal blog with limited reach and was part of a broader debate on police misconduct. The domestic courts had failed to properly balance Terentyev’s right to free expression against the aim of protecting public order.

The Savva Terentyev case reinforces the protection of online expression and political satire under Art. 10. It highlights that even harsh or exaggerated criticism of public officials, particularly in social media contexts, must be tolerated in a democratic society unless it clearly promotes violence or hatred.

71 Todorovic, 2000.

72 Case 8348/78 and 8406/78 *Glimmerveen and Hagenbeek v. the Netherlands*, Commission decision on the admissibility of 11 October 1979.

73 Case 65831/01 *Garaudy v. France*, Decision on the admissibility of 24 June 2003.

74 Case 10692/09 *Savva Terentyev v. Russia*, Judgment of 28 August 2018.

4. Restrictions of Freedom of Expression

Restrictions on freedom of expression were introduced by some international treaties. For example, the Convention on the Use of Radio for the Purpose of Peace⁷⁵ prohibited radio broadcasts that threaten internal order or the safety of other states. Those broadcasts that contain propaganda in support of war or present false information endangering international cooperation are also banned. This issue is also regulated by the Convention on the International Right of Correction,⁷⁶ from 1953. If information is presented on the territory of one State Party, which would harm the reputation of another state or threatens existing relations with that state, the injured state has the right to present its version of the facts by the same means of information. It must not contain comments or views, but only facts and must not be longer than what is necessary to correct the stated false information. A copy of the response will also be delivered to the correspondents and news agencies that broadcasted the false news. They will announce the new information to the public as soon as possible.

Every restriction of human rights must be proportionate to the interests it serves. In the case of *Müller and others v. Switzerland*,⁷⁷ the issue of the protection of morals was also raised. The applicants claimed that the Swiss government violated Art. 10 by confiscating several sexually provocative pictures and fined artists for publishing lascivious material. The Court concluded that these measures were justified under the second Para., noting that states have a broad margin of appreciation in deciding what is necessary to protect morals.⁷⁸

Freedom of expression holds special significance for political parties and their active members. Any interference with the freedom of expression of politicians, particularly those belonging to opposition parties, demands the Court's most rigorous examination. The boundaries of acceptable criticism are broader when directed at the Government than when aimed at a private individual or even a politician. This was confirmed in a number of cases regarding Turkey.⁷⁹ Political ideas that question the current system and promote change through peaceful methods must be given a fair chance of expression.⁸⁰

Not every interference with the human rights protected by Art. 10 will be considered a violation.⁸¹ However, if it is established that the aim could have been achieved

75 Convention on the Use of Radio for the Purpose of Peace, Geneva, 1936.

76 Convention on the International Right of Correction, Geneva, 1953.

77 Case 10737/84 *Müller and Others v. Switzerland*.

78 Ibid., para. 43.

79 Case 16853/05 *Faruk Temel v. Turkey*, Judgment of 1 May 2011, para. 55; Case 41/1997/825/1031 *Incal v. Turkey*, Judgment of 9 June 1998, para. 54; Case 50997/99 *Han v. Turkey*, Judgment of 13 December 2005, para. 29; Case 21163/11 *Mansur Yalcin v. Turkey*, Judgment of 16 December 2005, para. 43.

80 Case 20641/05 *Egitim ve Bilim Emekcileri Sendikasi v. Turkey*, Judgment of 25 December 2012, para. 70.

81 Schabas, 2016, p. 444.

by a lesser measure and was not necessary, the Member State will be deemed to have violated this Art. of the European Convention.⁸² For there to be a violation or a restriction, certain conditions must be met,⁸³ which are set out below. Nonetheless, Art. 10 para. 2 of the Convention allows very limited restrictions on political speech or debate⁸⁴ or discussions concerning matters of public interest.⁸⁵

The Court applies a three-step test to assess whether a restriction is justified under Art. 10 para. 2 of the Convention: (1) Prescribed by law: the restriction must have a legal basis that is accessible and foreseeable. (2) Legitimate aim: the restriction must pursue one of the legitimate aims enumerated in Art. 10 para. 2. (3) Necessary in a democratic society: the restriction must correspond to a pressing social need and be proportionate to the legitimate aim pursued.

4.1. Prescribed by Law

As per the jurisprudence of the Court, any interference by a public authority with an individual's rights that are safeguarded by Art. 10 must be carried out in accordance with the law.⁸⁶ This expression is not limited to the coherence of the interference, but also considers the quality of the law or regulation.⁸⁷ Quality is a matter of accessibility to citizens, precision of formulation and foreseeability of consequences.⁸⁸ In other words, a citizen should be aware that a certain rule is being applied and the rule should be expressed clearly enough to allow citizens to conform their conduct accordingly.⁸⁹ The Court considers that a regulation should provide the basic standard of legal safeguards against arbitrary and unjustified interference by public authorities with the rights guaranteed by Art. 10.⁹⁰ On the other hand, the Court is of the opinion that it is impossible to achieve absolute certainty, considering the fact that many laws contain vague provisions that are subject to interpretation in practice.⁹¹

When a rule is enforced for the first time in a case, the claimant cannot claim unpredictability of the law as a defence.⁹² Although the Convention does not set precise standards for how widely a rule must be publicized, it is available to all through its publication in the national official gazette.⁹³

82 Greer, 2007, p. 259.

83 Baširević, 2017, p. 307.

84 Case 71343/01 *Brasilier v. France*, Judgment of 11 July 2006, para. 41.

85 Case 26682/95 *Surek v. Turkey no. 1*, Judgment of 8 July 1999, para. 61.

86 Case 47621/13 *Vavrička and others v. The Czech Republic*, Judgment of 8 April 2021, para. 266; Case 24173/18 *Klaus Müller v. Germany*, Judgment of 19 February 2021, para. 48.

87 Case 58243/00 *Liberty and others v. The United Kingdom*, Judgment of 1 July 2008, para. 59.

88 Case 30194/09 *Shimovolos v. Russia*, Judgment of 21 June 2011, para. 67; Case 20652/92 *Djavit An v. Turkey*, Judgment of 9 July 2003, para. 65.

89 Case 28341/95 *Rotaru v. Romania*, Judgment of 4 May 2000, para. 52.

90 Case 24973/15 *Cangy v. Turkey*, Judgment of 29 April 2019, para. 42.

91 Case 12323/11 *Michaud v. France*, Judgment of 6 March 2013, para. 96.

92 Case 931/13 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Judgment of 27 June 2017, para. 131.

93 Case 28470/12 *NIT S.R.L. v. the Republic of Moldova*, Judgment of 5 April 2022, para. 163.

When determining whether legal grounds for a restriction exists, the Court considers the way in which the national courts interpret and enforce the regulation.⁹⁴ Regulation includes not only national laws but also ‘rules of professional conduct, principles of customary law, European Union regulations and international bilateral and multilateral treaties’.⁹⁵ This means that both written and unwritten regulations are considered, with the Court then relying on the interpretation given by the national authorities.⁹⁶

4.2. Legitimate Aim

The government must demonstrate that the interference in the particular case was aimed at achieving a legitimate objective,⁹⁷ and that the national authorities have established a legitimate aim.⁹⁸ This is reinforced by the Court’s practice of assessing the presence of a legitimate aim as defined in Arts. 8 to 11 of the Convention.⁹⁹

Although states can only rely on the aims set out in para. 2,¹⁰⁰ they are formulated in broad terms and allow states a degree of discretion.¹⁰¹ Accordingly, the Court has determined in numerous cases that the State acted in line with the objectives set out in Art. 8, and the requirement of legitimacy has been considered of little importance in determining whether the State violated this Art.¹⁰²

At this stage, the Court may determine that an interference failed to further the legitimate aim invoked,¹⁰³ or it may decide to uphold just one of the legitimate aims cited by the State, while the others are rejected.¹⁰⁴ The struggle against terrorism is frequently mentioned as the primary context in relation to limitations of this right. National legal provisions addressing these legitimate aims are diverse and typically found in criminal codes, anti-terrorism laws, and occasionally, in national Constitutions.

In the case *Dareskizb Ltd. v. Armenia*, the Court ruled on the justification of the restriction under Art. 10, stating that banning newspapers from publishing Arts. critical of the government during a state of emergency was not a justified limitation. Despite pursuing a legitimate aim, such a restriction was unnecessary in a democratic society and went against the core purpose of Art. 10.¹⁰⁵

94 Case 32555/96 *Roche v. The United Kingdom*, Judgment of 19 October 2005, para. 157.

95 Roagna, 2012, p. 38.

96 Case 38224/03 *Sanoma Uitgevers B.V. v. the Netherlands*, Judgment of 14 September 2010, para. 82.

97 Case 1122/12 *P.T. v. The Republic of Moldova*, Judgment of 26 August 2020, para. 29.

98 Case 10271/12 *Kilin v. Russia*, Judgment of 11 August 2021, para. 61.

99 Case 43835/11 *S.A.S. v. France*, Judgment of 1 July 2014, para. 114.

100 Mowbray, 2012, p. 591.

101 Stevandić, 2019, p. 189.

102 Case 9248/81 *Leander v. Sweden*, Judgment of 26 March 1987, para. 50.

103 Case 67667/09 *Bayev and others v. Russia*, Judgment of 13 November 2017, paras. 64 and 83.

104 Case 29369/10 *Morice v. France*, Judgment of 23 April 2015, para. 170; Dzehtsiarou, Garde, 2022, p. 254.

105 Case 61737/08 *Dareskizb LTD v. Armenia*, Judgment of 08 October 2021, para. 78.

4.3. *Necessity in a Democratic Society*

To decide if a specific rights violation satisfies this criterion, the Court must weigh the interests of the Member State against those of the applicant.¹⁰⁶ In each case, the Court must determine whether an equitable balance has been achieved between the individual's fundamental right to freedom of expression and the legitimate interest of a democratic society to defend itself against terrorist activities.¹⁰⁷

It has been held that 'the only form of necessity which can justify an interference with a right is one which can be shown to arise in a democratic society'.¹⁰⁸ The term 'necessity' implies the existence of a 'pressing social need' for the interference in question.¹⁰⁹ It is up to the States to evaluate whether a pressing social need exists in any given case¹¹⁰; however, the Court retains the authority to review their decision.¹¹¹ It is also necessary for the interference to be 'proportionate to the legitimate aim pursued' and for reasons justifying the interference to be 'relevant and sufficient',¹¹² as confirmed in the cases *Barthold v. Germany*¹¹³ and *Lingens v. Austria*.¹¹⁴ The extent of the margin of appreciation granted to the States varies according to the nature of the matter and the significance of the interests involved in each case.¹¹⁵ However, owing to the absence of a European-wide consensus on certain sensitive moral and ethical questions, States are afforded a broad margin of appreciation in addressing such matters.¹¹⁶

In addition, when examining compliance with Art. 10, the Court must assess whether the national authorities acted in a reasonable, thorough manner, in good faith, and whether the interference pursued a legitimate aim in a proportionate way, supported by adequate and pertinent justifications. The Court further evaluates whether the respondent State took into consideration the principles laid down in Art. 10 and whether its conclusions were based on a proper analysis of the relevant facts.¹¹⁷

In the judgment in *Olsson v. Sweden*,¹¹⁸ the Court clarified what is meant by the term 'necessary in a democratic society'. As established in the Court's case-law, the notion of necessity implies that any restriction of human rights must address a pressing social

106 Case 23890/02 *Phinikaridou v. Cyprus*, Judgment of 20 December 2007, para. 47.

107 Case 69/1996/688/880 *Zana v. Turkey*, Judgment of 25 November 1997, para. 55; Case 23168/94 *Karatas v. Turkey*, Judgment of 8 July 1999, para. 51.

108 Case 19392/92 *United Communist Party of Turkey and others v. Turkey*, Judgment of 30 January 1998, para. 45.

109 Case 10730/84 *Berrehab v. The Netherlands*, Judgment of 21 June 1988, para. 28.

110 Case 20071/07 *Piechowicz v. Poland*, Judgment of 17 July 2012, para. 212.

111 Case 7525/76 *Dudgeon v. The United Kingdom*, Judgment of 22 October 1981, para. 51.

112 Case 22009/93 *Z. v. Finland*, Judgment of 25 February 1997, para. 94.

113 Case 8734/79 *Barthold v. Germany*, para. 55.

114 Case 9815/82 *Lingens v. Austria*, para. 40.

115 Case 37283/13 *Strand Lobben and others v. Norway*, Judgment of 10 September 2019, para. 211.

116 Case 25358/12 *Paradiso and Campanelli v. Italy*, Judgment of 24 January 2017, para. 184.

117 Case 8606/13 *Association de solidarité avec les témoins de Jéhovah and Others v. Turkey*, Judgment of 17 October 2016, para. 98.

118 Case 10465/83 *Olsson v. Sweden*, Judgment of 24 March 1988.

need and, importantly, be proportionate to the legitimate aim pursued. Countries that are parties to the Convention enjoy some flexibility in assessing whether such needs exist; however, it happens under European supervision, which also includes legal regulations and relevant decisions, even those made by an independent court. The Court has the authority to make the final determination on whether a restriction aligns with the right to freedom of expression as guaranteed by Art. 10. In exercising its supervisory role, the Court does not substitute itself for the national courts, but instead assesses whether the national decisions comply with the requirements of Art. 10.

An example of the limitations can be the case of *Handyside vs. United Kingdom*.¹¹⁹ The Court considered whether it is contrary to Art. 10 of the Convention to convict a person who published a handbook for school children with advice on sexual and other issues. Although the Court acknowledged that the State had the discretion to invoke the protection of morals under para. 2 and to prevent the publication of the textbook, it nevertheless emphasized the importance of freedom of expression in a democratic society:

‘Freedom of expression is one of the necessary foundations of such a society, one of the fundamental preconditions for our progress and for the development of every human being. It includes not only information or ideas that are well received or considered as harmless or unimportant, but also those who offend, stress or disturb the state or some part of the population. These are the orders of pluralism, tolerance and broadmindedness, without which there is no democratic society.’¹²⁰

At the heart of the Court’s judgment lies the concept of the ‘margin of appreciation’, which serves to assess whether the interference with protected rights is necessary in a democratic society for the pursuit of certain legitimate interests. The possibility of such justification of interference with human rights is also envisaged for some other rights recognized by the Convention (Arts. 8, 9, 11). The manner in which the Court determines the presence or absence of such ‘necessity’ will have an important impact on determining the necessary limits of protection. What is required to accomplish the stated objectives, even within democratic societies, can vary among countries. Additionally, the assessment of necessity by some governments differs from that of an international court, which is, of course, less familiar with the circumstances in the given country. This can lead to a situation wherein an international court automatically approves any interference by the state in the guaranteed rights.

119 Case 5493/72 *Handyside v. The United Kingdom*.

120 *Ibid.*, para. 49.

5. Conclusion

This paper explores freedom of expression as outlined in Art. 10 of the Convention, focusing on its interpretation by the Court. The Court's case law plays a crucial role in shaping the understanding of all rights under the Convention, including freedom of expression.

Over time, the Court has established what is meant by expression, standards of freedom of the press (in the cases of *Sunday Times* and *Lingens*) and the transmission of information. Specifically, that it can manifest in several forms, as political, economic and artistic expression. Political expression is the 'freest', in the sense that politicians and public officials are more exposed to the public eye and media criticism than ordinary citizens.

Freedom of expression is not unlimited. It may be limited under the conditions set out in para. 2 of Art. 10 of the Convention. Such limitations must be necessary in a democratic society, prescribed by law – ensuring that citizens understand the possible limits – and aimed at achieving a legitimate goal, such as protecting morals, public safety, or the rights of others. State authorities have a broad margin of appreciation in deciding whether the proposed restrictions meet these criteria. Nevertheless, the ultimate authority to determine the permissibility of these restrictions rests with the Court.

The Court's case-law on the justification of restrictions of protected rights by provisions such as para. 2 of Art. 10 shows that the strictness with which such justification is sought depends on the specific circumstances of the case. The field of discretion is difficult to determine in advance, and varies according to the principles that the Court considers to be appropriate in that case. However, the field is the widest when the Court considers whether the derogations of some rights was at a time of threats to public order, and narrowest when discussing the alleged violation of the personal rights of individuals. Notably, the Court addressed two distinct objectives from Art. 10 para. 2, as valid grounds for limiting freedom of expression: the protection of morals and the preservation of the authority and impartiality of the judiciary.

In conclusion, while the Court remains a vital guardian of freedom of expression in Europe, its jurisprudence must continue to evolve alongside technological and societal change. States should not only respect but actively integrate the Court's case law into their domestic legislation, ensuring greater harmony between national practice and European human rights standards. A stronger and more direct influence of Court jurisprudence on national law is especially important in addressing new forms of expression emerging in the digital environment.

The rapid development of online communication, artificial intelligence, and large language models presents both opportunities and risks. While freedom of expression must be preserved as a cornerstone of democracy, unchecked disinformation and manipulative content generated through modern technologies pose significant threats to truth, public safety, and informed discourse. Therefore, the Court's approach

should evolve to recognize that certain categories of online expression – particularly deliberate disinformation spread by hostile actors – warrant stricter scrutiny. This would not amount to unjustified restriction but rather to a context-sensitive balancing that protects the public good and supports a healthier exchange of knowledge.

Systematic content analysis of the Court's decisions could illuminate how the concepts of freedom of expression and national security interact within the Court's language and logic. Such research would contribute to a deeper understanding of how human rights law can remain responsive, principled, and forward-looking in an era of digital transformation.

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Rights of Assembly and Association

Endre DOMANICZKY

ABSTRACT

This study presents the rules of the European Convention on Human Rights (ECHR), which are the European standard for the regulation of the rights of association and assembly. ECHR served as an important model for the Central European states to develop their national legislation during the regime change. The study presents the essence of the rules by interpreting the text of the Convention in its grammatical sense and outlines the limits of the rules based on the case law of the Strasbourg Court of Human Rights. The analysis of the case-law reveals that the Central European framework is divided into several smaller regions, where minority rights and religious issues still play a significant role, and their exercise is often closely linked to the exercise of the rights of association and assembly. Further, the study not only focuses on the past and the present but seeks to illustrate the likely trends in future legal developments.

KEYWORDS

right of association, right of assembly, Strasbourg Court, human rights, Central Europe

1. Introduction

In jurisprudence, the rights of association and assembly are closely linked, like the twin brothers, Castor and Pollux, in Roman mythology. These rights share the similar regulatory regime and appear together in legal documents. Though these rights are at the heart of European legal culture as a fundamental right and a right to political freedom, attempts to codify them date back to antiquity. They later appeared not only in European states but also, through colonisation, in all countries globally and were standardised in the constitutions of many countries and in the international catalogues of fundamental rights. In the following, the content of the rights of assembly and association will be examined in the light of the text of the European Convention on Human Rights (hereinafter: ECHR), the basic document of modern European fundamental rights law. Thus, we will briefly discuss the codification history of the ECHR text, which is of regulatory significance and review the (Strasbourg) case law based on the ECHR text.

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2. Interpretation of the Text of the Convention

The relevant text of ECHR is as follows:

‘Article 11 – Freedom of assembly and association

(1) Everyone has the right to the freedom of peaceful assembly and to the freedom of association with others, including the right to form and join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.’

Article 15 – Derogation in time of emergency

(1) In time of war or other public emergencies 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.

(3) Any High Contracting Party availing itself of this right of derogation shall fully inform the Secretary General of the Council of Europe of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16 – Restrictions on political activities of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.’

2.1. Title of the Section on Freedom of Assembly and Association

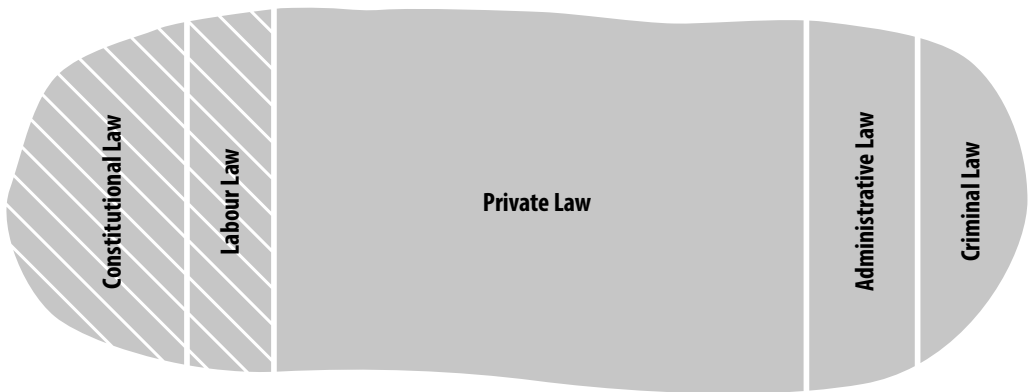
It is clear from the title of Article 11 that the ECHR aims to regulate the rights of assembly and association as *freedoms*. In other words, it approaches the content of these two rights from the perspective of the relationship between the state and individuals. Although the title may appear to have been influenced by the wording of the Universal Declaration of Human Rights (which also speaks of the freedoms of assembly and association), the wording of the article suggests that the ordering of the two rights is deliberate, since the peaceful assembly of the members is a precondition for the exercise of the right of association. In a conventional sense, the right of

assembly can be seen as a “precursor” of the right of association, since members must meet to hold a general assembly of members to exercise their right of association, or they must form and operate an organisation. Therefore, the two freedoms are closely linked, and this relationship is sufficient justification for their common regulation. However, there is also a fundamental difference in the relationship between the two freedoms, namely in the purpose for which they are exercised. When they exercise the right of assembly, individuals assemble for a specific purpose, whereas to exercise the right of association, they assemble to form a common will in a form recognised by law.

2.2. Scope of the Section on Freedom of Assembly and Association

Article 11 on the rights of assembly and association has a broad scope as a right of freedom. This means that the section covers concepts enshrined in constitutional law and includes provisions on trade unions, a form of associations in labour law. However, it excludes completely from its scope the rules and forms¹ of association law, which exist in the field of private law. In other words, although the ECHR contains rules on the rights of assembly and association in a single section, the regulation focuses on the right of association, which has regimes in constitutional law, labour law, private law, administrative law, and criminal law and rules relevant to the right of association as a right of freedom.

Figure 1. The location of the right of association rules in the different branches of law (the ECHR rules only extend to the redacted parts of the right of association)²



1 The case of for-profit organisations, such as the forms of business corporations defined in different legal systems, and “mule formations” that straddle the boundary between private and public law, such as the public foundations that proliferate from time to time in the vicinity of government are examples of this.

2 Source: Author’s own work.

Notably, the rights of assembly and association belong to the family of fundamental communication rights with freedom of expression at its core. The fundamental rights of communication aims to enable ‘an informed participation by the individual in social and political processes.’³ Indeed, when freedom of expression – or a related fundamental right – is violated,

‘social justice, human creativity and the potential for human fulfilment are impaired. The damaging consequences are felt not only in the life of the individual but also in the life of the whole society. Such experiences usually lead to a dead end in the development of humanity, with much suffering. The free expression of ideas and views, the free expression of even unpopular or idiosyncratic ideas, is a prerequisite for the existence of a developing and truly living society’.⁴

The rights to assembly and association are usually considered as one of the civil and political rights of the first generation of freedoms and are codified in this sense in this section. As freedoms, they give rise both to an entitlement of individuals to actively exercise their rights, and to an obligation of the state to refrain from unjustified interference. Although the exercise of these two rights is linked to the collective (associative) human activity, the Convention itself protects only individuals and their actions.

2.3. Eligibility

The definition of eligible persons is broad; though it includes everyone at first glance, “everyone” is used here in a narrow sense. The right of freedom applies only to those who belong to the political community – those who actively exercise it.⁵ Within this category, we can think primarily of natural persons and, in some cases, other legal persons. The state and its organisations in various forms are excluded from this.⁶ However, certain categories of public employees and foreigners are subject to restrictions (i.e. they may be excluded by the decision of the contracting parties), according to the text of the Convention.⁷ An intermediate category is that of minors, where the right of a parent or legal guardian may arise in certain cases (such as incapacity). Similarly, the category of persons with limited capacity requires case-by-case consideration.

3 Hungarian Constitutional Court Decision 30/1992 (26/05.) point 2.1.

4 Ibid.

5 Therefore, at a theoretical level, the question, for example, of the legality of the exercise of the rights of persons barred from participating in public affairs and the scope of the restriction(s) involved exist. For example, according to the current Hungarian Criminal Code, a person banned from participating in public affairs may not be a leading officer of a civil organisation (Point (i), para. 2 Art. 61 of Act C of 2012), but the legal institution itself was already recognised in the first modern Hungarian Criminal Code (Act No V. of 1878).

6 Cf. the examples in the footnotes 47–48.

7 Article 11 para. 2 sentence 3, and Article 16 ECHR.

2.4. *Forms of Action*

The Section on Freedom of Assembly and Association in the Convention requires individuals' active participation. The text also specifically mentions two forms of conduct in relation to trade unions: forming (i.e. participation in the establishment of the organisation) and *joining* (i.e. participation in the work of an existing organisation), which apply to all forms of organisation.

Regarding the rights of assembly and association, the section generally protects the conduct connected with the exercise of the fundamental right. *Implicitly*, in the case of an assembly, this *implies* not only participation but also the arrangement of participation, i.e. all the activities through which the exercise of the right of assembly can be realised (which are best captured by the terms “initiative” and “participation”). The regulatory regime is similar to the right of association, in that the two basic forms of activity – “forming” and “joining” – re-named in the text. However, it should cover all activities that can be covered by the terms of initiative and participation.

Though the convention does not specify it, it follows from the wording of Section 1 of Article 11 that the cases of association based on voluntary choice are covered – *not public bodies* based on compulsory membership.⁸

However, the legislator has already made two restrictions in the characterisation of “the activity”: in the case of the right of assembly, it states that only the “peaceful” exercise of rights is protected. In the case of the right of association, it says only that ‘freedom of association with others’ is protected, which leaves room for regional regulatory regimes. In other words, the legislator emphatically refrains from laying down a threshold in national law for the minimum number of founders or other administrative rules closely linked to the exercise of the right of association. Thus, it leaves this task to the national regulatory regimes and stresses that the Convention is intended to protect only the freedom and its exercise without considering differences between the national regulatory regimes relating to the exercise of this fundamental right.

2.5. *Conditions for the Restriction of Rights*

Since the rights of assembly and association are not among the unrestricted fundamental rights, the legislator sets strict conditions for restrictions.⁹ The majority of these are hard and fast rules; some of them discretionary, allowing for derogations; several restrictions require individual discretion.

⁸ In this case, the existence of the scope of eligibility is already questionable (see above, under “*Eligibility*”), since their establishment is usually laid down by law, which determines the objectives and activities of the organisation.

⁹ This purposive interpretation is also emphasised in the specific points of the Convention: ‘Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’ (ECHR, Art. 17), and ‘The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.’ (ECHR, Art. 18).

Therefore, it can be said that the Convention has specified detailed rules not only on the granting of rights but also on the limitation of these rights.

Two rules establish the general framework of the restriction: the ‘exercise of these rights *are* prescribed by law’, by legislation at the top of the national and legislative hierarchy. The exercise of these rights may be subject only to such restrictions as ‘are necessary in a democratic society...’

While the first condition is logical and generally accepted, the second condition is derogatory and its meaning may vary from case to case, since the legislator imposes a double legal test on restrictive measures. In general, and by the standards of a democratic society, restrictions must be necessary. It is clear that both elements require individual assessment: a.) of the necessity of the restriction; and b.) the standards of a democratic society. However, the content of these standards does not necessarily require a case-by-case examination, as the court may decide to identify it with concepts such as the rule of law and thus standardise it. However, this requires a decision by the legal practitioner. In other words, it does not follow from the text per se.

The legislator also sets out specific titles for the restriction. Restrictions may only be imposed: a.) on interests of national security or public safety; b.) for the prevention of disorder or crime; c.) for protection of health; d.) for protection morals; e.) for the protection of the rights and freedoms of others. Though the text does not specifically explain these concepts, the phrase “democratic society” indicates the criteria by which the content of these rights may be interpreted by case law. As mentioned above, judicial practice may play a key role in the interpretation of these concepts, and in the light of the Court’s decision,¹⁰ the meaning of these concepts may change over time and become standardised as a result of other international conventions.¹¹

2.6. Exceptions

For the sake of clarity, the Convention makes an addition to the rules on limitations. Although these may appear to be interpretative provisions containing the clarification of rules, they are cumulative norms similar to those outlined in the first sentence of Section 2 of Article 11.

The Convention authorises the contracting parties to restrict (a) the free exercise of the rights of assembly and association (b) by law (c) for the members of the armed forces, the police and the public administration. Although the list under (c) seems long because both the concepts of “armed forces” and “administration” leave some room for national legislation, it must be interpreted with the help of the case law of the courts.

10 “Court” means the European Court of Human Rights in this article.

11 The Court referred to this in its explanation of the *living instrument doctrine* (most recently in *Demir and Baykara v. Turkey* (2008)), when it stated that ‘the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies.’ ([2008] ECHR 1345. 146.).

A similar exception is made to a separate section in Article 16, though in the rules on restrictions on the political activities of foreigners (aliens).

2.7. Other Restrictive Empowerments

Further, the Convention (Art. 15) includes the rights of assembly and association among the rights that may be restricted in time of emergency. However, even in this exceptional situation, the legislator does not allow the contracting parties to restrict the right unconditionally.

In addition to the rules of necessity and proportionality, the relevant section contains a test of those rules, as it provides that in a given case only ‘a derogation to the extent strictly required by the exigencies of the situation’ (in other words, to the extent strictly required by the necessity of the situation) may be lawful, and only if it does not conflict with other international legal obligations of the contracting party concerned.

The text also defines the scope of the emergency as (a) war; or (b) ‘other public emergency threatening the life of the nation’ – categories that can be filled in and clarified over time by case law.

A further important – procedural – condition for a legal derogation is that the Contracting Party concerned must fully inform the Council of Europe of the derogation.¹² The notification cannot be formal, but must be comprehensive, including: (a) the measures taken by the party; and (b) the reasons for these measures; (c) the date of the repeal of these measures, and (d) a clause that ‘the provisions of the Convention will again be fully implemented’.

Consequently, in an emergency, contracting parties are not obliged to give prior notice or to consult each other on the derogation to avoid further damage. However, from the outset, they must act in the knowledge that their actions will be subject to ex post scrutiny, including an examination of their legality (i.e. their compliance with the Convention).

3. Historical Overview of the Fundamental Rights Regulation

As already mentioned in Introduction, the rights of association and assembly are essential parts of the European legal culture. It is no coincidence that these rights are mentioned in the laws of the Twelve Tables, one of the earliest written sources of Roman law, which is the cradle of modern European legal thought.¹³ These rights were also important in the organisational development of Christianity, which became

¹² Here the Convention specifically names the Secretary General of the Council of Europe, which makes it clear that an effective declaration of law can only be made addressed to the Secretary General (Article 15, point 3, ECHR).

¹³ See Table VIII, points 26 and 27. The former provided for the prohibition of night-time “bankruptcies”, the latter for the content of the rules of organisations with legal personality: Borzsák, 1993, p. 28.

the state religion of the Roman Empire from 380 AC onwards and an important part of European legal thought even without regulation.¹⁴

The two rights as freedoms only appeared during the Enlightenment (17th–18th centuries) through various American and French legal declarations and legislations (initially typically in constitutions). In the Central European region, two codifications (both still in force) had the greatest impact: (a) the Belgian Constitution of 1831 and (b) the Austrian Charter of Fundamental Rights of 1867,¹⁵ which declared the rights of assembly and association. The impact of these codifications was felt even in areas where only temporary – procedural – regulation was applied for a long time mainly through lower-level legislation.

After the First World War, most of the new Central European states declared several civil and political rights in their constitutions, including the rights of assembly and association, but there was no time to develop a clear practice, as most of these states were occupied by Germany and then by the Soviet Union some two decades after their formation. The Soviet Union settled in the region for several decades, and the countries within its sphere of influence declared political rights and freedoms in their constitutions based on the Soviet model. However, these rights had limited practical application throughout. Most grass-roots associations were dissolved or partly reorganised in a controlled manner from above.¹⁶

Table 1. Constitutions in the Central and Eastern European countries in the Interwar Period¹⁷

Country	Constitutions made (year)	Regulating the right of assembly	Regulating the right of assembly
Albania	1928	yes (§ 199)	yes (§ 199)
Bulgaria	1879	yes (§ 82)	yes (§ 83)
Czechoslovakia	1920	yes (§ 113)	yes (§ 113–114)
Hungary ¹⁸	No written constitution	by Regulations	by Regulations
Poland	1921	yes (§ 108)	yes (§ 108)
Romania	1866, 1923, 1938	yes	yes
Yugoslavia	1920, 1931	yes	yes

14 It is worth noting that the first country to make Christianity a state religion was *Armenia* in the early 4th century (traditional date is 301 AC), some eight decades before the Romans. Christianity also became a state religion very early (in the first half of the third century) in what are now *Georgia* and *Ethiopia*.

15 Full name: Basic State Law on the General Rights of Citizens. Freedoms of assembly and association were already guaranteed in the Austrian Constitution of 1849 (but this was repealed in 1851).

16 For more on the history of the regulation for Hungarian NGOs in the 20th century, see: Domaniczky, 2009, pp. 1–16 and Domaniczky, 2010, pp. 1–16.

17 Source: Author's own work.

18 On the Hungarian regulation on special legal order, see: Domaniczky, 2021, pp. 145–156.

The changes that began after 1989, some of which resulted in the formation of new states, thus included the recodification of civil liberties. However, this process did not generally return to legal history where it existed but, in line with Euro-Atlantic integration which was the main objective of the countries of the region, looked primarily to the international legal declarations of the second half of the 20th century and the practice that had developed in the application of these declarations. Thus, the latest trend in the theory and practice of the rights of assembly and association is that of standardising them and contributing content to the national catalogues of fundamental rights in line with international conventions. This process has been accelerated by the accession of the states in the region to international organisations (Council of Europe, European Union, EU), which has led to the harmonisation of law and practice in essence after the political decision and well before the accession. Thus, for three decades after the system change, a uniform jurisprudence has been created regarding the content of fundamental rights and their application, as well as case law based on it – organically based on previous jurisprudence and case law (of the Western European countries).

With regard to the rights of assembly and association, this basis establishes the framework for future interpretation and possible directions for legal development. Open questions in this respect may arise mainly through technical developments, which may lead to a reinterpretation of the concepts underlying legal institutions in extreme cases.¹⁹

4. Comparison of the Legislation with Other International Conventions

After the First World War, the victorious great powers decided to build a new world order. This meant, first and foremost, the establishment of a new balance of power and the alliance systems that would ensure it. Human rights were only tangentially addressed by the international organisations that were being established at the time, mainly in the form of bilateral commitments. Thus, while fundamental freedoms, including the freedoms of assembly and association, were enshrined in the

19 For example, if national rules on the right of association recognise the legality of electronic meetings of members, the associations can also be formed electronically. However, if the law recognises that a *group* – if the national law in question sets the number of members of that group higher to that of even a *crowd* – can be formed virtually, where is the point at which a virtual dimension of the exercise of the two freedoms is created, and how much of it is worthy of judicial protection? This was obviously a simplified example, but it illustrates that technological progress can bring about radical changes in the meaning of certain fundamental rights in a short span of time.

constitutions of an increasing number of states at the national level, the implementation and enforcement of these freedoms were often only partial.²⁰

However, during the Second World War, the fundamental documents (the Atlantic Charter (1941), the Declaration by United Nations (1942) and the UN Charter (1945)) that formed the basis of the post-war world order contained references to fundamental (human) rights and their protection. These were consolidated in the Universal Declaration of Human Rights (1948), which already brought together in a single section the rights of assembly and association (Article 20). The Declaration emphasises the freedom of peaceful assembly and the right of association, while stressing the voluntary nature of the right of association.

Also in 1948, the International Labour Organisation (ILO) Convention No. 87 on Freedom of Association and Protection of the Right to Organise was signed.²¹

The ECHR, drafted within the framework of the Council of Europe and adopted in 1950, builds primarily on these two earlier documents: the Universal Declaration of Human Rights of 1948 and Convention No. 87 of the International Labour Organisation, summarising their *acquis* in a single article (Art. 11). However, this is not the end of the development, as the ECHR serves as a model for the drafting of other international human-rights conventions.

Table 2. Dates of the ECHR's ratification at the Central and Eastern European States²²

Country	Year of ratification
Albania	1996
Bosnia and Herzegovina	2002
Bulgaria	1992
Croatia	1997
Czech Republic	2001 (1992)
Georgia	1996
Hungary	1992
Moldova	1997
Montenegro	2006 (2004)
North Macedonia	1997

20 For example, freedoms of assembly and association play a significant role in the exercise of minority rights, and it is sufficient to refer here only to cultural events (the right of assembly) and organisations established for cultural purposes (the right of association). Yet, at that time, some constitutions had already restricted the exercise of these rights by minorities (e.g. the Yugoslav Constitution of 1931) and others in subordinate legislation (e.g. acts and regulations).

21 This was supplemented by Convention No. 98 on the right to organise and collective bargaining, adopted in 1949.

22 Source: Author's own work.

Country	Year of ratification
Poland	1993
Romania	1994
Serbia	2004 (2011)
Slovakia	1992
Slovenia	1994
Ukraine	1997

At the international level, ECHR has influenced three main directions of development:

Conventions of the Council of Europe

Agreements of the European Economic Communities (EEC), now the EU, and Legislation under the aegis of the United Nations Regarding a.) The following conventions of the Council of Europe relating to the rights of assembly and association should be noted:

The European Social Charter (1961), which refers to the right to organise (Art. 5). The European Charter for Regional or Minority Languages (1992), which mentions the right of association among the cultural activities and facilities (Art. 12). The Framework Convention for the Protection of National Minorities (1995). Given that public participation and NGOs are one of the manifestations of this convention, it plays a key role in the implementation of the Convention and contains provisions on the rights of assembly and association (Art 7.).

Regarding b.) Among the conventions of the EEC/EU, the so-called European constitutional process, which started in 2000 with the adoption of the Charter of Fundamental Rights of the European Union, should be highlighted. The Charter was originally intended to be part of a European Constitution, but with the Treaty of Lisbon it became a separate document on an equal footing with the EU Treaties. Article 12 of the Charter, which is currently in force, covers both the freedoms of assembly and association. The text is clearly modelled on the relevant part of the ECHR but has evolved considerably in structure and content. The most important innovation is the naming of political parties within the section.

As far as EU is concerned, since the Treaty of Maastricht, all candidates for EU membership have been required to accede to the ECHR, which means that the ECHR is not only considered as an exemplary piece of legislation for the EU, but also as a kind of minimum human rights standard for all members and candidates.

Regarding c.) Among the conventions concluded under the aegis of the United Nations, it is worth mentioning the International Covenant on Civil and Political Rights (1966), which, as its preamble refers to, was drafted to develop the Universal Declaration of Human Rights and to expand and elaborate on the fundamental rights contained therein. Conversely, the International Covenant on Civil and Political Rights looked to the ECHR as a model for its structure but deviated from its regulatory

regime in several respects. The most significant difference is the separation between the rights of assembly and association (Articles 21–22), which is not only structural but also substantive, since the right of peaceful assembly is protected in a broader sense in the Covenant than in the ECHR. The two conventions also differ with regard to the right of association, since the International Covenant on Civil and Political Rights clearly refers to the provisions of ILO Convention No 87, which allows a wider scope of exercise than the ECHR in the case of the right to organise in relation to trade unions.

Lastly, all three organisations (Council of Europe, EU, United Nations) have established institutions with official or semi-official status to monitor the implementation and application of fundamental rights. In addition to the case-law of the Strasbourg Court, the reports and resolutions of the Venice Commission (VC), the European Commission against Racism and Intolerance (ECRI), the Commissioner for Human Rights (CHR), the European Union Agency for Fundamental Rights (FRA), the European Ombudsman (EUO), the Office for Democratic Institutions and Human Rights (OSCE ODIHR) and the United Nations Human Rights Committee (UNHRC) are significant in relation to the rights of assembly and association.

5. Presentation of the Relevant Case Law of European Court of Human Rights

As mentioned above (point 2), the meaning that can be attributed to Article 11 of the ECHR in everyday practice is based on the grammatical or logical interpretation of the law. However, the European Court of Human Rights (hereinafter: the Court) has developed its practice through a deeper, complex method involving both historical and teleological interpretation of the law, with a scientific depth through decades of slow and painstaking work on a case-by-case basis. A detailed analysis of its practice would go beyond the scope of this document. However, we shall attempt to highlight some of its features.²³ The Court has done considerable interpretative work on both (a) the right of assembly and (b) the right of association, in some cases extending the interpretative framework of the text, while in others strictly adhering to its narrow interpretation.

Regarding a.) The Court has ruled that the freedom of peaceful assembly as a basic principle is a fundamental right in a democratic society and must not be interpreted restrictively.²⁴ This idea, which is a broad interpretation of concepts, also permeates the relevant case law.²⁵ In order to ensure this broad interpretation, the Court has so

23 If you are interested in the deeper context of the Strasbourg case law on the freedoms enshrined in the ECHR, you can find a sepointte legal notice for each freedom on the Court's website.

24 *Djavit An v. Turkey* (2003), *Taranenko v. Russia* (2014), *Kudrevičius et al. v. Lithuania* (2015).

25 Cf. Guide on Article 11 of the European Convention on Human Rights (29/02/2024 version, 6–23.).

far ‘(...) refrained from formulating the notion of an assembly, which it regards as an autonomous concept, or exhaustively listing the criteria which would define it.’²⁶

The Court considers the right of assembly as being closely linked, both doctrinally and based on the received applications, to other fundamental rights in the Convention, such as freedom of thought, conscience and religion (Art. 9.) and, in particular, freedom of expression (Art. 10.). In this respect, the Court has also emphasised that ‘the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association(...)’.²⁷ Therefore, not only assemblies as defined under national law but also the forms of assembly not covered by national legislation may be subject to scrutiny and protection.²⁸ The most important characteristic is the participants’ common purpose, which distinguishes an assembly from a random grouping of individuals.²⁹

The Court has also moved towards a broad definition of the form of assembly, stating that both private assemblies and assemblies held in a public place are protected, regardless of how they are held (for example: marching or standing still somewhere).³⁰ The Court also stated that ‘The right to freedom of assembly includes the right to choose the time, place, and manner of conduct of the assembly...’ However, this right is not unlimited and can only be exercised within the limits set out in Sect. 2, Art. 11 of the Convention.³¹

The Court has carried out significant legal development work on two concepts: the *peaceful* nature of assembly and restrictions on the right of assembly. Regarding the former, it has consistently sought to develop the broadest possible interpretative framework. Accordingly, the Court has placed burden on authorities and on the State in both positive and negative terms.³² Conversely, the Court considered that some behaviours fall within the concept of peaceful assembly which, in themselves,

26 *Navalny v. Russia* (2018).

27 *Freedom and Democracy Party (ÖZDEP) v. Turkey* (1999); see also *Ezelin v. France* (1991); *Éva Molnár v. Hungary* (2008).

28 *Navalny v. Russia* (2018). For regulation of flash mobs, see: *Obote v. Russia* (2019).

29 *Navalny v. Russia* (2018).

30 For the interpretative framework, see: *Djavit An v. Turkey* (2003); *Barankevich v. Russia* (2007); *Friend, the Countryside Alliance and others v. United Kingdom* (2009); *Kudrečiūš and others v. Lithuania* (2015); *Emin Huseynov v. Azerbaijan* (2015); *The Gypsy Council and others v. United Kingdom* (2002); *Forcadell i lluis v. Spain* (2019).

31 *Sáska v. Hungary* (2012); see also: *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria* (2005); *Lashmankin and Others v. Russia* (2017); *Mustafa Hajili and Others v. Azerbaijan* (2022); *Appleby and Others v. United Kingdom* (2003); *Rai and Evans v. United Kingdom* (2009); *Taranenko v. Russia* (2014); *Frumkin v. Russia* (2016); *Lashmankin and Others v. Russia* (2017); *Öğrü v. Turkey* (2017), *Tuskia and Others v. Georgia* (2018); *Ekrem Can and Others v. Turkey* (2022).

32 For example, the Court has held that the burden of proving that the organisers of an assembly intended to use violence lies with the authorities (*Christian Democratic People’s Party v. Moldova* (No. 2) (2010)). Similarly, the Court has emphasised in several judgments that States must protect individuals against arbitrary interference by public authorities. But there may also be positive obligations to secure the effective enjoyment of these rights (*Kudrečiūš and Others v. Lithuania* (2015); *Djavit An v. Turkey* (2003)).

would not necessarily be peaceful in the ordinary sense of the word.³³ In other words, the most important limits to peaceful assembly under case law are the preparation of disorder or criminal offences³⁴ and the protection of the rights and freedoms of others.³⁵ Put differently, it must be examined on a case-by-case basis whether ‘the assembly was peaceful in intent and whether the organisers had violent intentions; whether the applicant had violent intentions when joining the assembly; and whether the applicant caused bodily harm to anyone’.³⁶

Regarding restrictions on the right to assemble, the Court made two important observations. First, the restriction does not necessarily consist of a single, well-defined measure, but may be a combination of different measures taken by the authorities.³⁷ Second, the restriction can only be justified if it meets a kind of three legality tests established by the Court:³⁸ being prescribed by law; having a legitimate aim; and the necessity of achieving that aim in a democratic society. In its judgements, the Court has elaborated in detail on all three elements of the legality test, and we would focus only on the basic delimitation issues. On the one hand, a restriction prescribed by law must be interpreted broadly and implies that the restrictive measure must be based on a rule of national law.³⁹ On the other hand, this national law must have the characteristics of a law – being so precisely worded that it is accessible to the persons concerned and being clear in its effects.⁴⁰ However, its legitimate aim is a narrowly defined category, which covers the prevention of disorder and the protection of the rights of others.⁴¹ Lastly, regarding restrictions required in a democratic society, not only necessity but proportionality, appropriateness and the relevance of the measure must be assessed.⁴² If sanctions are imposed, they must be particularly justified if they are of a criminal nature.⁴³

33 *Kudrevičius and others v. Lithuania* (2015); *Laurijsen and others v. Netherlands* (2024). See also: *Plattform ‘Ärzte für das Leben’ v. Austria* (1988); *Cisse v. France* (2002); *Tuskia and others v. Georgia* (2018); *Annenkov and others v. Russia* (2017); *Makarashvili et al v Georgia* (2022), as well as *Ezelin v France* (1991), *Fáber v Hungary* (2012); *Primov et al v Russia* (2014); *Frumkin v Russia* (2016); *Laguna Guzman v Spain* (2020).

34 *Osmani and Others v. the Former Yugoslav Republic of Macedonia* (2001); *Giuliani and Gaggio v. Italy* (2011); *Schwabe and M.G. v. Germany* (2011).

35 *Osmani and Others v. the Former Yugoslav Republic of Macedonia* (2001); *Protopapa v. Turkey* (2019); *Gülcü v. Turkey* (2016).

36 *Gülcü v. Turkey* (2016); see also: *Shmorgunov and others v. Ukraine* (2021).

37 *Kudrevičius and others v. Lithuania* (2015).

38 *Vyerentsov v. Ukraine* (2013).

39 *Kudrevičius and others v. Lithuania* (2015).

40 *Kudrevičius and others v. Lithuania* (2015); *Djavit An v. Turkey* (2003); but see also: *Ezelin v. France* (1991); *Galstyan v. Armenia* (2007).

41 *Navalny v. Russia* (2018); as well as *Éva Molnár v. Hungary* (2008); *Bayev and others v. Russia* (2017).

42 See especially: *Kudrevičius and others v. Lithuania* (2015).

43 *Kudrevičius and others v. Lithuania* (2015); as well as *Rai and Evans v. United Kingdom* (2009); *Akgöl and Göl v. Turkey* (2011); *Gün and Others v. Turkey* (2013); *Taranenko v. Russia* (2014); *Ekrem Can and Others v. Turkey* (2022).

Regarding b.) – in the case of freedom of association – the Court has repeatedly pointed out a direct link between freedom of association and the exercise of democracy,⁴⁴ since ‘the way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned’.⁴⁵ Although the right of association, especially through political parties established under the right of association, plays a fundamental role in ensuring democracy and pluralism, associations for purposes, such as cultural, religious or minority purposes, also play a crucial role in the realisation of democracy.⁴⁶ In other words, according to the Court, the freedom of association must deeply penetrate the fabric of society in order to be effective.

As with freedom of assembly, freedom of association is closely linked to the freedoms of thought, conscience and religion, and freedom of expression, as enshrined in Articles 9 and 10 of the Convention.⁴⁷ The Court has made considerable efforts to define the organisations covered by the freedom of association. The right of association is essentially based on the autonomy of private law; therefore, most of its rules are found in private law. Therefore, the Court insists that the protection of Article 11 of the Convention is reserved only to private-law organisations or to a well-defined circle of such organisations.⁴⁸ This does not include public institutions and professional bodies, for which the Court has developed its own criteria,⁴⁹ and has separated certain categories of organisation from the eligible group by means of negative definitions.⁵⁰

The Court has also focused on defining the main characteristics of freedom of association. In this context, it stated that one of the most important attributes of the freedom of association is the possibility of forming a legal person for the purpose of acting jointly in a field of common interest.⁵¹ However, associations cannot be forced

44 *Gorzelik and others v. Poland* (2004); *Sidiropoulos and others v. Greece* (1998).

45 Guide on Article 11 of the European Convention on Human Rights (29/02/2024 version, point 112).

46 *Gorzelik and Others v. Poland* (2004); *Rhino Association and Others v. Switzerland* (2011).

47 *Young, James and Webster v. United Kingdom* (1981); *Vörður Ólafsson v. Iceland* (2010).

48 *Chassagnou and others v. France* (1999); *Schneider v. Luxembourg* (2007).

49 According to the case-law of the Court, the following elements play a role in determining whether an association is a private or a public body: a.) whether it was founded by individuals or by the legislator; b.) whether it has remained integrated into the structures of the State; c.) whether it had administrative, rule-making and disciplinary powers; and d.) whether it pursued a public interest objective (*Mytilinaios and Kostakis v. Greece* (2015); *Herrmann v. Germany* (2011), *Slavic University in Bulgaria and Others v. Bulgaria* (2004); *Köll v. Austria* (2002).

50 For example, these forms are not included: doctors’ unions, veterinary surgeons’ councils, architects’ associations, bar associations, notaries’ chambers, works councils, chambers of commerce. For relevant case law, see *Le Compte, Van Leuven and De Meyere v. Belgium* (1981); *Vialas Simón v. Spain* (1992); *Popov and others v. Bulgaria* (2003); *Barthold v. Germany* (1985); *Revert and Legallais v. France* (1989); *A. and others v. Spain* (1990); *Bota v. Romania* (2004); *O.V.R. v. Russia* (2001); *National Chamber of Notaries v. Albania* (2008); *Karakurt v. Austria* (1999); *Weiss v. Austria* (1991).

51 *Gorzelik and Others v. Poland* (2004); *Hungarian Christian Mennonite Church and Others v. Hungary* (2014).

into certain legal forms, because this would reduce the freedom of the association of their founders and members to the extent that these associations would either not exist or would have no practical value.⁵² However, the freedom to choose the legal form does not mean that associations have the right to have a special legal status.⁵³ The Court also considered it important to point out that not only the positive freedom of association (i.e. freedom to form or join an organisation) but also its negative freedom (i.e. freedom not to join or leave an organisation) may be protected under Article 11 of the Convention.⁵⁴

As in the case of the right of assembly, the Court has also addressed the cases of restriction of this right in the case of the right of association. The Court has held that unjustified State interference generally takes the forms of refusal to register an association, of its dissolution, and of other activities which hinder its functioning, such as controls or financial restrictions.⁵⁵ However, such restrictions may be justified based on a *test of legality* developed under the Convention. As explained above regarding the right of assembly, the three elements of this test are: (a) being prescribed by law; (b) having a legitimate purpose; and (c) the necessity of a *democratic* society to achieve that purpose. The Court has developed in detail all three elements of the legality test in its judgments, and here we will merely draw attention to the basic delimitation issues. A restriction prescribed by law must be interpreted broadly and implies, on the one hand, that the restrictive measure must be based on a rule of national law. On the other hand, however, this national law must have the characteristics of a law, i.e. it must be precisely worded, known to the persons concerned and clear in its effects.⁵⁶ The *legitimate aim*, on the other hand, is a narrowly defined category, which must serve at least one of the legitimate aims defined in Sect. 2, Art. 11 of the Convention (interests of national security or public safety; prevention of disorder or crime, protection of health or morals; protection of the rights and freedoms of others).⁵⁷

Finally, with regard to the restrictions *necessary* in a democratic society, it is worth noting that here not only necessity but also proportionality, appropriateness and relevance of the measure must be assessed.⁵⁸ Exceptions under this point should be interpreted narrowly, which is primarily a matter for national authorities. Here, the Court must review the decisions of the national authorities in the light of the Convention.⁵⁹ Of the relevant case-law, one delimitation issue is the scope of restrictive measures taken by the authorities to protect democracy. In this respect, the Court

52 *Republican Party of Russia v. Russia* (2011); *Zhechev v. Bulgaria* (2007); *Kungyun National Turkish Union v. Bulgaria* (2017).

53 *Hungarian Christian Mennonite Church and Others v. Hungary* (2014).

54 *Sigurður A. Sigurjónsson v. Iceland* (1993); *Vörður Ólafsson v. Iceland* (2010).

55 *Yordanovi v. Bulgaria* (2020); *Ecodefence and Others v. Russia* (2022).

56 *N.F. v. Italy* (2001); *Maestri v. Italy* (2004); *Koretskyy and Co. v. Ukraine* (2008); *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* (2009); *Yefimov and Youth Human Rights Group v. Russia* (2021).

57 *Sidiropoulos and Others v. Greece* (1998).

58 Basically: *Kudrevičius and others v. Lithuania* (2015).

59 *Gorzeliak and others v. Poland* (2004); *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania* (2005); *Hungarian Christian Mennonite Church and others v. Hungary* (2014).

has viewed that States have the right to take preventive measures to protect democracy, both against political parties and against other organisations. ‘They cannot be required to wait until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention. Where the danger of that policy has been sufficiently established and imminent, a State may reasonably forestall the execution of such a policy before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime...’⁶⁰

In addition to general rules on the right of association, based on its case-law, the Court has specified certain types of organisation which can be divided into two broad categories by form and activity. By form these organisations are a.) political parties and b.) trade unions. By activity they are a.) religious; and b.) minority organisations. Of these, only trade unions are normatively mentioned in the text of the Convention, while the role of political parties, religious and minority organisations – given that they are key actors in democratic society – has been highlighted by the Court’s decisions.

In the case of political parties, the Court stressed that the measures taken against these parties, in view of their prominent role in the realisation of pluralism and democracy, affect both the freedom of association and democracy, and that the restrictive conditions must, therefore, be interpreted narrowly. With regard to the refusal to register and the dissolution of political parties, the Court has identified two criteria ‘on which a political party may promote a change in the law or the legal and constitutional structures of the State. The first criterion is that the means used to that end must be legal and democratic. The second criterion is that the change proposed must be compatible with fundamental democratic principles.’⁶¹ Whether a party’s programme contains a call for ‘the use of force, insurrection or any other form of rejection of democratic principles’ must also be examined.⁶² Further, factors such as statements by leaders must be examined to ascertain the true intentions of the party.⁶³ The Court has repeatedly addressed the issue of party funding and official controls in view of the increased public confidence in parties. In this context, the Court has ruled that financial control should not be used as a political tool and has

60 Guide on Article 11 of the European Convention on Human Rights (29/02/2024 version, point 174). From relevant case law, see in particular: *Refah Partisi (Welfare Party) and Others v. Turkey* (2003); *Herri Batasuna and Batasuna v Spain* (2009); *Vona v. Hungary* (2013), as well as *Zehra Foundation and Others v Turkey* (2018); *Kalifatstaat v Germany* (2006); *Les Authentiks and Supras Auteuil v France* (2016); *Ayoub and Others v France* (2020); *Internationale Humanitäre Hilfsorganisation v Germany* (2023).

61 Guide on Article 11 of the European Convention on Human Rights (29/02/2024 version, point 179).

62 Ibid., point 180. See also: *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania* (2005); *Freedom and Democracy Party (ÖZDEP) v. Turkey* (1999).

63 *Refah Partisi (the Welfare Party) and others v. Turkey* (2003).

concluded that the prohibition of funding of parties by foreign states ‘is not in itself incompatible with Article 11 of the Convention’.⁶⁴

The Court also conducted an in-depth analysis of minority organisations. Although the Convention focuses on individual freedoms, in this case, it has moved towards the protection of collective rights based on case law, since ‘forming an association in order to express and promote its identity may be instrumental in helping a minority community to preserve and uphold its rights.’⁶⁵ The Court has defined the scope of activities of a minority association that can be protected in a rather broad way. On the one hand, it stated that the existence of minorities and different cultures in a country is the ‘historical fact that a democratic society has to tolerate, and even protect and support, according to the principles of international law.’⁶⁶ The preservation and development of minority culture and the mention of the consciousness of belonging to a minority community should not be a threat ‘to a “democratic society”, even if it may provoke tensions.’⁶⁷ Indeed, the emergence of tensions is primarily the result of pluralism, which the authorities must protect, not eliminate.⁶⁸ The Court also found that separatist views or the demand for territorial autonomy do not constitute a threat to a country’s territorial integrity or national security.⁶⁹

The Court considers that several fundamental rights meet in the case of religious organisations, too, and obligated the state to adopt a neutral and impartial approach. Here too, the Court has moved towards recognising the collective exercise of rights, as it stated in one of its judgments:

‘while religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to “manifest [one’s] religion” alone and in private or in community with others, in public and within the circle of those whose faith one shares. Since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one’s religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention.’⁷⁰

64 Guide on Article 11 of the European Convention on Human Rights (29/02/2024 version, point 198).

65 *Gorzelik and others v. Poland* (2004).

66 *Eğitim ve Bilim Emekçileri Sendikası v. Turkey* (2012).

67 Guide on Article 11 of the European Convention on Human Rights (29/02/2024 version, point 203).

68 *Ouranio Toxo and others v. Greece* (2005).

69 *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria* (2005).

70 *Salvation Army Moscow v. Russia* (2006).

This also means that ‘particularly weighty and compelling reasons are required for refusing to re-register a religious community that has existed for many years’.⁷¹ However, authorities must reasonably shorten the procedural time limits for obtaining legal personality. The Court has also held that where the refusal of recognition by the authorities is based on a ground relating to the internal organisation of the religious organisation, it also constitutes an interference with the applicants’ right to freedom of religion based on Article 9 of the Convention.⁷² However, the Court has been careful of defining the margin of manoeuvre of the State, even if the limits of this margin are rather narrow.⁷³

Finally, a brief mention should be made of trade unions, which are clearly defined both in the Convention and in the relevant case law as a form of freedom of association, rather than as a right in its own right.⁷⁴ The Court stated relatively early on in this connection that the Convention protects the freedom of trade union members to defend ‘their occupational interests (...) by trade-union action, the conduct and development of which the Contracting States must both permit and make possible.’⁷⁵ However, this does not mean that trade unions can claim any special treatment from the state.⁷⁶ The Court has also held that Sect. 2, Art. 11 of the Convention ‘does not exclude any category of occupation from the scope of that article. At most, the national authorities are entitled⁷⁷ to impose “lawful restrictions” on a certain of their employees’ in accordance with that Article.

In relation to trade unions, the right of association includes the essential elements of ‘the right to form or join a trade union; the prohibition of private closed-shop agreements; the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members and, in principle, the right to bargain collectively with the employer.’⁷⁸ The Court applies two principles to the substance of the right of association:

‘firstly, the Court takes into consideration the totality of the measures taken by the State concerned...; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance. While in principle States are

71 Guide on Article 11 of the European Convention on Human Rights (29/02/2024 version, point 218).

72 *Salvation Army Moscow v. Russia* (2006).

73 For example, the Court has ruled that Contracting States have a discretionary power to choose the forms of cooperation with different religious communities, including the right to modify privileges granted by the State; See: *Doğan and Others v. Turkey* (2016); *Hungarian Christian Mennonite Church and Others v. Hungary* (2014).

74 *National Union of Belgian Police v. Belgium* (1975); *Manole and ‘Romanian Farmers Direct’ v. Romania* (2015).

75 *Swedish Engine Drivers’ Union v. Sweden* (1976).

76 *Sindicatul ‘Păstorul cel Bun’ v. Romania* (2013).

77 *Ibid.*

78 *Demir and Baykara v. Turkey* (2008); *Sindicatul ‘Păstorul cel Bun’ v. Romania* (2013).

free to decide what measures they wish to take in order to ensure compliance with Article 11, they are under an obligation to take account of the elements regarded as essential by the Court's case-law.⁷⁹

Examples include the right to freely join a trade union⁸⁰ or the case law regarding the refusal by the State to allow the formation of a trade union.⁸¹ The Court has also gone into detail on the content of the founding and internal autonomy of trade unions. In doing so, it held that 'the right to form trade unions involves, for example, the right of trade unions to draw up their own rules, to administer their own affairs and to establish and join trade union federations'.⁸² In the latter case, however, the membership must be voluntary for all parties.⁸³ Besides being free to choose their members,⁸⁴ these parties can establish their internal rules and regulations and decide on the level of membership fees.⁸⁵ Early on, the Court had viewed⁸⁶ that though the right to organize strikes is one of the most important safeguards of trade union freedom, it is also not absolute and, therefore, cannot be limited by the state.⁸⁷ Later, by way of a legal precedent going beyond its earlier practice, the Court also held that the right to collective bargaining should be considered an essential element in the formation and membership of trade unions.⁸⁸

6. Short Overview of the Strasbourg Case Law for 16 Central European Countries

6.1. Trends

A vast majority of 16 Central European countries joined the Convention in the 1990s partly because it was a precursor to joining the EU. Then the EU membership was the most important foreign policy objective for most of these countries. Therefore, the Central European countries have sought to be early adopters of the Convention in their own interests both in adopting the legal framework and in developing case law. Partly for this reason and partly because by the 1990s the Court had already developed a wide-ranging practice in many areas and had a large body of case law to draw on, there is no *sui generis* Central European case law with its own character.

79 Guide on Article 11 of the European Convention on Human Rights (29/02/2024 version, point 246).

80 *ASLEF v. United Kingdom* (2007).

81 *Young, James and Webster v. United Kingdom* (1981); *Sigurður A. Sigurjónsson v. Iceland* (1993).

82 *Cheall v. United Kingdom* (1985).

83 *Yakut Republican Trade-Union Federation v. Russia* (2021).

84 *ASLEF v. United Kingdom* (2007).

85 *Ibid.*

86 *Schmidt and Dahlström v. Sweden* (1976).

87 *Wilson, National Union of Journalists and Others v. United Kingdom* (2002); *Enerji Yapı-Yol Sen v. Turkey* (2009).

88 *Demir and Baykara v. Turkey* (2008).

However, owing to the characteristics of the development of law and the social order in Central Europe, some typical cases are more frequently found in case law from this region. In most of these countries, religion and churches play a much more important role than in Western Europe. A similarly striking feature in almost all countries is the existence of minorities who wish to practise their culture, traditions and language, often in the form of associations. Thus, several important cases concerning freedom of association, both religious and minority associations, have been brought before the Court in the states of this region.⁸⁹

The majority of Central European countries have a different perception on the role of the state and the depth and scope of state intervention from those of countries in Western Europe. This is not necessarily a sharp contrast between Western and Eastern Europe, but rather a shift from the central to the periphery of Western Europe, where the role of the state is being strengthened mainly as a result of different historical developments. This divergence is clearly reflected in the Court's case-law, and one need only think of the large number of Turkish and Russian judgments on the freedoms of association or assembly.⁹⁰ The 16 Central European countries under examination in this case are somewhere in the middle between the two poles of the West and East. However, although the final aim of the Convention and the Strasbourg case law would be to establish a uniform interpretation of the law for the parties to the Convention, this does not imply the exclusive victory of one aspect but rather an objective of developing jurisprudence acceptable to all parties in the long run through mutual harmonisation. In the three decades following the regime change which began in 1989, this process is also perceptible, since the community of the legal scholars in the Central European States now regards both the Convention and the case-law which has emerged from it as a common minimum.

89 For religious organisations, see for example: *Cârmuirea Spirituală a Musulmanilor din Republica Moldova v. Moldova* (2005); *Hungarian Christian Mennonite Church and Others v. Hungary* (2014); *Metodiev and Others v. Bulgaria* (2017); *Peći Patriarchate Greek Orthodox Ohrid Archdiocese v. the former Yugoslav Republic of Macedonia* (2017). In relation to minority organisations, see for example: *Gorzelik and Others v. Poland* (2004); *'Radko' and the Union of Citizens of Paunkovski v. the former Yugoslav Republic of Macedonia* (2009); *National Turkish Union Kungyun v. Bulgaria* (2017); *The United Macedonian Organisation Ilinden and Others v. Bulgaria* (2006).

90 See for examples: Guide on Article 11 of the European Convention on Human Rights (29/02/2024 version, pp. 51–59).

6.2. Key Cases from the Court's Case-Law in the Region

Table 3. Key cases from the Court's case-law in the region⁹¹

Legal case	Country	Year	Fundamental right concerned
Gorzelik and others v. Poland	Poland	2004	Right of association
The United Macedonian Organisation Ilinden and Others v. Bulgaria	Bulgaria	2006	Right of association, Right of assembly
The Communist Party and Ungureanu v. Romania	Romania	2005	Right of association
Hungarian Christian Mennonite Church and Others v. Hungary	Hungary	2014	Right of association
Christian Democratic People's Party v. Moldova (No 2)	Moldova	2010	Right of assembly
Tuskia and others v. Georgia	Georgia	2018	Right of assembly
Vyerentsov v. Ukraine	Ukraine	2013	Right of assembly
Sindicatul 'Păstorul cel Bun' v. Romania	Romania	2013	Right of association

7. Conclusion

We have provided an overview of the ECHR provisions on the rights of assembly and association and the case law based on these provisions from a Central-European perspective. We have seen that both legal institutions have deep roots in legal history and that, as a right of freedom, have a history of several centuries. Although the legal institution is taxonomically linked to European legal systems, it became a universal fundamental right in the 19th and 20th centuries, and its regulation falls within the scope of minimum requirements in all legal systems.

Our investigation posed one of the basic questions: what has been the recent development in Europe, the birthplace of these rights, which in fact covers the period from the end of the Second World War to the present (1945–2024)? The answer has shown that the new world order, based on the victory of the Allied Powers in the war, has from the outset prioritised the safeguarding of human rights, understood as individuals' fundamental rights. The scope of these rights was defined in various international conventions, sometimes more extensively, sometimes more narrowly, and specific international legal agreements were made to protect them. One of these was the ECHR, signed in Rome, one of the cradles of ancient culture and law. An independent set of institutions was soon created to interpret and defend the rights guaranteed by the treaty, the most important of which was the European Court of Human Rights, set up in 1959. The Court's law-making role was greatly enhanced by the process of European economic integration, which also began after the Second World War and which, in half a century, politically unified large parts of the European continent. The founding fathers of European integration recognised that the success of political

⁹¹ Source: Author's own work.

integration largely depended on the success of legal unification. The case law of the Strasbourg Court was soon recognised by the European Community and later by the EU Court of Justice as a guide and as being fundamental in the field of human rights. The Court's case-law which became part of the judicial practice of Western European integration in its politically and economically nascent phase assumed a much greater role than originally envisaged. By the 1990s the case-law had become a benchmark for human rights at the global level. And the EU's practice of making the adoption of the ECHR a precondition for EU negotiations has contributed greatly to the unification of human rights law in European states.

The answer to the first basic question is therefore clear: although the ECHR regime started as a regional human rights system, its intertwining with European integration has multiplied its impact and its case law has become known and accepted worldwide. Further, with the EU's support, the ECHR has become a *de facto* minimum human rights standard on the European continent.

Our second basic question is: can this development be considered positive or negative for the states of the Central European region? The above sections show that the answer to this question is clearly positive at least in terms of the rights of assembly and association. We have seen that though the Central European states have long tried to regulate these two fundamental rights, historical conditions and the political situation did not favour this activity, which then became fully formalised after the German and then the Soviet occupation. After the regime change of 1989, the Central European states signed the ECHR and gave it the legal framework they had originally sought to develop, which would have taken decades to complete without their accession to the ECHR. There was the major question of how the Court would react to the somewhat different approaches and circumstances of the Central European states. However, the above analysis of the case law showed that the last decades have also brought positive changes in this respect.

In conclusion, there is the third fundamental question about the future: is the ECHR-based system capable of further development or has it already achieved its goal by unifying the human rights legislation of the European states? To answer this question, it is worth going back to the starting point. The ECHR was essentially created as a regional legal regime, which, because of European integration, has had a greater impact than expected, both within and outside Europe. However, this proved to be a temporary position, and from the end of the 2010s, the EU has been increasingly marginalised as an economic centre and as a model. Other continents, countries, and federal systems are emerging, and this shift may entail the strengthening of the role of other regional human rights regimes and their becoming models.⁹² Conversely, the limited sustainability of the European human rights model based on individuals cannot be neglected. Increasingly scarce resources, slowing economic growth, and natural disasters requiring ever greater cooperation favour human rights regimes

92 See for example the growing role of ASEAN. ASEAN adopted its own human rights declaration in 2012, which differs from the ECHR in several respects.

that promote a moderately individualistic approach to human rights. In short, the weakening of Europe can also erode (international) faith in its own legal system. However, exhaustible natural resources are pushing back the limits to the individualistic development of human rights. Therefore, the future is not promising. However, in terms of the past, the Central European countries have utilised opportunities available to them in this field best.

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- Case of Djavit An v. Turkey*, Application no. 20652/92, Judgement 20 February 2003.
- Case of Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, Application no. 20641/02, Judgement 25 September 2012.

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- Case of Mytilinaios and Kostakis v. Greece*, Application no. 29389/11, Judgement 3 December 2015.
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- Case of Obote v. Russia*, Application no. 58954/09, Judgement 19 November 2019.
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- Case of Refah Partisi (the Welfare Party) and Others v. Turkey*, Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, Judgement 13 February 2003.
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- Case of Schwabe and M.G. v. Germany*, Application nos. 8080/08 and 8577/08, judgement 1 December 2011.
- Case of Sidiropoulos and Others v. Greece*, Application no. 26695/95, Judgement 10 July 1998.
- Case of Sigurður A. Sigurjónsson v. Iceland*, Application no. 16130/90, Judgement 30 June 1993.
- Case of Sindicatul 'Păstorul cel Bun' v. Romania*, Application no. 2330/09, Judgement 9 July 2013.
- Case of Slavic University in Bulgaria and Others v. Bulgaria*, Application no. 60781/00, Judgement 18 November 2004.
- Case of Swedish Engine Drivers' Union v. Sweden*, Application no. 5614/72, Judgement 6 February 1976.
- Case of Taranenko v. Russia*, Application no. 19554/05, Judgement 15 May 2014.
- Case of Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application no. 37083/03, Judgement 8 October 2009.
- Case of The Gypsy Council and Others v. United Kingdom*, Application no. 66336/01, Judgement 14 May 2002.
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- Case of Vona v. Hungary*, Application no. 35943/10, Judgement 9 July 2013.
- Case of Vörður Ólafsson v. Iceland*, Application no. 20161/06, Judgement 27 April 2010.
- Case of Vyerentsov v. Ukraine*, Application no. 20372/11, Judgement 11 April 2013.
- Case of Weiss v. Austria*, Application no. 14596/89, Judgement 10 July 1991.
- Case of Wilson, National Union of Journalists and Others v. United Kingdom*, Application nos. 30668/96, 30671/96 and 30678/96, Judgement 2 July 2002.
- Case of Yakut Republican Trade-Union Federation v. Russia*, Application no. 29582/09, Judgement 7 December 2021.
- Case of Young, James and Webster v. United Kingdom*, Application nos. 7601/76, 7806/77, Judgement 13 August 1981
- Case of Yefimov and Youth Human Rights Group v. Russia*, Application nos. 12385/15, 51619/15, Judgement 7 December 2021.
- Case of Yordanovi v. Bulgaria*, Application no. 11157/11, Judgement 3 September 2020.
- Case of Zehra Foundation and Others v. Turkey*, Application no. 51595/07, Judgement 10 July 2018.

Right to Marry

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ABSTRACT

The right to marry represents a fundamental human right, protected primarily for its significance in founding a family. Family has always been understood as one of the basic values in the life of an individual, but also one of the basic values of society, due to its great contribution in preserving social stability and development. This right is protected by a plethora of global and regional documents, among others the European Convention on the Protection of Human Rights and Fundamental Freedoms (Article 12).

It is therefore the aim of this chapter to represent an incentive for further analysis of the right to marry, in light of current trends, and in particular of its limitations, such as the issues of marriageable age, consanguinity, number of spouses, consensus and capacity. The corollary principle of the equality of spouses, as emphasised in Article 5 of the Protocol 7 to the European convention represents a parallel *fil rouge*, since it is a *conditio sine qua non* in all considerations regarding marriage. Doctrinary considerations are complemented by references to relevant case law of the European court of human rights, while particular attention is devoted to selected topics with regard to the countries of Central and Eastern Europe, namely religious marriages, the issue of the aim of marriage, and divorce. The conclusion deriving from the analysis is that the cautious approach of the European Court, relying on European-wide consensus, or in other words the Court's choice to follow, and not to lead, is welcomed. Namely, the issue of marriage is inextricably linked to traditions of the states and the cautious approach should therefore be continued.

KEYWORDS

Right to marry and to found a family, Article 12 of the European Convention on Human Rights and Fundamental Freedoms, European Court of Human Rights, family law

1. Introduction

The right to marry represents a fundamental human right, protected primarily for its significance in founding a family. Family has always been understood as one of the basic values in the life of an individual, but also one of the basic values of a society as well, due to its great contribution in preserving social stability and development. In words of V. Puljiz, 'family is primary, multifunctional human group which has utmost

importance in forming the life of an individual, as well as society'.¹ This paradigm is reflected in numerous human rights documents, such as the Universal declaration on human rights and the International covenant on civil and political rights,² or the Convention on the rights of the child.³

'Generally speaking, the function of marriage has always been the birth of offspring and the survival of society.'⁴ Contemporary societies witness two important processes in this regard, the first is the deinstitutionalisation of family and the second is the development of new family forms.⁵ V. Puljiz therefore correctly emphasises two basic aspects of family deinstitutionalisation: the first, an ever-growing number of individuals who do not consider marriage as the only form of common life of a woman and a man and the second, which changes of legal provisions contribute to the 'flexibilization of marital relationships', and among others is the liberalisation of divorce proceedings and the equalisation of marital and extra-marital unions.⁶

Demographic trends in Europe confirm such a conclusion. Namely, the number of concluded marriages is diminishing and its conclusion is often postponed.⁷ Today's marriages are concluded at a more mature age, but in present social and economic conditions, this does not mean they carry greater stability, in fact rather quite the opposite.⁸ There is a significant rise in the number of children born out of wed-

1 Puljiz, 2001, p. 11.

2 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Art. 16, para. 3 of the Universal declaration on human rights and United Nations, Treaty Series, vol. 999, p. 171, Art. 23, para. 1 of the International covenant on civil and political rights.

3 United Nations, Treaty Series, vol. 1577, p. 3, Preamble of the Convention on the rights of the child '...Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.'

4 Hrabar, 2024, p. 121.

5 Puljiz, 2001, p. 14. As noted by A. Korać, 'the marriage is transforming, not only because of the liberalisation of divorce still under way also today, but also for the fact that other institutes are approaching it in the terms of content: extra-marital union and the life partnerships of same-sex persons'. Korać Graovac, 2015, p. 802.

6 Puljiz, 2001, p. 14. Similarly, C. Sörgjerd points to the trend of liberalization of divorce proceedings which makes divorce more accessible, as well as to the notion of pluralism in civil status issues, meaning recognition of rights of unmarried and same-sex couples. Cf.: Sörgjerd, 2016, pp. 38–40.

7 E.g. around 1.9 million marriages and an estimated 0.6 million divorces took place in the European Union in 2022, according to the most recent data available for the EU Member States. These figures may be expressed as 4.2 marriages for every 1 000 persons (in other words the crude marriage rate) and 1.6 divorces for every 1 000 persons (in other words the crude divorce rate). Cf.: Eurostat, 2025.

8 Akrap, 2001, p. 98.

lock.⁹ All of the above is also influenced by another process, namely the ageing of population.¹⁰

As emphasised in the jurisprudence of the European court of human rights (further: ECtHR or simply the Court), ‘the institution of the family is not fixed, be it historically, sociologically or even legally’.¹¹ It is also of utmost importance

‘to distinguish between a marriage and a family. Namely that almost all conducted research show that family represents the greatest value for the majority of people, even whilst the marriage has become quite instable. Therefore, a discrepancy exists between the instability of marriage and the high value attributed to family as a basic social unit’.¹²

In this regard, A. Korać argues that despite the fact that marriage is still the basis of founding a family, a more contemporary approach moves away from the understanding that only married people can found a family.¹³

It is therefore the aim of this chapter to represent an incentive for further analysis of the right to marry, in light of the current trends. The corollary principle of the equality of spouses represents a parallel *fil rouge*, since it is a *conditio sine qua non* in all considerations regarding marriage.¹⁴

2. Contextual Analysis of the Right to Marry and the Corollary Principle of the Equality of Spouses in the Light of the European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention on Human Rights (furthermore referred to as ECHR, or simply Convention)¹⁵ is the ‘European charter of liberty’.¹⁶ As regards the right to marry, the fundamental provision is Article 12, which reads: Right to marry; ‘Men and

9 ‘The proportion of live births outside marriage has shown an increasing trend in the past decades, more than doubling since 1993 (17.7 %) when these data were first available in the EU. In 2022 this proportion was estimated at 42.2 %, meaning that 57.8 % of children were born inside marriage. This share reflects changes in patterns of family formation alongside the more traditional pattern where children were born within marriage. Extramarital births occur in non-marital relationships, among cohabiting couples, to lone parents and in registered partnerships.’ Eurostat: A rise in births outside marriage, Available at: Eurostat, 2025.

10 ‘On 1 January 2023, the EU population was estimated at 448.8 million people and more than one-fifth (21.3 %) of it was aged 65 years and over.’ Eurostat, 2024.

11 *Mazurek v. France*, Application no. 34406/97, Judgment 1 February 2000 (para. 52).

12 Puljiz, 2001, p. 15.

13 Korać, 1997, p. 340.

14 For a comparative analysis of ‘progressive’ European jurisdictions, namely Sweden, The Netherlands, Germany, France and Spain, regarding the principle of equality of spouses, cf.: Sörgjerd, 2016, pp. 5–12.

15 European Treaty Series – no. 005.

16 Modinos, 1962, p. 1108.

women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’

As argued by A. Korać, this right is hence twice limited – ‘For the first time concerning the age of persons, who have to be at the age of marriageable maturity. For the second time concerning the national legislations which regulate this area.’¹⁷ As emphasised in the decisions of the ECtHR, ‘the essence of the right to marry is the formation of a legal union of a man and a woman’.¹⁸ Namely, in its jurisprudence, well-established already almost half a century ago, the ECtHR emphasised that ‘the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family’.¹⁹

It should be concluded from the wording at the end of Article 12, concerning ‘this right’ in the singular form, that the right to marry and found a family constitutes only one, and not two separate, or distinctive rights. However, certain comments should be made in this regard.

Firstly, it should be said that ‘the right to found a family secured in Article 12 of the Convention exists only in marriage. The existence of a couple is fundamental in this sense’.²⁰ In this regard, R. Probert and A. Barlow argue that the traditional family resulting from marriage was a dominant family form at the time of the emergence of the ECHR, so it was logical and convenient to introduce the marriage-based family as a social unit regulated by the law.²¹

Secondly,

‘the ability to found a family is not a condition for marriage. In other words, the inability of a couple to conceive or parent a child could not be regarded as removing their right to enjoy the right to marry’.²²

17 Korać, 1996, p. 68.

18 *Jaremwowitz v. Poland*, Application no. 24023/03, Judgment 5 January 2010 (para. 60).

19 *Rees v. The United Kingdom*, Application no. 9532/81, Judgment 17 October 1986. (para. 49). Cf. also: *Cossey v. The United Kingdom*, Application no. 10843/84, Judgment 27 September 1990. (para. 40), *Sheffield and Horsham v. The United Kingdom*, Applications nos. 22885/93, 23390/94, Judgment 30 July 1998 (para. 66).

20 Guide on Article 12, 2024, pt. 54. With reference to *X. v. Belgium and Netherland*, Commission, 1975.

21 Probert and Barlow, 2000, cited in Lucić and Grigić, 2015, pp. 57–84. Indeed, in the first family-law case before the ECtHR, *Marckx v. Belgium* (which concerned the status of a child born out of wedlock) the ECtHR itself recognised that ‘support and encouragement of the traditional family is in itself legitimate or even praiseworthy’. *Marckx v. Belgium*, Application no. 6833/74, Judgment 13 June 1979 (para. 40). As D. Hrabar emphasises, ‘It is the traditional family that maintains and improves social relations, while fostering the prosperity of society and human civilization’ and notes that ‘without family there is no society, since it is unrepeatable, irreplaceable form of human unity, comparable to nothing else’. Hrabar, 2024, pp. 122. and 127, respectively.

22 Guide on Article 12, 2024, pt. 55.

Therefore, the right to marry is guaranteed even if there is no chance of founding a family, for instance due to reasons of medical nature. Furthermore, the Court has confirmed that the right to found a family does not as such create a right to procreate or to have grandchildren.²³ In other words, neither Article 12 nor any other Article of the Convention guarantees the right to adopt or otherwise integrate into a family a child who is not a biological child of the married couple concerned.²⁴

Thirdly, such a concept does not mean that unmarried persons (notwithstanding their sexual orientation) are not protected with regards to their family life. The protection is simply provided in another provision of this Convention, namely in Article 8 guaranteeing the Right to respect the private and family life for heterosexual

23 Guide on Article 12, 2024, pt. 56. Cf. e.g. the case of *Margarita Šijakova and Others v. The Former Yugoslav Republic of Macedonia*, Application no. 67914/01, Decision 6 March 2003, concerned the claims of five applicants – mothers whose children joined the monastic order of the Macedonian Orthodox Church. The applicants claimed that numerous fundamental rights guaranteed to them were breached. Among other, they complained that they were ‘prevented from founding a larger family and having grandchildren because their children in holy orders have taken a vow of celibacy’ (para. 3). In that regard, the Court reiterated that ‘the right to have grandchildren or the right to procreation is not covered by Article 12 or any other Article of the Convention’ and that the complaint, as being incompatible *ratione materiae* with the provisions of the Convention must be rejected (para. 3). *Margarita Šijakova and Others v. the Former Yugoslav Republic of Macedonia*, Application no. 67914/01, Decision 6 March 2003.

24 Harris et al., 2018, pp. 742, 743, with reference to cases *Di Lazzaro v. Italy*, Application no. 31924/96, Decision 10 July 1997, *Akin v. Netherlands*, Application no. 34986/97, Judgment 4 July 2000, *E.B. v. France*, Application no. 43546/02, Judgment 22 January 2008, *Emonet and Others v. Switzerland*, Application no. 39051/03, Judgment 13 December 2007. As noted by the same authors, the most obvious interferences with the right to found a family are programmes of compulsory sterilisation or abortion, with reference to cases *N.B. v. Slovakia*, Application no. 29518/10, Judgment 12 June 2012, *V.C. v. Slovakia*, Application no. 18968/07, Judgment 8 November 2011, *McGinley and Egan v. The United Kingdom*, Application no. 10/1997/794/995-996, Judgment 9 June 1998, and *Boso v. Italy*, Application No. 50490/99, Judgment 5 September 2002.

extra-marital partners and children born in out of wedlock, as well as to cohabiting same-sex couples living in a stable *de facto* partnership.²⁵

In the words of K. Turković regarding Article 8 and Article 12,

‘these are two distinct albeit interrelated rights, between which there is a sharp contrast. While the essence of marriage for the purposes of the Convention is defined in minimalistic and formalistic terms as the formation of legal bonds between a single man and a single woman of a marriageable age and while the right to found a family does not arise under Article 12 in absence of marriage, assessment of ‘family life’ under Article 8 is qualitative, what matters is the substance of relationship, primarily real existence in practice of close personal ties’.²⁶

In this regard, C. Sörgjerd argues that both provisions of Articles 8 and 12 ‘protect the family as something of a cornerstone in society ... Article 8 prohibits interference with an existing relationship or family unit, whereas Article 12 governs the right to form family ties through marriage’.²⁷

Furthermore, it should be noted that unlike Article 8, Article 12 does not foresee any limitations, as are known in other human right instruments, in particular ones referring to race, nationality and religion. However, it should not be concluded that this right is absolute, since it is subjected to the discretionary powers of contracting

25 Cf. Shabas, 2015, p. 534. Article 8 of the ECHR reads: ‘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.’ For example, in the case of *Johnston and Others v. Ireland*, Application no. 9697/82, Judgment 18 December 1986 (para. 56) the Court stated that the first and the second applicant, having lived together for fifteen years in a heterosexual extra-marital union, constituted a family as an element which falls under Article 8 even if their relationship existed outside marriage. Also, in the case of *Keegan v. Ireland*, Application no. 16969/90, Judgment 26 May 1994 (para. 44) the Court recalls that the notion of the ‘family’ in the provision of Article 8 cannot be confined solely to marriage-based relationships and may encompass other *de facto* ‘family’ ties where people live together outside their marriage. A child born in such a relationship is automatically part of that ‘family’ from the moment of his or her birth and by the very fact thereof (c.f. also: case of *Kroon and Others v. the Netherlands*, Application no. 18535/91, Judgment 27 October 1994 (paras. 31–32)). Regarding application of Article 8 to same-sex couples, in the case of *Schalk and Kopf v. Austria*, 30141/04, Judgment 24 June 2010 (paras. 91–95) the Court, for the first time, stated that a cohabiting same-sex couple living in a stable *de facto* partnership enjoys protection of their ‘family life’ (cf. also: *P.B. and J.S. v. Austria*, Application no. 18984/02, Judgment 22 July 2010 (paras. 25–30)). However, Article 12 is still applied restrictively in this regard. In the aforementioned case of *Schalk and Kopf v. Austria*, 30141/04, Judgment 24 June 2010 the Court has established that ‘Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage’ (para. 101).

26 Turković, 2020, with reference to the case *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment 24 January 2017 (para. 140). Cf. also: Lucić and Grigić, 2015, pp. 78. and 80.

27 Sörgjerd, 2016, p. 32.

states. This means that contracting states may impose certain restrictions through their domestic laws, but the aim of such restrictions must be legitimate and proportionate to the goal which is to be achieved (e.g. prevention of incest and polygamy).²⁸ As defined in jurisprudence of the ECtHR, ‘the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’.²⁹

As emphasised by the Court,

‘the matter of conditions for marriage in the national laws is not left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far’.³⁰

Therefore, ‘in examining a case under Article 12 the Court would not apply the tests of ‘necessity’ or ‘pressing social need’ which are used in the context of Article 8 but would have to determine whether, with regard being given to the State’s margin of appreciation, the impugned interference was arbitrary or disproportionate.’³¹ In other words,

‘with regard to marriage, the State has more extensive powers than in some other fields. This is particularly apparent when one compares the very brief and non-exhaustive reference to ‘national laws’ in Article 12 ... with the more

28 Sörgjerd, 2016, p. 32, pp. 32–33.; Korać, 1997, p. 341.; Rainey, McCormick and Ovey, 2020, p. 401.; Alinčić, 2013, pp. 25–26.

29 *Rees v. The United Kingdom*, Application no. 9532/81, Judgment 17 October 1986 (para. 50); *Cossey v. The United Kingdom*, Application no. 10843/84, Judgment 27 September 1990 (para. 43); *Sheffield and Horsham v. The United Kingdom*, Applications nos. 22885/93, 23390/94, Judgment 30 July 1998 (para. 66).

30 *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010 (para. 88), with reference to *R. and F. v. the United Kingdom*, Application no. 35748/05, Judgment 28 November 2006.

31 Cf.: *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010 (para. 90); *O’Donoghue and Others v. The United Kingdom*, Application no. 34848/07, Judgment 14 December 2010 (paras. 84 and 90); *Jaremovicz v. Poland*, Application no. 24023/03, Judgment 5 January 2010 (paras. 48, 50 and 53).; Cf. Harris, p. 736. and Rainey, McCormick and Ovey, 2020, p. 402. As noted in the case *Jaremovitz v. Poland*, Application No. 24023/03, Judgment 5 January 2010., ‘The essential element of the violation of Article 12 of the Convention alleged in the present case is not the scope of discretion afforded to the Polish authorities but the arbitrary fashion in which they exercised their decision-making power. The discretion available in theory may be very wide, but the decisive element is how it is applied in practice. In the applicant’s case the Convention breach was caused by the authorities’ failure to strike a fair balance of proportionality among various public and individual interests at stake in a manner compatible with the Convention, rather than by the absence of detailed rules on marriage in prison.’ (para. 64).

circumscribed and restrictive wording of the second paragraph of each of Articles 8, 9, 10 and 11...³²

Article 12 regulates the public law dimension of the right to marry. At a private law level, it is complemented by a special provision guaranteeing the equality between spouses, being integrated in Article 5 of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms,³³ stipulating: Equality between spouses;

‘Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children.’

As emphasised in the Explanatory Report, under the terms of this article,

‘equality must be ensured solely in the relations between spouses themselves, in regard to their person or their property and in their relationships with their children. The rights and responsibilities are thus of a private law character; the article does not apply to other fields of law, such as administrative, fiscal, criminal, social, ecclesiastical, or labour laws’.³⁴

However, the second sentence contains – in the words of W. A. Shabas – the ‘necessity clause’,³⁵ since, as emphasised in the Explanatory Report, ‘the fact that the spouses shall enjoy equality of rights and responsibilities in their relations with their children shall not prevent States from taking such measures as are necessary in the interests of their children’.³⁶

Finally, ‘the words ‘in the event of its dissolution’ do not imply an obligation on a State to provide for dissolution of marriage or to provide any special forms of dissolution’.³⁷

32 Joint dissenting opinion of Judges Thór Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher, Pinheiro Farinha, Walsh, De Meyer and Valticos to the Judgment in the case *F. v Switzerland*, Application no. 11329/85, Judgment 18 December 1987.

33 European Treaty Series – No. 117.

34 Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory report European Treaty Series – No. 117., para. 35.

Of course, as emphasised in the Report itself, it does not constitute an instrument providing an authoritative interpretation of the text of the Protocol (Preamble, I). Nevertheless, it definitely facilitates the understanding of its provisions.

35 Shabas, 2015, p. 1159.

36 Explanatory Report, para. 36.

37 Explanatory Report, para. 36.

3. A Short Historical Overview on the Development of the Right to Marry

The mid 20th century and the period after the Second World War were marked by the appearance and development of documents within the system of human rights protection.³⁸ This period witnessed the recognition of the right to marry and to found a family, as a content of firstly global and then also regional instruments. Hence, international legal sources, both global and regional, recognised, *inter alia*, ‘the right to conclude a traditional marriage as a model of multi-century heterosexual life union of woman and man, regulated by customs and law, being a foundation of the family with own biological progeny’.³⁹

‘The right to marry and to found a family has not been included in the catalogue of rights in the Convention without discussion. It was provoked by the opposition of those who believed that it was not a fundamental right, and it was considered that only fundamental rights could be included in the text of the Convention. Nevertheless, the argument prevailed that totalitarian regimes limited the freedom to marry and found a family by racial laws, which is completely unacceptable in democratic orders.’⁴⁰

Indeed, it has been noted that ‘the right to marry was largely an intervention of the Commission on human rights in the preparation of the Universal declaration of human rights’.⁴¹ Article 16 para. 1, as shall be mentioned *infra*, guarantees the right to marry and found a family to men and women of full age, without any limitation due to race, nationality or religion.

It should be emphasised, also elaborated *infra*, that

‘... the words ‘men and women’ replaced ‘everyone’ in order to ensure equal treatment and not – this is the modern-day gloss based on a simplistic reading of the text rather than the intent of those who crafted the provision – so as to reserve marriage to persons of opposite sex’.⁴²

Hence, the choice of wording was deliberate, as it was in the case in drafting the ECHR, which the ECtHR reiterated sixty years after its adoption:

38 Alinčić, 2013, p. 25. In the words of N. Hlača, the Second World War has awoken the conscience of the mankind, allowing for the supranational system of the protection of human rights. Hlača, 1993, p. 120.

39 Alinčić, 2013, p. 25.

40 Korać, 1996, p. 68.

41 Shabas, 2015, p. 528. For a very thorough analysis of the drafting of the provision, cf. Shabas., pp. 529–533.

42 Shabas, p. 528.

‘... The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to ‘everyone’ or state that ‘no one’ is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex’.⁴³

‘The link between the right to marry with the right to found a family at the time of genesis of the international documents on human rights (United Nations and Council of Europe) was based on the assumption and comprehension that marriage in many countries indeed is the most common basis of the family’.⁴⁴

In contemporary perspective, it can be said that both at the international and the national level,

‘marriage law regulates and guarantees the right to marry as well as its realisation on the basis of principles of equality of citizens before the law, equality of spouses and the respect and legal protection of personal and family life, dignity, reputation and honour’.⁴⁵

4. Comparison with Other Universal and Regional Human Rights Instruments Guaranteeing the Right to Marry

The right to marry, as a fundamental human right, is guaranteed and protected by a plethora of international documents. Such an approach clearly demonstrates the dedication to promotion and safeguarding of human right in contemporary societies. Changes in societies at all levels also cause the stipulation of ‘mirroring rights’, offering a new perspective on the issue of marriage.

At a global level, four documents should be emphasised. Firstly, the Universal declaration on human rights, which although of a non-binding nature, still represents a cornerstone of the system of human rights protection. The right to marry is herein described in Article 16 paras. 1 and 2 which define it as:

43 *Schalk and Kopf v. Austria*, Application no. 30141/04, Judgment 24 June 2010 (para. 55).

44 Alinčić, 2013, pp. 26–27.

45 Alinčić et al., 2007, p. 19.

- ‘1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.’

This provision hence guarantees the right to marry for men and women of full age, without any limitations with regards to racial, nationality or religious issues, and also guarantees the equality of the rights of spouses, as well as stipulating the principle of consensus. It is noted that this rather elaborated provision represents an exception with regards to the approach taken in the document as a whole.⁴⁶

Secondly, concerns the International covenant on civil and political rights, which echoes the principles of the Universal Declaration on Human Rights.⁴⁷ As for the right to marry and the corollary principle of equality of spouses, Article 23 Paragraphs 2–4 are of the utmost importance, defining:

- ‘2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.’⁴⁸

Thirdly, the Convention on the elimination of all forms of discrimination against women⁴⁹ defines in Article 16 that states parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, such as:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities in a marriage and during its dissolution;

46 As W. A. Shabas notices, ‘as a general rule, the provisions of the Declaration are more laconic than the detailed texts of the subsequent treaties whose content it has inspired, but this is not the case with article 12’. Shabas, 2015, p. 529.

47 United Nations, Treaty Series vol. 999, p. 171. and vol. 1057, p. 407.

48 Para. 4 obviously served as a basis for Article 5 of the Protocol No. 7 to the ECHR, regarding the equality of spouses in marriage.

49 United Nations, Treaty Series, vol. 1249, p. 13.

- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of children shall be paramount;
- (g) The same personal rights as a husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.'

Last, but being of utmost value for the approach of the development of human rights in the 21st century, the Convention on the Rights of Persons with Disabilities (furthermore referred to as CRPD), guarantees the right of all persons with disabilities who are of marriageable age to marry and found a family on the basis of the consensus of spouses.⁵⁰ Article 23 of this document *inter alia* defines:

'States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized...'

At the European regional level, besides the ECHR, significant importance lies in the Charter of Fundamental Rights of the European Union (further: Charter).⁵¹ Although it did not introduce a new concept, but primarily relied on the provisions of the ECHR, it is important as a symbol of the dedication of the European Union towards the protection of human rights.

As S. Douglas-Scott notices,

'on balance, it seems beneficial that the EU has its own Charter of Rights, both for reasons of clarity and transparency. But a Charter of Rights is also important on a symbolic level – an EU Charter could conceivably develop as much significance as the US Bill of Rights or the European Convention, both beacons of individual protection. It might mark the EU's coming of age as a polity'.⁵²

On the other hand, a slightly less optimistic standpoint can be found emanating from other relevant authors. Thus, M. Antokolskaia argues that

50 United Nations, Treaty Series, vol. 2515, p. 3.

51 Official Journal of the European Union C 326/391, 26. 10. 2012.

52 Douglas-Scott, 2011, p. 656.

‘in contrast to the more than 50-year-old ECHR upon which it is built, the Charter could reasonably be expected not only to reflect the current level of protection, but also to upgrade it. It could also be expected systematically to fill all the gaps that have arisen from the piecemeal development of case law. However, at least with respect to family law, almost all these expectations have remained unjustified’.⁵³

Two provisions of this document deserve special attention. The first one is Article 9 which stipulates:

‘The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.’

It should be concluded from the wording of Article 9, with ‘these rights’ in the plural form, that ‘the right to marry and the right to found a family’ constitute two separate rights which may or may not be interconnected.⁵⁴ This means that social shifts from the traditional family based on marriage have been taken into account while crafting this provision of the Charter, at the same time expressing a contemporary understanding that the right to found a family is not necessarily related only to the institute of marriage.⁵⁵

Furthermore, the ECtHR noted that ‘the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women’.⁵⁶

As C. McGlynn noticed almost a quarter of a century ago ‘such a provision leaves considerable ambiguity in interpretation and thus enlarges judicial discretion in the interpretation and development of rights, either progressively or regressively, with little control or direction from the Charter’.⁵⁷

Although it is clear that the element of heterosexuality, as a constitutive element of marriage, has been omitted from the provision of Article 9, the European union has continuously referred to the document entitled Explanations relating to the Charter, in which it is expressly stated:

‘This Article is based on Article 12 of the ECHR ... The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither

53 Antokolskaia, 2010, p. 411. The author notices: ‘The Charter contains no more than slight alterations regarding the right to marry and to found a family. Most surprisingly, the Charter has failed to incorporate the right to dissolve a marriage.’ Antokolskaia, 2010, p. 411.

54 Majstorović, Šimović and Hoško, 2022, p. 773.

55 Alinčić, 2013, pp. 28–29.; Lucić and Grigić, 2015, p. 74.

56 *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, Judgment 11 July 2002 (para. 100).

57 McGlynn, 2001, p. 584.

prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.⁵⁸ (accentuated by the authors).

The second provision that should be emphasised is Article 53 which regarding the level of protection defines:

‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Member States’ constitutions (accentuated by the authors).’

Indeed, even before the Charter gained its binding nature, the (then) European Court of Justice defined that

‘the principal aim of the Charter, as is apparent from its preamble, is to reaffirm rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights’.⁵⁹

In line with such a view is the standpoint of D. Hrabar who argues that most of the 54 articles of the Charter correspond to rights and principles contained within constitutions of EU member states and international documents.⁶⁰

58 Cf.: Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union, C 303/17, 14.12.2007.

59 Case C-540/03 *European Parliament v. Council of the European Union*, ECR 2006 I-05769 (para. 38). The idea that ‘international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law’ is present for decades now. Cf. Case 4-73 J. Nold, *Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*. ECR 1974 -00491, para. 13: ‘As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states’. However, trends in the jurisprudence of the Court of the European Union suggest a different trend, hardly a welcomed one. Cf. e.g.: Case C-673/16. *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*. ECLI:EU:C:2018:385.

60 Hrabar, 2013, p. 58.

With regards to the importance of the member states' constitutions, it should be noted that certain legal sources of the highest level explicitly guarantee the protection of the state to marriage and the family.⁶¹ D. Jakovac-Lozić notices that the constitutional protection of the family has been a common notion in Europe for more than a century now, and that even in European constitutions which do not mention family explicitly, the family is protected beyond any doubt by their respective civil and family-law codes as an institution upon which the real social values rest.⁶²

5. Case Law Analysis of the ECtHR With Regards to the Right to Marry and the Principle of Equality of Spouses

Article 12 of the ECHR, as noted by the ECtHR,

‘secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. Both as to procedure and substance it is subject to the national laws of the Contracting States...’⁶³

The scope of the provision is clear. Namely,

‘there is no positive duty on a state to provide the material conditions to make the right to marry effective. A state may foster marriage by granting benefits to married couples which it denies to single cohabitantes but it is not obliged to do so. Nor is it under a duty to guarantee that married couples are not worse off than cohabitantes in a similar position to them’.⁶⁴

61 Certain legislations go a step further than guaranteeing a special protection to the family, but also have particular acts in that regard. For instance, a family is in Hungary protected by an organic law – Law on the protection of the family No. CCXI (especially articles 1–25). Cf. Heka, 2013, p. 165.

62 Jakovac-Lozić, 2002, p. 51. The author also reminds of the Article 119 of the Constitution of the German Empire of 1919 (Die Verfassung des Deutschen Reichs), which, *inter alia*, reads: ‘Marriage, as the foundation of the family and the preservation and expansion of the nation, enjoys the special protection of the Constitution. It is based on the equality of both genders. It is the task of both the State and the communities to strengthen and socially promote the family.’

63 *F. v Switzerland*, Application no. 11329/85, Judgment 18 December 1987 (para. 32), *Rees v. The United Kingdom*, Application no. 9532/81, Judgment 17 October 1986 (para. 50), *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, Judgment 11 July 2002.

64 Harris et al., 2018, p. 739, with reference to *Marckx v. Belgium and F.P.J.M. Kleine Staarman v. The Netherlands*, Application no. 10503/83, Decision 16 May 1985.

In other words, 'Article 12 cannot be made the vehicle for requiring positive social programmes from the state in support of the family'.⁶⁵ In this regard, N. Lucić and N. Grigić rightly conclude:

'the Court justifiably states that there is nothing controversial in the fact that marriage and cohabitation do not always imply the same legal effects since partners can freely choose to conclude marriage or to live in cohabitation. In regard therewith, cohabitants and spouses accept the legal consequences of their decisions or differently said, they commit to and accept the legal effects of the form of a family union which they have decided to found.'⁶⁶

Furthermore, it should be reiterated that Article 12

'does not apply to the marriage and relationships between spouses beyond the right to marry. Some aspects of marriage, including the right to choose a family name, may and have been examined under Article 8 alone or in conjunction with Article 14 of the Convention'.⁶⁷

It is therefore no surprise that Article 12

'has generated a relatively small number of Court judgements'.⁶⁸ One reason for this has been its limited textual scope, which to its credit the Court has largely made good by its broad and dynamic interpretation of the rights to respect for private and family life in Article 8. ... A second reason has until recently been the Court's restriction in Article 12 of the right to marry to individuals of the biological opposite sex and of the right to found a family to married couples'.⁶⁹

This means that the ECtHR practice is being accommodated by the changes in social relations 'by expanding the scope of Article 8 of the ECHR far beyond the scope of the

65 Harris et al., 2018, p. 742 with reference to *Andresson and Kullmann v. Sweden*, Application no. 11776/85, Judgment 22 August 1985.

66 Lucić and Grigić, 2015, p. 80.

67 Guide to Article 12, 2024, pt. 12, with reference to *Burghartz v. Switzerland*, Application No. 16213/90, Judgment 22 February 1994, and *Ünal Tekeli v. Turkey*, Application no. 29865/96, Judgment 16 November 2004.

68 Judge Nußberger in the Separate opinion to the Judgment in the case *Delecalle v. France* notices: 'Whereas in hundreds of judgments the Court has widened the guarantees of Article 8, transforming them into a kind of 'umbrella protection', it has treated the interpretation of Article 12 as a 'poor relation'. However, if the right to marry were not governed by a separate provision it could just as easily fall within the ambit of Article 8...' In other words, as mentioned in literature, 'although closely connected with the notions of 'family life' and 'private life' in Article 8, which have been interpreted imaginatively, the Court ... has not been so receptive to developing the content of Article 12.' Harris et al., 2018, p. 735.

69 Harris et al., 2018, p. 744.

traditional marriage concluded between two people of the opposite sex', in that way encouraging the social and legal perception of these changes.⁷⁰

Of course, Article 12 does not guarantee an unlimited right to marry since, as the Court upheld in the case of *B. and L. v The United Kingdom*, this right is regulated by 'the national laws' governing its exercise and is subject to limitations, although national laws could not restrict nor reduce the right to such an extent that its very essence was impaired.⁷¹

5.1. The Right to Marry and Its Limitations

As defined in well-established case law of the ECtHR,

'the Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy'.⁷²

In legal theory, a consideration of limitations by D. Harris et al. might serve as a basis of further examination.⁷³ Namely, they suggest that as to procedural limitations, those 'relate mainly to publicity and solemnization of marriage', and as to substance 'the state may impose limitations on such matters as marriageable age, consanguinity, the number of spouses, consent and capacity'.⁷⁴

With regards to the procedural limitations, states can require marriage to be entered into as a civil marriage, however they are free to recognise religious marriages according to their national laws. Namely,

'the Court has reiterated that marriage is not considered simply as form of expression of thought, conscience or religion protected under Article 9 of the Convention, but is governed by the specific provision of Article 12 of the Convention, which refers to the national laws governing the exercise of the right to marry'.⁷⁵

70 Lucić and Grigić, 2015, p. 80.

71 *B. and L. v. The United Kingdom*, Application No. 36536/02; Judgment 13 September 2005 (paras. 34–41). Hence, Article 12 of the Convention, as well as Article 5 of the Protocol 7 to the Convention can be defined as 'relatively protected derogable rights.' Omejec, 2013, pp. 843 and 846 et seq.

72 *Frasik v. Poland*, Application No. 22933/02, Judgment 5 January 2010 (para. 89); *F. v Switzerland*, Application no. 11329/85, Judgment 18 December 1987 (para. 32); *Jaremowicz v. Poland*, Application no. 24023/03, Judgment 5 January 2010 (para. 49).

73 Harris et al., 2018, pp. 736. Similarly: Shabas, 2015, p. 533.

74 Harris et al., 2018, p. 736.; Cf. also: Sörgjerd, 2016, pp. 32–33.; Korać, 1997, pp. 341. and 365–367.; Rainey, McCormick and Ovey, 2013, p. 401.; Alinčić, 2013, pp. 25–26.

75 Guide to Article 12, 2024, pt. 7.

Simultaneously, states are free to exercise discretion to recognise a religious marriage.⁷⁶ The limitations as to their substance are analysed in continuance.

5.1.1. Marriageable Age

As W.A. Shabas emphasises, the concept of marriageable age ‘does not seem to have led to any litigation’.⁷⁷ In many countries, it is possible to marry even before reaching full age, but mainly with the approval of the court in such cases. Without such ‘safety mechanisms’, child marriages represent a breach of rights of the child⁷⁸ and discrimination of women in particular.⁷⁹ In this regard, it should be noted that even the Convention on the Rights of the Child (further: CRC) does not explicitly prohibit child marriages. The provisions of the CRC (Article 24 para. 3 in relation to Article 2 para. 1) are often read as tacitly permitting child marriages, but only in exceptional circumstances.⁸⁰

In countries in which the legal position of children born to married parents is equal to the legal position of children born out of wedlock, the reasons for allowing the entering into a marriage of a minor (as a rule above the age of 16) probably lie in social reasons, namely the intention of the legislator not to further deteriorate the position of young mothers, in particular linked to the possible stigma as a result of pregnancy before reaching full age. Another possible reason as to why such an exception could be allowed is ‘respecting the child’s evolving capacities and autonomy in making decisions that affect his or her life’.⁸¹

The ECtHR has rarely addressed the issue of child marriages directly. In the case of *Khan v. the United Kingdom* the Court found that religious a marriage involving a 14-year-old girl cannot be considered simply as a form of expression of thought, conscience or religion, without taking into consideration the internal rules of contracting states governing preconditions for access to the right to marry, as expressly prescribed by Article 12.⁸² Thirty years later, in the case of *Z.H. and R.H. v. Switzerland* the ECtHR found that

‘Article 8 cannot be interpreted as imposing an obligation to recognise a marriage – religious or otherwise – contracted by a 14-year-old girl. Nor can such

76 Guide to Article 12, 2024, pt. 8., with reference to *Muñoz Diaz v. Spain*, Application No. 49151/07, Judgment 8 December 2009.

77 Shabas, 2015, p. 537.

78 Cf. United Nations Children’s Fund, 2023.

79 In that regard, it should be emphasised that Art. 16 Para. 2 of the Convention on the Elimination of All Forms of Discrimination against Women stipulates: ‘The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.’

80 Khazova and Dawit Mezmur, 2019, p. 317.

81 Khazova and Dawit Mezmur, 2019, p. 317.

82 *Khan v. The United Kingdom*, Application no. 11579/85, Judgment 7 July 1986. For a detailed analysis of this case cf.: Fenton-Glynn, 2021, pp. 35–38.

an obligation be derived from Article 12, which expressly provides for the regulation of marriage by national law'.⁸³

The Court also noted that importance needs to be attached to the protection of children and the fostering of their secure family environment, as well as to the fact that it 'must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society'.⁸⁴

Due to the recent migration crisis that raised a number of unsettled questions pertaining to child marriages, this phenomenon of child marriages has an international dimension too, which is confirmed by the German legislative process, as reflected in the Civil Code (Bürgerliches Gesetzbuch).⁸⁵ Namely, in 2017 Germany adopted the Act to Prevent Child Marriages.⁸⁶ In 2024, the scope of protection is widened by means of the adoption of the Act on the protection of minors with regards to the marriages concluded abroad.⁸⁷

5.1.2. Consanguinity

As noted in the jurisprudence of the ECtHR, limitations on the right to marry may include 'substantive provisions based on generally recognised considerations of public interest', *inter alia* in particular concerning prohibited degrees of affinity.⁸⁸

For instance, in the case of *B. and L. v. The United Kingdom* the applicants, who are father-in-law and daughter-in-law, complained that they were prohibited from marrying each other, invoking Articles 12 and 14 of the Convention. In this particular case, the Court reflected on the inherent limitations of family law. Namely, as emphasised in paras. 37 and 38 of this Judgement, although this

'bar on marriage is aimed at protecting the integrity of the family (preventing sexual rivalry between parents and children) and preventing harm to children who may be affected by the changing relationships of the adults around them, contemporaneously the bar on marriage does not prevent the relationships occurring'.

83 *Z.H. and R.H. v. Switzerland*, Application no. 60119/12, Judgment 8 December 2015 (para. 44). Cf.: Fenton-Glynn, 2021, p. 37.

84 *Z.H. and R.H. v. Switzerland*, Application no. 60119/12, Judgment 8 December 2015 (para. 44).

85 Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 1 des Gesetzes vom 11. Juni 2024 (BGBl. 2024 I Nr. 185).

86 Gesetz zur Bekämpfung von Kinderehen Vom 17. Juli 2017, Bundesgesetzblatt Jahrgang 2017 Teil I Nr. 48, ausgegeben zu Bonn am 21. Juli 2017, p. 2429. It was found 'incompatible with the Basic Law due to the failure to address the legal consequences of the invalidation of child marriages concluded abroad and the lack of possibility for a marriage to be recognised as valid after the age of majority is reached.' Cf.: Bundesverfassungsgericht, 2023.

87 Gesetz zum Schutz Minderjähriger bei Auslandsehen vom 24. Juni 2024, Bundesgesetzblatt, Teil I 2024 Ausgegeben zu Bonn am 27. Juni 2024 Nr. 212.

88 *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010. (para. 89).

The Court concluded that a breach of Article 12 occurred.

The case of *Theodorou and Tsotsorou v. Greece* concerned the applicants who were brother- and sister-in-law respectively, whose marriage was annulled due to their close affinity.⁸⁹ The Court noted the existence of a consensus within the member states of the Council of Europe regarding the impediment to marriage of (former) sisters- and brothers-in-law, namely only two member states at that point (Italy and San Marino) had introduced such an impediment to marriage, and to which consensus ‘the Court attaches particular importance’ (para. 30).⁹⁰ In this case, the Court concluded that

‘it appears that the applicants are currently deprived of all the rights granted to married couples, which they nevertheless enjoyed for ten years’ and hence concluded that ‘in the circumstances of the case, the recognition of the nullity of the applicants’ marriage disproportionately restricted their right to marry to such an extent that that right was impaired in its very essence. There has therefore been a violation of Article 12 of the Convention’. (paras. 35 and 36 respectively).

5.1.3. *Number of Spouses*

The European legal circle has always been characterised by monogamy, deeply rooted in national traditions. Several cases before the ECtHR deserve special attention in that regard. Firstly, the case of *Johnston and Others v. Ireland*, in which the European Court of Human Rights stated that in any society espousing the principle of monogamy, ‘it is inconceivable’ that any person should be able to marry as long as his previous marriage has not been dissolved.⁹¹

Secondly, in the case of *F. v. Switzerland*, the Court noted that ‘Article 12 ... does not distinguish between marriage and remarriage’ (para. 33). In that regard, the Court reiterated ‘that the stability of marriage is legitimate aim which is in public interest’ (para. 36) and that

‘a delay imposed, before getting married, on persons of full age and otherwise fulfilling the conditions for marriage under national law, be it as a civil

89 *Theodorou and Tsotsorou v. Greece*, Application no. 57854/15, Judgment 5 September 2019. On this case, cf. Kovaček Stanić and Samardžić, 2020, p. 554.

90 On the historical and comparative development of the institute of marriage restrictions, cf. Hlača, 2001, pp. 481–491. and also: Kovaček Stanić and Samardžić, 2020, pp. 549–555.

91 *Johnston and Others v. Ireland*, Application no. 9697/82, Judgment 18 December 1986 (para. 50). As Judge Pinheiro Farinha emphasises in his Declaration to the Judgment in this case, an additional sentence should have been added to the explanation: ‘The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy’, proposing the argumentation as follows: ‘This is a citation from paragraph 40 of the *Marckx* judgment of 13 June 1979, the omission of which might cause the present judgment to be interpreted – incorrectly – as meaning that the Court attaches no importance to the institution of marriage.’

sanction or the practical consequence of such a refusal as in the instant case, cannot be considered justified under Article 12 of the Convention' (para. 97).

Furthermore, the Joint dissenting opinion of Judges Thór Vilhjálmsson, Bindschedler-Robert, Gölcüklü, Matscher, Pinheiro Farinha, Walsh, De Meyer and Valticos offers another perspective:

'The restriction thus placed on the exercise by the applicant of his right to marry and found a family did not affect the substance of that right. It was merely temporary. It was neither arbitrary nor unreasonable. It was based on legitimate reasons and could be considered to be commensurate with their gravity. It did not go beyond the powers of the competent national authorities. ... In order for it to be concluded that there has been a breach of this right, it must be shown that the State has impaired the essence of the right or that it has restricted the exercise thereof in an arbitrary or unreasonable manner. That has not been shown in this case.'

Thirdly, the case of *V. K. v. Croatia*, where the ECtHR noted that 'the Croatian legal system adheres to the principle of monogamy, and does not allow individuals who are already married to conclude another marriage' and continued:

'Therefore, a failure on the part of the domestic authorities to conduct divorce proceedings with the required urgency may impair the right to marry of an individual who has, for example, sought to have his previous marriage dissolved in order to marry again, or who has acquired a serious and genuine opportunity to remarry after he had instituted divorce proceedings'.⁹²

Hence, the principle of monogamy reflects the consensus of the European family law systems. On the other hand, keeping contact ever more often with systems which allow for polygamous marriages, a remark is in order. Namely, the Court has made clear that

'Article 12 expressly provides for regulation of marriage by national law, and given the sensitive moral choices concerned and the importance to be attached to the protection of children and the fostering of secure family environments, this Court must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society'.⁹³

92 *V. K. v. Croatia*, Application no. 38380/08, Judgment 27 November 2012 (para. 100).

93 *Z.H. and R.H. v. Switzerland*, Application no. 60119/12, Judgment 8 December 2015 (para. 44): 'The usual conflict-of-laws rule is that the *lex loci celebrationis* applies. Thus, a state may recognise polygamous marriages celebrated lawfully abroad while not allowing them under its own law'. Cf. Harris et al., 2018, p. 737, footnote 20, referring to *X. v. Switzerland*, Application no. 16744/14, Judgment 26 January 2017.

5.1.4. *Consent*

The issue of consent in contemporary societies does not solely signify the free will of a person as one of the necessary preconditions for a marriage. Indeed, it also must be taken into consideration with regards to entering into marriage having another goal in mind, different than that of entering into a life union. Therefore, one of the main challenges, especially with regards to the recent migration crisis are marriages of convenience.

Such marriages, in words of S. Winkler ‘lack at least one of the structural elements, namely the establishing of a life union’.⁹⁴ Also, these marriages are entered into with the aim of achieving other goals, different from establishing a life union with the other spouse, whose goals ‘could not be achieved (or could be more difficult to achieve) without the marital status’.⁹⁵ The aim is mostly found in the fraudulent acquisition of certain benefits regarding rights *in rem*, hereditary interests or certain tax exemptions, or very concrete effects such as acquiring residence permits or citizenship.⁹⁶

‘States attempt to regulate through a range of measures the use of marriage that is undertaken solely for the purpose of permitting one of the partners to immigrate or to regularize a particular status.’⁹⁷ In that regard, as W. A. Shabas notices ‘The Court has said that States are entitled ‘to prevent marriages of convenience, entered solely for the purpose of securing an immigration challenge.’⁹⁸ However, as the Court warns,

‘the relevant laws – which must also meet the standards of accessibility and clarity required by the Convention – may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice.’⁹⁹

94 For example, Croatian Aliens Act partially regulates so-called ‘marriage of convenience’ and regulates that the temporary residence permit for the purpose of family reunification shall not be issued if the marriage is entered into for convenience (Art. 68), as well as regulates that foreign citizens can be expelled from the country if he/she represents a danger for the public order or public health if, *inter alia*, ‘enters into a marriage of convenience’. Aliens Act, Official gazette, nos. 133/2020, 114/2022, 151/2022.

95 Winkler, 2016, p. 497.

96 Winkler, 2016, p. 497.

97 Shabas, 2015, p. 540.

98 Shabas, 2015, p. 540. with reference to *O'Donoghue and Others v. The United Kingdom and Sanders v. France*, Application no. 31401/96, Decision 16 October 1996.

99 *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010 (para. 89).

On the other hand, it should be emphasised that ‘reasonable limitations requiring the provision of information that will establish the genuineness of the marriage are permissible, even though they may delay the marriage’.¹⁰⁰

5.1.5. Capacity

‘The right to marry can be subject to prior authorisation, owing to the restriction on a person’s legal capacity, one of the substantive limitations the relevance of which is acknowledged in the case-law.’¹⁰¹

In the case of *Lashin v. Russia*, the applicant complained in particular about his status as a legally incapacitated person, his non-voluntary commitment to a psychiatric hospital and his inability to marry.¹⁰² Regarding the applicable law, it should be stated that the Family Code of the Russian Federation of 1995 made it ‘impossible to marry if at least one of the would-be spouses had been declared incapable by a court because of a mental illness’ (para. 63). As mentioned *supra*, Article 23 Paragraph 1 of the CRPD establishes that ‘the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognised’.

100 Certain systems have long withheld historically known solution of preventing a woman to enter into a new marriage within 300 days since the termination of the previous one. It was formerly explained by the theory of the so-called *perturbatio sanguinis*, namely the intention of the legislative solution to prevent any doubt whatsoever as regards the paternity of the child born within this period. In that regard, the ECtHR concluded ‘that the requirement that divorced women, on account of potential pregnancy, observe a 300-day waiting period before remarrying unless they can prove by way of a medical examination that they are pregnant constitutes direct discrimination on grounds of sex that is not justified by the aim of preventing uncertainty as to the parentage of a possible unborn child’. *Nurcan Bayraktar v. Türkiye*, Application no. 27094/20, Judgment 6 November 2023, paras. 90-92. In this case, the Court found ‘that the unequal treatment to which the applicant was subjected on the ground of her sex was neither objectively justified nor necessary’ and that ‘there has therefore been a violation of Article 14 read in conjunction with Article 12 of the Convention’. It seems though that the Court avoided certain delicate topics and kept the ‘safe’ approach. Hence, Judge Krenc in his Concurring opinion to this Judgment expressed regret for the Court’s choice of words, emphasising that ‘On such matters involving gender equality, the Court’s speech must be truthful and accurate. Truthful because these issues are fundamental with regard to the Convention; accurate because the Court has a crucial pedagogical role’.

101 Guide to Article 12, 2024, pt. 19.

102 *Lashin v. Russia*, Application no. 33117/02, Judgment 22 January 2013 (para. 3). He suffered from schizophrenia, due to which he was concluded to be ‘incapable of understanding the meaning of his actions and was unable to control them’ (paras. 7 and 9 respectively). In 2000, the competent court declared him legally incapacitated because of his illness, in regards to which the attempts by his daughter and father (as guardian) were made to restore his legal capacity, which were refused. In 2002, the applicant and his fiancée requested that the municipality register their marriage, and claimed that they had not received any reply from the municipality (para. 20). Later that year, they wrote letters to the court informing it of their desire to marry (para. 39).

The Court recalled that ‘deprivation of legal capacity may amount to an interference with the private life of the persons concerned’.¹⁰³ Hence, it was the intention of the ECtHR to ‘examine whether a fair balance was struck between his Article 8 rights and any other legitimate interest, private or public, which may have been at stake’ (para. 79). The Court reiterated that ‘depriving someone of his legal capacity and maintaining that status may pursue a number of legitimate aims, such as to protect the interests of the person affected by the measure’ (para. 80). The extent of the state’s margin of appreciation depends on two major factors.

‘First, where the measure under examination has such a drastic effect on the applicant’s personal autonomy as in the present case, the Court is prepared to subject the reasoning of the domestic authorities to a somewhat stricter scrutiny. Second, the Court will pay special attention to the quality of the domestic procedure.’¹⁰⁴

The conclusion of the Court was that a breach of Article 8 had occurred. Consequently, the Court observed that

‘the applicant’s inability to marry was one of many legal consequences of his incapacity status... In other words, the applicant was unable to marry primarily because of the same two major factors analysed under Article 8, namely the deficiencies in the domestic decision-making progress and the rigidity of the Russian law on incapacity. In view of its findings under Article 8 of the Convention, the Court considers that there is no need for a separate examination under Article 12 of the Convention’ (para. 124).

Indeed, although a separate examination did not occur, the Court’s message is nevertheless very strong. It reminds states of the importance of maintaining high standards in the protection of human rights of such vulnerable individuals, consequently diminishing the state’s margin of appreciation, having in mind ‘the higher value’, i.e. the protection of human rights.

The same line of reasoning was kept, i.a. in the case of *Delecolle v. France*. In this case, the applicant complained that he had been denied the right to marry on the grounds that his marriage had been subject to the authorisation of his supervisor or the guardianship judge, since at the age of 72 he was placed under enhanced protective supervision (*curatelle renforcée*) for five years (paras. 3 and 4 respectively). His attempts to lift the measure were unsuccessful. He requested the supervisor’s authorisation to marry a friend who had become his partner during the previous year.

103 *Lashin v. Russia*, Application no. 33117/02, Judgment 22 January 2013 (para. 77). About the impact of deprivation of legal capacity on the private life of a person, cf: Majstorović and Šimović, 2018, pp. 75–77.

104 *Lashin v. Russia*, Application no. 33117/02, Judgment 22 January 2013 (para. 81), references to the case-law here omitted.

The supervisor refused authorisation, claiming that she had known the applicant only for a few months and therefore lacked necessary information (para. 6). The guardianship judge ordered a social inquiry and, having undertaken all necessary action, dismissed the request, noting that no one disputed applicant's attachment to the women he intended to marry, but that it was 'insufficient to justify authorising the planned wedding' and that the 'planned marriage as it stood was not in the applicant's interests' (para. 12). The court of appeal concluded that 'the psychopathological turn in his disorders and his failing perception of the realities of his finances¹⁰⁵ were such that she could not give his informed consent to marriage'. (para.13).

The Court found that, although the right to marry of persons under supervision is subject to prior authorisation, they are not deprived of it (para. 54). Furthermore, it concluded 'having regard to the foregoing considerations, and in the light of the circumstances of the case and of the margin of appreciation available to domestic authorities' that 'the restrictions on the applicant's right to marry did not limit or reduce that right in an arbitrary or disproportionate manner' and consequently 'there was no violation of Article 12 of the Convention' (para. 62).¹⁰⁶

5.2. The Principle of Equality of Spouses

The case-law regarding the Article 5 of Protocol no. 7 has always been rather rare, as noted by the Court a quarter of a century ago. Namely, in the case of *Cernecki v. Austria*, the Court underlined that

'the scarce case-law which exists so far on Article 5 of Protocol No. 7 shows that it essentially imposes a positive obligation on States to provide a satisfactory legal framework under which spouses have equal rights and obligations concerning such matters as their relations with their children'.¹⁰⁷

It is considered that Article 5

105 Judge Nußberger in her Separate opinion emphasised: 'It is clear that if he had been poor no one would have objected to his planned marriage' and continued 'in my view, the right to marry, in the presented case, was unduly reduced to a purely financial decision and was consequently disproportionately restricted, affecting its very essence. The authorities completely disregarded the social and personal aspects of marriage. The fact is that those aspects were what counted for the applicant.' Judge Nußberger also noted: 'It is true that the risk of a person with a 'slight cognitive disorder', 'psychological fragilities' and 'some degree of vulnerability' (para. 9 of the judgment) being exploited by third persons should not be under-estimated, particularly where such person is a large property holder. However, a restrictive measure adopted against the will of the person concerned should not, in my opinion, go beyond what is strictly necessary. Although the content of Article 460 (1) of the Civil Code is unobjectionable as such, its application in the circumstances of the present case, which resulted in a ban on marriage, is disproportionate. The measure in question is more paternalistic than protective, which is incompatible with Article 12 read in the light of Article 8' and that therefore she voted for a finding of a violation of Article 12.

106 On this case, cf. Korać Graovac, 2023, pp. 110-111.

107 *Cernecki v. Austria*, Application no. 31061/96, Decision 11 July 2000.

‘does not prevent States from taking such measures as are ‘necessary in the interests of the children’. According to the Explanatory Report on Protocol No. 7, the case-law of the Convention organs, relating *inter alia* to Article 8 of the Convention, where they have stressed the need to take account of the interests of the child, is to be noted in this connection. The Court, therefore, considers that the necessity clause contained in Article 5 of Protocol No. 7 should be interpreted in the same way as the necessity clauses contained in other provisions of the Convention.’¹⁰⁸

Therefore, the Court recalled that according to well-established case-law the notion of necessity implies that the interference complained of corresponded to a pressing social need, and in particular that it was proportionate to the legitimate aim pursued. In determining the necessity of an interference, a margin of appreciation is left to the contracting states. This margin of appreciation is not however, unlimited and in exercising its supervisory function, the Court must determine whether the reasons adduced to justify the interference at issue are ‘relevant and sufficient.’¹⁰⁹ In this very case, the application was rejected as being manifestly ill-founded and hence declared inadmissible. The same line of reasoning was maintained in subsequent rulings.¹¹⁰

In the case of *Jonche Blazheski and Vide Blazheska v. Northern Macedonia*, the Court considered the right to a welfare benefit under Article 5 of Protocol 7, namely whether it is of ‘a private law character’. The conclusion was that the dispute ‘does not fall in the sphere of private law’ and hence declared the complained inadmissible as incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto.¹¹¹

In certain cases, the Court found that the complaints raised under Article 5 of Protocol 7 in reality reiterated the complaints raised under Article 8. Therefore, since they are closely linked, the former ones do not warrant a separate examination and hence the relevant part of the applications were rejected as manifestly ill-founded.¹¹²

5.3. ECHR as a Living Instrument - Marriage as Solely a Heterosexual Union?

Apart from being a ‘Charter of liberty’, the ECHR is contemporaneously also ‘a living instrument’. As noted by G. Letsas, ‘the idea that the ECHR is a living instrument that must be interpreted according to present-day conditions has been a central

108 *Cernecki v. Austria*, Application no. 31061/96, Decision 11 July 2000.

109 *Cernecki v. Austria*, Application no. 31061/96, Decision 11 July 2000.

110 E.g. in the case *Iosub Caras v. Romania*, Application no. 7198/04, Judgment 27 July 2006 (paras. 55–58).

111 *Jonche Blazheski and Vide Blazheska v. Northern Macedonia*, Application no. 38692/16, Decision 7 September 2023.

112 E.g. in the *Dorca v. Romania*, Application no. 59651/13, Decision 15 April 2014 (paras. 27 and 28).

feature of Strasbourg's case law from its very early days'.¹¹³ In the words of J. Kokott, 'this living instrument has undergone remarkable developments, reflecting at the same time changes across our societies' and the willingness of the Court to reassess its prior judgements in light of such changes and developments.¹¹⁴ One issue which attracts particular attention is to the right to marry and found a family, taking into consideration that the time is ripe to reconsider the heterosexuality of spouses as a fundamental characteristic of marriage. In this regard, Harris et al. reiterate: 'The question whether marriage is limited to unions between a man and woman has arisen in two situations: marriages between a transsexual and another; and marriages of same-sex couples'.¹¹⁵

As A. Korać noted almost thirty years ago, cases in which the ECtHR applied the provision of Article 12 to transsexual persons were always particularly interesting to legal scholars, as these cases were an example of how a provision of Article 12 could be interpreted differently, in line with the method of dynamic and evolutive interpretation of the ECHR as a living instrument.¹¹⁶ The starting opinion of the Court in its earlier case law was that the right to marry as guaranteed by Article 12 referred to 'the traditional marriage between persons of opposite biological sex' and that the general aim was 'to protect marriage as the basis of the family'.¹¹⁷ Furthermore, the Court found that an

'attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed

113 Letsas, 2012, p. 2. The author emphasises that 'in the hands of the ECtHR, the idea of a living instrument has three main features. First, the Court will take into consideration 'present-day standards' as an important factor in interpreting the Convention; it will very rarely inquire into what was thought to be acceptable state conduct when the Convention was drafted, or into what specific rights the drafters of the Convention intended to protect. Second, the present-day standards that the Court takes into consideration must somehow be common or shared amongst contracting states. The Court has never clarified what it means for a standard to be common or shared ... the Court does not make it a condition that all contracting states have expressly accepted the standard by way of legislative enactment. Third, the Court will not assign decisive importance to what the respondent state (be it its authorities or public opinion) considers to be an acceptable standard in the case at hand. This is so particularly if the respondent state's practice is out of line with the commonly accepted standards in the Council of Europe. Over time however, the European Court has shifted the emphasis it places on the various aspects of the living instrument approach'. Letsas, 2012, p. 2. More about the ECtHR's dynamic and evolutive approach to interpretation of the provisions of the Convention, cf.: *Tyrer v. The United Kingdom*, Application no. 5856/72, Judgment 24 April 1978; *Stafford v. the United Kingdom*, Application no. 46295/99, Judgment 28 May 2002 (para. 68); *Schalk and Kopf v. Austria*, Application no. 30141/04, Judgment 24 June 2010 (para. 94).

114 Kokott, 2020, p. 1.; Cf. also: Fenton-Glynn, 2021, p. 6.

115 Harris et al., 2018, p. 739.

116 Korać, 1997, pp. 343–344.

117 *Rees v. The United Kingdom*, Application no. 9532/81, Judgment 17 October 1986 (paras. 49–50).

within the power of the Contracting States to regulate by national law the exercise of the right to marry'.¹¹⁸

However, in 2002, the Court changed its previous standpoint regarding transsexual persons' access to marriage and pointed to the fact that there had been 'major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality'.¹¹⁹ This is why, in the case of *Christine Goodwin v. The United Kingdom*, the Court for the first time found that denying transsexual persons who had undergone gender-reassignment surgery the right to marry someone of the opposite sex constituted a breach of Article 12 of the Convention (paras. 101 and 103–104 respectively). It is obvious that the Court heavily relied on 'a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals' considering this to be sufficient reason to reassess its prior judgements (*Rees*, *Cossey*, *Sheffield and Horsham*) in light of new social changes and developments.¹²⁰

Regarding same-sex couples and the level of protection granted to such relationships, it must be said that this poses a complex issue and is a good example of the method of dynamic and evolutive interpretation of provisions of the ECHR (Articles 8 and 12). Notwithstanding the fact that there are a considerable number of contracting states that have extended marriage to same-sex partners, it should be noted that 'this reflects their vision of the role of marriage within their societies and does not originate from the interpretation of the fundamental right prescribed by Article 12, that the contracting states established by the ECHR'.¹²¹

Such a standpoint of legal theory is based on the case law of the ECtHR, from which it follows that the Court has enhanced the protection of the rights of same-sex couples thorough a more extensive interpretation of Article 8, but still remained firm in the restrictive application of Article 12 and the interpretation of the issue of access to marriage. In the case of *Schalk and Kopf v. Austria* the Court emphasised that it would 'no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex', but ultimately came to a conclusion that 'the question whether or not to allow same-sex marriage is left to regulation by the national law of the contracting state'. The Court

118 *Cossey v. The United Kingdom*, Application No. 10843/84, Judgment 27 September 1990 (paras. 43 and 46–48); *Sheffield and Horsham v. The United Kingdom*, Applications nos. 22885/93, 23390/94, Judgment 30 July 1998 (paras. 66–68).

119 The Court also emphasised that Article 9 of the Charter departed from the wording of Article 12 of the Convention in removing the reference to men and women. Cf.: *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, Judgment 11 July 2002 (para. 100).

120 *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, Judgment 11 July 2002 (paras. 84–85). Cf. also: Sörgjerd, pp. 34–35.; Renucci, J-F.: Introduction to the European Convention on Human Rights, The rights guaranteed and the protection mechanism, Council of Europe Publishing, Strasbourg, 2005, p. 40.

121 Dimovski, 2021, p. 175.

also observed that ‘marriage has deep-rooted social and cultural connotations which may differ largely from one society to another’ and for that reason ‘it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society’ (paras. 61–62). In conclusion, the Court noted that Article 12 of the ECHR does not impose an obligation to grant same-sex couples access to marriage and, thus, found no violation of Article 12 (paras. 63–64).

The Court maintained a similar approach to this issue in the cases of *Vallianatos and Others v. Greece*, *Hämäläinen v. Finland*, *Oliari and Others v. Italy*, and *Chapin and Charpentier v. France*.¹²² Although, the Court acknowledged that same-sex couples were in need of legal recognition and protection of their relationship, in the case of *Oliari and Others v. Italy* it ultimately drew a conclusion that

‘in the absence of marriage, same-sex couples ... have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection’ (para. 174).

In the case of *Orlandi and Others v. Italy*, the Court did not depart from its aforementioned position, reiterating that domestic legislations that provide ‘civil unions a legal status equal or similar to marriage ... *prima facie* suffice to satisfy Convention standards’ (paras. 191–194),¹²³ and whose position has been firmly kept in further decisions on the matter.

6. Analysis of the Case Law of the ECtHR in Terms of Central and Eastern European Countries

The case law of the Court in regard this group of countries with regards to the right to marry, as protected by Article 12 of the ECHR reflects the social and political changes, as well as the efforts undertaken to harmonise national legal systems with the European standards. It also reflects the constant interaction between the ‘conservative’ and ‘progressive’ family ideologies, which are, as M. Antokolskaia puts it, ‘clearly of a

¹²² *Vallianatos and Others v. Greece*, Application nos. 29381/09 and 32684/09, Judgment 7 November 2013 (paras. 91–92); *Hämäläinen v. Finland*, Application no. 37359/09, Judgment 16 July 2014 (paras. 96–97 in connection with paras. 85–89); *Oliari and Others v. Italy*, Application nos. 18766/11 and 36030/11, Judgment 21 July 2015 (paras. 174–175, 177–178 and 185–187); *Chapin and Charpentier v. France*, Application no. 40183/07, Judgment 9 June 2016 (paras. 36–40).

¹²³ *Orlandi and Others v. Italy*, Application nos. 26431/12; 26742/12; 44057/12 and 60088/12, Judgment 14 December 2017.

pan-European nature, since they both have their own rank and file in each European country'.¹²⁴

This interaction is in the continuance analysed from three perspectives. The first perspective concerns religious marriages, which is a topic of particular importance for former socialist countries. The second perspective offers considerations regarding the intended aim of marriage, taking into account both the fundamental characteristics of a marriage as well as the aspirations of the spouses. The third perspective is the one focusing on the issue of divorce, not only from the standpoint of the issue whether the right to marry incorporates the right to divorce, but also from the perspective of the development of social relations and the (de)stigmatisation of marriage.

6.1. Religious Marriages

The issue of religious marriages was quite important in former socialist states. Namely, at some point of the development of marriage law, certain states introduced the institute of non-existent marriage in order to avert the citizens to conclude religious marriages and to obey the obligatory civil form of marriage.

'The obligatory form of marriage was strengthened by the almost autonomous concept of non-existent marriage within civil, socialist codification. The reason for introducing such a level of coercion was exactly due to the fear of *matrimonia clandestina*, or secret marriages, but this time entered into exclusively before the representatives of religious communities.'¹²⁵

Contemporary issues point to another perspective, namely the one supported by Article 9, para. 1 of the ECHR, guaranteeing freedom of thought, conscience and religion.¹²⁶ As confirmed in the jurisprudence of the ECtHR, Article 9, para. 1 ECHR 'cannot be interpreted so as to impose an obligation on States to have the effects of

124 Antokolskaia, 2008, p. 29.

125 As N. Hlača notices, marriage legislation of the Federal People's Republic of Yugoslavia was among a few countries which included provisions and sanctions determining the category of non-existent marriages, referring also to M. Stevanov who claimed that the Polish Law on family and guardianship of 1964 contained the same provision. Cf. Hlača, 2006, pp. 1061 and 1064 respectively.

126 Article 9 of the ECHR reads:

'1. 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.

2. 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.'

religious marriages recognised as equal to those of civil marriages'.¹²⁷ However, if there is a possibility foreseen by the state for religious marriages, it has to be exercised without discrimination.

The case of *Savez crkava 'Riječ života' and Others v. Croatia* originated from an application lodged by the Union of Churches 'The Word of Life', Church of the Full Gospel and the Protestant Reformed Christian Church in the Republic of Croatia against Croatia in 2007. The applicant churches alleged that the refusal of the Government of Croatia to conclude an appropriate agreement with them and the resulting inability, among other, to obtain state recognition of religious marriages conducted by them had breached their right not to be discriminated against in the exercise of their freedom of religion and the rights set forth by the law (para. 3).¹²⁸

Therefore, although Croatia is not obliged under Article 9 of the Convention to recognise religious marriages, 'the fact of the instant case nevertheless falls within the wider ambit of that Article' (para. 58). The applicant churches emphasised that agreements were concluded with numerous religious communities with regard to which the Court noted that 'conclusion of agreements between the state and a particular religious community establishing a special regime in favour of the latter does not, in principle, contravene the requirement of Articles 9 and 14', of course 'provided that there is an objective and reasonable justification for the difference in treatment and that similar agreements may be entered into by other religious communities wishing to do so' (para. 85).

The Court found in this case that

'the difference in treatment between applicant churches and those religious communities which had concluded agreements on issues of common interest ... and were therefore entitled ... to have religious marriages they performed recognised by the State did not have any 'objective and reasonable justification' (para. 92).

Hence the Court accordingly found a violation of Article 14 of the Convention taken in conjunction with Article 9 (para. 93). Consequently, the Agreement on issues of

127 *Savez crkava 'Riječ života' and Others v. Croatia*, Application no. 7798/08, Judgment 9 December 2010 (para. 56), with reference to *X. v. Germany*, Application no. 6167/73, Decision 18 December 1974, Decisions and Reports (DR) 1, pp. 64–65; *Khan v. The United Kingdom*, Application no. 11579/85, Decision 7 July 1986, DR 48, pp. 253 and 255; *Spetz and Others v. Sweden*, Application no. 20402/92, Decision 12 October 1994; and *Şerife Yiğit v. Turkey*, Application no. 3976/05, Judgment 2 November 2010 (para. 102).

128 Namely, the relevant state bodies claimed that 'the applicant churches did not satisfy, either individually or jointly, historical and numerical criteria', that is that 'they had not been present on the territory of Croatia since 6 April 1941 and the number of their adherents did not exceed 6,000' (para. 9). Apart from the historical and numerical criterion, the cultural criterion demanded that the religious communities were 'historical religious communities of the European cultural circle'. (paras. 74 and 75 respectively).

common interests was concluded between the applicant churches and the Government of the Republic of Croatia in 2014.¹²⁹

6.1.1. *The Intended Aim of Marriage*

In the case of *Frasik v. Poland*, the applicant alleged in particular a breach of Article 12 on account of the national court's refusal to grant him leave to marry in prison and a breach of Article 13¹³⁰ in that he had had no domestic remedy to challenge that refusal (para. 3). The case concerned a prisoner, convicted for violent behaviour against a woman, who expressed her wish to marry him while he was imprisoned and also asked the court to absolve her from the duty of testifying against him, due to their particularly close personal relationship (para. 25), in other words, she relied on testimonial privilege.

While in prison, the applicant asked the trial court to grant him leave to marry the victim in the remand centre, which was refused. The Supreme court held that the refusal

‘constituted a violation of Article 12 of the Convention. Nevertheless, in the Supreme Court's view, this kind of – admittedly serious – breach of the law on the part of the trial court did not have any bearing on the applicant's conviction and could not result in it being quashed’ (para. 41).

The ECtHR emphasised that

‘personal liberty is not a necessary pre-condition for the exercise of the right to marry. Imprisonment deprives a person of his liberty and also – unavoidably or by implication – of some civil rights and privileges. This does not, however, mean that persons in detention cannot, or can only very exceptionally, exercise their right to marry. As the Court has repeatedly held, a prisoner continues to enjoy fundamental human rights and freedoms that are not

129 Official gazette, No. 112/2014.

It is interesting to mention that the applicant churches also complained that their inability to celebrate marriages with the same effect as civil marriages had violated their rights under, *inter alia*, Article 12. The Court reiterated that ‘solely the members of a religious community, as individuals, can claim to be victims of a violation of the right to marry or the right to education, rights which by their nature are not susceptible of being exercised by a religious community itself’. Therefore, the applicant churches as religious communities cannot themselves allege a violation of either of these rights (cf.: *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden*, Application no. 11533/85, Decision 6 March 1987, DR 51, p. 125, and *Scientology Kirche Deutschland e.V. v. Germany*, Application no. 34614/97, Decision 7 April 1997), from which it follows ‘these complaints are incompatible *ratione personae* with the provisions of the Convention’ (paras. 125 and 126 respectively).

130 Article 13 of the ECHR reads:

‘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.’

contrary to the sense of deprivation of liberty, and every additional limitation should be justified by the authorities'.¹³¹

Having all the afore mentioned in mind, the Court concluded that there had been a violation of Article 12. Indeed, the Court noted:

'The choice of a partner and the decision to marry him or her, whether at liberty or in detention, is a strictly private and personal matter and there is no universal or commonly accepted pattern for such a choice or decision.' (para. 95).

Even if certain doubts might remain regarding the true will and intentions of future spouses, both in this case and in general, it is indeed an inherent limitation of family law. Therefore, the considerations regarding the intention of the spouses, as already accentuated, have to be made with the utmost sensitivity.

Another case was conducted simultaneously with the *Frasik* case, 'in the interests of the proper administration of justice', namely the case of *Jaremowicz v. Poland*. In this case, the applicant was imprisoned, as well as his intended wife. He alleged a breach of Article 12 in that he had been refused leave to marry in prison, as well as Article 13 on account of the fact that he had had no domestic remedy to challenge that refusal. Unlike applicant *Frasik*, applicant *Jaremowicz* invoked Article 14, maintaining that he had been discriminated against on the ground of his status as a prisoner (para. 3).

The Court emphasised, that

'under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for any automatic interference with prisoners' rights, including their right to establish a marital relationship with the person of their choice, based purely on such arguments as what – in the authorities' view – might be acceptable to or what might offend public opinion' (para. 53).

Moreover, it stressed the following:

'Except for overriding security considerations and in order to ensure that the right to marry is exercised 'in accordance with the national laws' – which ... must themselves be compatible with the Convention – the authorities are not allowed under Article 12 to interfere with a prisoner's decision to establish a marital relationship with a person of his choice, especially on the grounds

131 *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010 with reference to *Hirst (No. 2) v. The United Kingdom*, Application No. 74025/01, Judgment 6 October 2005 (para. 69).

that the relationship is not acceptable to them or deviates from prevailing social conventions and norms.’ (para. 59)

Having in mind the aforementioned, the Court concluded that there had been a violation of Article 12. The question of the general social consensus on the features of the marriage, such as its aim, also applies to the question of divorce, which is analysed in continuance.

6.1.2. *The Divorce*

As noted by the ECtHR,

‘the ordinary meaning of the words ‘right to marry’ is clear, in the sense that they cover the formation of marital relationships but not their dissolution. Furthermore, these words are found in a context that includes an express reference to ‘national laws’; even if, as the applicants would have it, the prohibition on divorce is to be seen as a restriction on capacity to marry, the Court does not consider that, in a society adhering to the principle of monogamy, such a restriction can be regarded as injuring the substance of the right guaranteed by Article 12’.¹³²

Although Article 12 is inspired by Article 16 para. 1 of the Universal declaration of human rights, as mentioned *supra*, the *travaux préparatoires* confirm that the last sentence of this provision (‘They are entitled to equal rights as to marriage, during marriage and at its dissolution.’) was not included in Article 12. Hence, it is the opinion of the Court that there was ‘no intention to include in Article 12 any guarantee of a right to have the ties of marriage dissolved by divorce’.¹³³

The noted sentence was nevertheless incorporated in Article 5 of the Protocol No. 7 to the ECHR, stipulating, as already stated:

‘Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution (accentuated by the authors). This article shall not prevent States from taking such measures as are necessary in the interests of the children.’

¹³² *Johnston and Others v. Ireland*, Application no. 9697/82, Judgment 18 December 1986 (para. 52).

¹³³ *Johnston and Others v. Ireland*, Application no. 9697/82, Judgment 18 December 1986 (para. 52).

However, it should be emphasised that the ‘the words ‘in the event of its dissolution’ do not imply and obligation on a State to provide for dissolution of marriage or to provide any special forms of dissolution’ (para. 39).¹³⁴

In states which allow for a divorce, two issues deserve particular attention. The first is the efficiency of the procedures, since delays in divorce proceedings could also be understood as a breach of the right to marry. In other words, ‘the failure to conduct divorce proceedings within a reasonable time could also, in certain circumstances, raise as issue under Article 12 of the Convention’.¹³⁵ The second issue is the one of the results, namely, ‘Article 12 can also not be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of a law allowing for divorce’.¹³⁶

As regards the efficiency of the procedures, the following remarks are in order. In the case of *V. K. v. Croatia*, the applicant complained that ‘the lengthy divorce proceedings had impaired his right to marry again’ (para. 94).¹³⁷ The Court noted that

‘a failure on the part of the domestic authorities to conduct divorce proceedings with the required urgency may repair the right to marry of an individual who has, for example, sought to have his previous marriage dissolved in order to marry again, or who has acquired a serious and genuine opportunity to remarry after he had instituted divorce proceedings’ (para. 100).

With regards to the breach of Article 12, the Court noted that the restriction was a result of the well-argued rejection of the divorce request, which relied on the principle of monogamy, hence it concluded that the right to marry was not breached and that the complaint should be rejected as manifestly unfounded (para. 67). The Court reminded the domestic courts of their already ‘existing obligation to conduct the divorce proceedings diligently and expediently’ (para. 104). It also noted that ‘in these particular circumstances the applicant was left in a state of prolonged uncertainty which amounted to an unreasonable restriction of his right to marry,’ which

134 Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory report European Treaty Series – No. 117.

135 Guide to Article 12, 2024, pt. 53., with reference to *Aresti Charalambous v. Cyprus*, Application no. 43151/04, Judgment 19 July 2007 and *V. K. v. Croatia*, Application no. 38380/08, Judgment 27 November 2012.

136 Guide to Article 12, 2024, pt. 47., with reference to *Aresti Charalambous v. Cyprus*, Application no. 43151/04, Judgment 19 July 2007 and *V. K. v. Croatia*, Application no. 38380/08, Judgment 27 November 2012.

137 *V. K. v. Croatia*, Application no. 38380/08, Judgment 27 November 2012.

in turn lead the Court to conclude that ‘there has been a violation of Article 12 of the Convention’ (paras. 106 and 107 respectively).¹³⁸

The second issue deserving particular attention is that of the results, in other words the outcome of the proceedings. In the case of *Ivanov and Petrova v. Bulgaria* the two applicants (intending to marry each other) alleged the breach of rights as guaranteed by the Convention.¹³⁹ The first applicant alleged that the decision by which the domestic courts rejected his request for divorce represented a breach of Article 6, Paragraph 1 and of Article 8 respectively. Both applicants claimed that they suffered an unjustified restriction on their right to marry¹⁴⁰ and they also complained about the absence of remedies within national system, as protected by Article 13 of the Convention. The European Court of Human Rights concluded that the domestic courts did not fail in their obligation to provide reasoning for the decision of rejecting the divorce request, and that consequently there was no violation of Article 6 Paragraph 1 ECHR.

In the case of *Chernetskiy v. Ukraine*, the applicant claimed ‘that the restrictions on his right to remarry during his detention in prison had been contrary to Article 12 of the Convention’.¹⁴¹ Meaning that his previous marriage had been divorced during his incarceration, but he had not obtained a divorce certificate, since it could have been obtained exclusively by the applicant at the relevant civil status registry. He requested to be escorted to the registry, but his request was refused and he was informed that he would be able to obtain it after his release from prison. After more than three and a half years, the competent ministry issued an order providing a temporary procedure for registering divorces and issuing divorce certificates in prison. When provided with the certificate, the applicant remarried. The ECtHR concluded that ‘given the circumstances of the case ... the restriction at issue was unjustified and impaired the very essence of the applicant’s right to marry and found a family with his new female partner’ and that there has been a violation of Article 12.¹⁴²

138 It should be noted that Judge Berro-Lefevre in Partially dissenting opinion made strong arguments to the contrary, to which we adhere. Namely, as emphasised in this opinion: ‘Will all violations of Article 6 for unreasonable length of proceedings entail, *ipso facto*, a violation of Article 12 if the applicant can demonstrate that he or she has found another soul mate or is contemplating a fresh attempt at matrimony?’ and concluded ‘the applicant has been able to marry, admittedly at a later date than he would have wished, and his religious convictions have thus been respected.’ (paras. 6 and 7 respectively).

139 *Ivanov and Petrova v. Bulgaria*, Application no. 150017/04, Judgment 14 June 2011.

140 Bulgarian law, as defined in the Judgment (para. 26), recognises two cases of divorce: divorce for alteration of the marital bond and divorce by mutual consent of the spouses. The national court concluded that the alteration of the marital bond was the consequence of the applicant’s unacceptable behaviour, including adultery, as evidence by the birth of a child born to him and his new partner (para. 16). Furthermore, the attempts of the first applicant to obtain a divorce by mutual consent also failed and he had lived with the new partner without being able to formalise their relationship (para. 24).

141 *Chernetskiy v. Ukraine*, Application no. 44316/07, Judgment 8 December 2016 (para. 3).

142 *Chernetskiy v. Ukraine*, Application no. 44316/07, Judgment 8 December 2016, (paras. 33. and 34 respectively).

In the case of *Piotrowski v. Poland*, ‘the applicant complained under Articles 8 and 12 of the Convention that by refusing to grant him a divorce, the authorities had breached his right to respect for his private life and prevented him from marrying someone else’ (para. 28).¹⁴³ The Court noted that his ‘argument is not based on an absolute impossibility to obtain a divorce under family law in Poland but on a dismissal of his divorce action by the domestic courts’ (para. 48). Furthermore, the Court emphasised:

‘if the provisions of the Convention cannot be interpreted as guaranteeing a possibility, under domestic law, of obtaining divorce, they cannot, *a fortiori*, be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of that law allowing for a divorce’ (para. 53).

In other words, ‘that in the circumstances of the present case the positive obligations arising under Article 8 of the Convention ... did not impose on the Polish authorities a duty to accept the applicant’s petition for divorce’ (para. 54).¹⁴⁴

In the case of *Babiarz v. Poland*, the applicant, similarly to the case of *Piotrowski v. Poland*, complained ‘under Articles 8 and 12 of the Convention that by refusing to grant him a divorce the authorities had prevented him from marrying the woman with whom he had been living’ (para. 32).¹⁴⁵ The ECtHR came to the same conclusion, namely that

‘if the provisions of the Convention cannot be interpreted as guaranteeing a possibility, under domestic law, of obtaining divorce, they cannot, *a fortiori*, be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of that law allowing for a divorce’. (para. 56).

143 *Piotrowski v. Poland*, Application no. 8923/12, Decision 15 December 2016.

144 Therefore, the Court found that the application was manifestly ill-founded and hence declared inadmissible.

145 *Case Babiarz v. Poland*, Application no. 1955/10, Judgment 10 January 2017. Cf. Heri, 2017.

The Court found that there has been no violation of Article 12 of the Convention by five votes to two.¹⁴⁶

In the case of *Mihaela Mara Pătrăuceanu-Iftime v. Romania*, the applicant, among other alleged breaches of the Conventional rights, claimed under Article 5, Protocol 7 to the Convention, ‘that her request for a divorce had been refused in order to protect her husband in his capacity as a priest’.¹⁴⁷ The Court, being master of the characterisation to be given in law to the facts of the case,¹⁴⁸ decided to examine the complaint from the standpoint of Article 8 alone, in which regard the Court considered that ‘the positive obligations arising under Article 8 of the Convention did not impose a duty on the national authorities to accept the applicant’s petition for divorce as formulated by her’. (para. 41).

7. Summary

The right to marry represents a fundamental human right, protected primarily for its significance in the founding of families. Family has always been understood as one of the basic values in a life of an individual, but also as one of the basic values of society as well for its great contribution in preserving social stability and development. The right to marry is guaranteed and protected by a plethora of international documents, the Universal Declaration on Human Rights (Art. 15), the International Covenant on Civil and Political Rights (Art. 23), the Convention on the Elimination of All Forms of Discrimination Against Women (Art. 16), CRPD (Art 23), Charter (Art. 9), as well as the ECHR (Art. 12). Such an approach clearly demonstrates the dedication to the promotion and safeguarding of this human right in contemporary societies.

146 Judge Sajó noted: ‘I see no reason why the State should be able to force citizens to live in a partnership contrary to their choosing. A marriage between two citizens cannot provide the State with the prerogative of its perpetuation once one of the parties has taken the private and family life decision not to continue living under such a legal bond – even more so with the irretrievable conditions and length in this particular case’ (para. 22). Judge Pinto de Albuquerque accentuated: ‘Article 12 of the Convention does not protect the right to terminate a marriage on demand. If national law allows for divorce, Article 12 secures for divorced persons the right to remarry. The prohibition on divorce may be an admissible restriction to the right to remarry if it is couched in clear terms and applied in a proportionate way. This was not the case. In Poland, the law provides for the right to divorce, but the legal requirements are so vague that they transform the right to remarry into a legal fiction. In fact, the very essence of the applicant’s right to remarry was impaired, due to a restrictive interpretation and strict application of the law in his case. The long agony of the applicant’s marriage is a telling example of the human costs of this legal fiction both for the spouses and for the third persons affected’ (para. 35).

147 *Mihaela Mara Pătrăuceanu-Iftime v. Romania*, Application no. 30777/14, Decision 8 January 2019 (para. 28). Cf.: Grgurev, 2020, pp. 203–219.

148 Cf. *Radomilja and Others v. Croatia*, Application nos. 37685/10 and 22768/12, Judgment 20 March 2018 (para. 114), and in particular the Joint partly dissenting and partly concurring opinion of Judges Yudkivska, Vehabović and Kūris and the Joint dissenting opinion of Judges De Gaetano, Laffranque and Turković.

The ECHR stipulates in Article 12 that ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right’. Unlike other articles of the ECHR, this article does not foresee any limitations, however, it should not be concluded that this right is absolute, since it is subjected to the discretionary powers of contracting states. This means that contracting states may define certain restrictions in their national legislations, but the aim of such restrictions must be legitimate and proportionate to the goal which is to be achieved. As defined in the jurisprudence of the ECtHR, ‘the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’.¹⁴⁹

As defined in the well-established case law of the ECtHR,

‘the Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy’.¹⁵⁰

In legal theory, a consideration of limitations by D. Harris et al. might serve as a basis for further examination.¹⁵¹ Namely, they suggest that regarding procedural limitations, those ‘relate mainly to publicity and solemnization of marriage’, and regarding substance, ‘the state may impose limitations on such matters as marriageable age, consanguinity, the number of spouses, consent and capacity’.¹⁵² Indeed, as emphasised by the Court,

‘the matter of conditions for marriage in the national laws is not left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far’.¹⁵³

149 *Rees v. The United Kingdom*, Application no. 9532/81, Judgment 17 October 1986 (para. 50); *Cossey v. The United Kingdom*, Application no. 10843/84, Judgment 27 September 1990 (para. 43); *Sheffield and Horsham v. The United Kingdom*, Applications nos. 22885/93, 23390/94, Judgment 30 July 1998 (para. 66).

150 *Frasik v. Poland*, Application no. 22933/02, Judgment 5 January 2010 (para. 89); *F. v. Switzerland* (para. 32); *Jaremowicz v. Poland* (para. 49).

151 Harris et al., 2018, pp. 736.

152 Harris et al., 2018, pp. 736. Cf. also: Sörgjerd, 2016, pp. 32–33.; Korać, 1997, pp. 341. and 365–367.; Rainey, McCormick and Ovey, 2020, p. 401.; Alinčić, 2013, pp. 25–26.

153 *Frasik v. Poland*, Application no. 229 R. and *F. v. the United Kingdom*, Application no. 35748/05, Judgment 28 November 2006.

Article 12 regulates the public law dimension of the right to marry. At a private law level, it is complemented by a special provision guaranteeing equality between spouses, being integrated in Article 5 of the Protocol No. 7 to the ECHR, stipulating:

‘Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children.’

As N. Hlača notes, ‘family law provisions are by nature civilisational provisions which prove that law is a cultural phenomenon (and need) adapting to reality’.¹⁵⁴ The legal regulation of the right to marry and to found a family confirms this assumption. As Judge Turković emphasised:

‘The Court has often chosen to follow and not to lead on various issues of social tradition. It is cautious, it endorses the changes taking place at the national level. However, the Court has also demonstrated that it is also prepared to trigger rather than to endorse the change relying on the concept of emerging consensus, proportionality test or balance of harms test emphasising the loss minority will suffer if measure is not introduced. The Court would obviously need the overwhelming consensus to change the traditional institution of marriage.’¹⁵⁵

In that regard, a cautious approach can only be welcomed,¹⁵⁶ particularly having in mind the very nature of ‘the right to marry, the field of matrimony being so closely bound up with the cultural and historical traditions of each member country’.¹⁵⁷

154 Hlača, 1999, p. 403.

155 Turković, 2020, pp. 5, 6. Similarly: Harris et al., 2018, p. 741.

156 This being particularly so, if a different approach is taken into account, namely the one of the Court of the European Union. As J. Kokott, the former Advocate General at this Court noted: ‘... courts can at one and the same time act as mouthpieces of the law and as social engineers’. Kokott, 2020, p. 4. On challenges deriving from the concept of court as social engineers, cf. e.g. Hrabar, 2019, pp. 133–162.

157 As emphasised e.g. by Judge Nußberger in the Separate opinion to the Judgment in the case *Delecalle v. France*, Application no. 37646/13, Judgment 25 October 2018.

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The Right to an Effective Remedy

Nataša PLAVŠIĆ

ABSTRACT

This paper studies the evolution, scope, and practical significance of Article 13 of the European Convention on Human Rights, which guarantees the right to an effective domestic remedy in cases of alleged violations of Convention rights. Through a systematic analysis of the European Court of Human Rights jurisprudence, the study summaries the development of key concepts for applicability of Article 13 of the ECHR, such as ‘national authority’, ‘arguable claim’, and the criteria that determine whether a remedy is effective in law and in practice. Special attention is given to the relationship between Article 13 and other substantive Convention rights, particularly Articles 2, 3, 5, 6 and 8, highlighting the overlap, absorption, and the *lex specialis/lex generalis* relationship in the ECtHR’s approach. The paper furthermore explores the proceduralisation of Convention rights and the absence of the Court’s clear methodology for examining Article 13 complaints. The paper concludes by identifying remaining issues, emphasizing the importance of strengthening national remedial systems as a foundation of principle of subsidiarity and effective human rights protection.

KEYWORDS

European Convention on Human Rights, Article 13 of the ECHR, effective remedy, arguable claim, European Court of Human Rights, subsidiarity, domestic remedies

1. General Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention or ECHR) has developed an effective international system for the protection of human rights. The mechanism established by the Convention ‘is most likely the most influential human rights’¹ mechanism in the world. The ‘beneficiaries of the Convention rights’ are everyone within the jurisdiction of the Contracting States.² The European Court of Human Rights (the Court or the ECtHR) has jurisdiction over the interpretation and application of the Convention, reflecting the principle of shared responsibility. Yet, the ‘scheme of the Convention’³ stipulates

1 Vila, 2017, p. 394.

2 Ehlers, 2007, p. 39.

3 Harris, O’Boyle and Warbrick, 2023, p. 17.

Nataša Plavšić (2026) ‘The Right to an Effective Remedy’ in Paczolay, P. (ed.) *The European Convention on Human Rights A Central and Eastern European Perspective*. Miskolc–Budapest: Central European Academic Publishing, pp. 465–497. https://doi.org/10.71009/2026.pp.tecohr_15

that national authorities hold primary responsibility for implementing and enforcing the Convention rights at the domestic level.

The main objective of the Convention is to safeguard the fundamental freedoms and rights of individuals under the jurisdiction of the state's parties to it. This subsidiary role of the Convention system originates in Article 1 of the Convention, which provides that the High Contracting Parties shall secure everyone within their jurisdiction the rights and freedoms defined in the Convention. The subsidiary nature of the Convention control mechanism is further expressed in Articles 13 and 35 § 1 of the Convention.⁴

Article 13 of the Convention protects the right to an effective remedy and guarantees the accessibility and availability of a remedy at the domestic level to enforce the protection of the right. This Article provides as follows: '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'.

The greatest possible protective effect of the Convention is achieved when individuals and public authorities respect the individual rights of others enshrined in the Convention; nevertheless, daily violations and denials of human rights occur, triggering different mechanisms for their protection. Article 13 of the Convention requires States to have an efficient system in place to protect rights in the event that any of the rights specified in the Convention are violated or denied, making this right one of the key provisions of the Convention.⁵ According to Articles 1 and 13 of the ECHR, national authorities are required to ensure that the rights guaranteed by the Convention are effectively enjoyed and that, in the event that a protected right is violated, a domestic remedy is provided. Thus, the role of the State to protect human rights within the boundaries of its own legal system is expressly stated in Article 13.

The Court's work, which 'has contributed, through a progressive approach and expansive reach',⁶ is directly impacted and influenced by the existence and ongoing development of efficient domestic remedies for the protection of Convention rights. If these remedies 'at home'⁷ are available and effective, the overall caseload will be reduced, allowing the Court to process fewer cases and to review them more effectively.⁸

'If Article 13 does not have full application, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise have to be addressed in the first place within the national legal system. In the long term, the effective functioning, on both the national and international

4 *Cocchiarella v. Italy*, Application No. 64886/01, Judgment 29 March 2006., § 38; *Scordino v. Italy*, Application no. 36813/97, Judgement 29 March 2006, § 140.

5 Beširević et al., 2017, p. 338.

6 Morawska, 2019, p. 160.

7 Tumay, 2009, p. 190.

8 Recommendation REC (2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies.

level, of the scheme of human rights protection set up by the Convention, is liable to be weakened.’⁹

There is no legal obligation to incorporate the Convention into the domestic legal system. According to Article 1 of the Convention, the substance of the rights and freedoms set forth in the Convention must be provided under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States.¹⁰ Additionally, the main positive obligation of the State under Article 13 is to guarantee the availability of an effective remedy at the domestic level. Given the margin of appreciation granted to Contracting States and discretion as to the manner in which they conform to this obligation under Article 13, the protection provided by Article 13 does not go so far as to require any specific type of remedy.¹¹

The role of the Court is to determine whether the national legal system provides an ‘effective remedy’ that would have stopped the alleged infringement of the applicant’s rights or provided the applicant with the necessary redress for any violations that have already happened.

‘Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. This Article therefore requires the provision of a domestic remedy allowing the ‘competent national authority’ both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.’¹²

The importance of Article 13 of the Convention and the existence of an effective legal remedy at the domestic level is highlighted in other documents produced under auspices of the Council of Europe. For example, in Recommendation REC(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, the member states have been encouraged

‘to examine their respective legal systems in the light of the case-law of the Court and to take, if need be, the necessary and appropriate measures to ensure, through legislation or case-law, effective remedies as secured by

9 *Kudla v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 155.

10 *Lithgow and others v. UK*, Application nos. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgment 8 July 1986, § 205.

11 *Kaya v. Turkey*, Application no. 158/1996/777/978, 19 February 1998, § 106 and *Budayeva and Others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment 20 March 2008, § 190.

12 *Rotaru v. Romania* [GC], Application no. 28341/95, Judgment 4 May 2000, § 67.

Article 13. The examination may take place regularly or following a judgment by the Court'.¹³

In addition, declarations adopted in the Interlaken process¹⁴ underlined the importance of the proper implementation of the Convention at the national level and the obligation of the states to provide effective domestic remedies to address alleged violations of the Convention, emphasising the significance of the 'work' done by national authorities, as well as the Court.

Throughout its evolution, the Court has recognised the existence of procedural rights of various substantive Convention rights in the so-called 'proceduralisation'¹⁵ of the Convention rights. This case-law of the Court often resulted in the overlap between Article 13 and other Convention rights, for example Articles 2, 3, 5 and 6 of the Convention, and Article 13 has been comprehended as a 'framework norm.'¹⁶ At the same time, it sometimes created uncertainty in the court's approach as to whether and when Article 13 complaints would be examined. Furthermore, since the right to an effective remedy lacks an independent existence owing to its supplementary nature, this right may only be examined in connection with other substantive Convention rights, again potentially creating scope for overlapping with other Convention rights or its absorption.

This paper analyses the development of the Court's case law under Article 13 and the key cases that have shaped its scope, as well as the general principles regarding Article 13, and its applicability and relationship with other provisions of the Convention. Finally, the paper provides conclusions on the methodology that the Court uses and explores current issues regarding this right.

2. Development of the Case-Law Under Article 13 of the Convention

Article 13 of the Convention is one of the most significant instruments for implementing the Convention in practice at the national level. This Article functions as a mechanism of cooperation between the Convention's system and domestic legal systems, as well as a tool for dialogue between the Strasbourg Court and national

13 Recommendation REC (2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, p. 4.

14 Five ministerial conferences have been organized as part of the Interlaken process to modify the Convention system, with the goal of ensuring improved implementation of the Convention at the domestic level. The conference was first held in February 2010 in Interlaken, in April 2011 in Izmir, in April 2012 in Brighton, and in March 2015 in Brussels. In April 2018, the last conference took place in Copenhagen. Following each of these conferences, declarations including recommendations and measures that member states ought to do domestically, were adopted. On 16 and 17 May 2023, Reykjavík hosted the CoE Summit of Heads of State and Government and Reykjavík Declaration has been adopted.

15 Buckley, Kamber, McCormick, Harris, 2022, p. 269.

16 Ibid.

courts. Nevertheless, in interpreting Article 13 of the Convention, the ECtHR has provided ‘little principled reasoning’,¹⁷ leading to the frequently cited opinion from two of the Court’s judges that,

‘Article 13 constitutes one of the most obscure clauses in the Convention and that its application raises extremely difficult and complicated problems of interpretation’.¹⁸

At first, the Court analysed Article 13 using a very restrictive methodology predicated on a verbatim reading of its clause. The phrase ‘everyone whose rights and freedoms... are violated’ was interpreted literally, meaning that the Court¹⁹ would only find a breach of Article 13 if it also found a violation of any other Article of the Convention²⁰ (emphasis added).

This limiting approach was revised in the *Klass* ruling, which held that Article 13 must be interpreted as guaranteeing an ‘effective remedy before a national authority to everyone who claims that his rights and freedoms under the Convention have been violated’²¹ (emphasis added). However, the scope of application of Article 13 remained unclear; further development of the Court’s case-law helped establish the threshold for applying Article 13 and provided clarification on the notion of ‘everyone who claims a violation’.

In *Boyle and Rice* case, the ECtHR reiterated that

‘Article 13 guarantees the availability of a remedy at national level to enforce – and hence to allege non-compliance with – the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order’. However, the Court further emphasised that, ‘Article 13 cannot reasonably be interpreted so as to require a remedy in domestic law *in* respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an *arguable* one in terms of the Convention’²² (emphasis added).

Still, the Court did not provide an abstract definition of the notion of arguable claim, stating that

17 Reiertsen, 2022, p. 22.

18 See Partially dissenting opinion of judges Matscher and Pinheiro Farinha in *Malone v. UK*, application no. 8691/79, 2 August 1984.

19 At that time Commission and the Court.

20 *Wilde, Ooms and Versyp (Vagrancy) v. Belgium* (Merits), Application nos. 2832/66; 2835/66; 2899/66). Judgment 18 June 1971, §95 and *Swedish Engine Drivers’ Union v. Sweden*, Application no. 5614/72, Judgment 6 February 1976, § 50.

21 *Klass and others v. Germany*, Application no. 5029/71, Judgment 6 September 1978, § 64.

22 *Boyle and Rice v. UK*, Application nos. 9659/82; 9658/82, Judgment 27 April 1988, § 52.

‘rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of violation forming the basis of a complaint under Article 13 was arguable and, if so, whether the requirements of Article 13 were met in relation thereto’.²³

In the *Silver* case²⁴, the Court reaffirmed key ideas derived from the abovementioned case-law while also establishing a few important new concepts – some of which will be discussed later. First, the ECtHR stressed in *Silver* that if an individual has an arguable claim of a breach of their rights under the Convention, they should have a remedy before a national authority to have the claim decided and, if appropriate, to receive redress. Second, the *Silver* case interpreted the notion ‘a national authority’ and outlined that ‘the authority referred to in Article 13 may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective’.²⁵ Third, the *Silver* case established the possibility of combining domestic legal remedies; if a single remedy is unable to fully satisfy the requirements of Article 13, a combination of remedies available under domestic law may be able to accomplish this. Furthermore, the Court reiterated in *Silver* that the Contracting States are not required by Article 13 or the Convention to implement any particular method in order to guarantee the efficient implementation of any of the Convention’s provisions within their national legal systems²⁶.

Although *Silver* case provided some new insights into the scope of Article 13, there were still some outstanding issues, especially regarding the necessity and methodology of the court’s examination of the complaint under Article 13 and potential overlaps with other provisions of the Convention. These issues were addressed in the *Kudla* judgment²⁷, often mentioned as the ‘renaissance’²⁸ case of Article 13 case-law.

In the *Kudla* case, the applicant complained under Article 13 of the Convention that he had no effective domestic legal remedy whereby to raise the issue of the

23 *Boyle and Rice v. UK*, Application nos. 9659/82; 9658/82, Judgment 27 April 1988, § 55.

24 *Silver and Others v. UK*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, §113.

25 *Ibid.*

26 Today the Convention became an integral part of the domestic legal orders of all states, see Recommendation REC (2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, point 7.

27 *Kudła v. Poland [GC]*, Application no. 30210/96, Judgment 26 October 2000.

28 Chanturia, 2023, p.10; see Morawska, 2019, p. 162 on the significance and influence of *Kudla* judgment.

excessive length of the proceedings in his case before a national authority.²⁹ The Court was called upon to answer the question whether it was necessary to examine the complaint under Article 13, since in many previous cases in which the Court had found a violation of Article 6 § 1, it did not consider it necessary to decide on an additional complaint under Article 13. Analysing the issue of overlap and absorption of different Convention rights, the Court emphasised that

‘the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 § 1’.³⁰

The main reason for the change in the Court’s approach to separately examining complaints under Article 13 arose from the ‘growing frequency’ of violations in this regard and ‘the important danger’ that exists for the rule of law within national legal orders when ‘excessive delays in the administration of justice’ occur ‘in respect of which litigants have no domestic remedy’.³¹ In *Kudla*, the Court highlighted that the scope of the States’ obligations under Article 13 varies based on the nature of complaint raised by the applicant; nevertheless, the remedy envisaged by Article 13 of the Convention must be ‘effective’ both in practice and in law.³²

Even with its importance, the above-mentioned rulings indicate that the Court did not initially consider Article 13 of the Convention particularly significant, nor did it see it necessary to provide general principles for interpreting this article. In the words of Judges Matscher and Pinheiro Farinha ‘for approximately two decades, the Convention institutions avoided analysing this provision, for the most part advancing barely convincing reasons’.³³ Starting from *Kudla*, the ECtHR revisited its position on overlapping rights and the need to look into an additional complaint under Article 13, mainly due to the altered circumstances regarding the broader acknowledgment of the subsidiarity principle, as well as an increase in the number of similar violations, and a general backlog of cases before the Court. Although there is an ongoing trend towards coherence in the interpretation of this provision, outstanding questions

29 See *Kudla v. Poland*, Application no. 30210/96, Judgment 26 October 2000, §113: ‘The Court has been invited to determine the scope of the Contracting States’ obligation under Article 13 to provide a person with an ‘effective remedy before a national authority’ if the Convention right asserted by the applicant is the right to a ‘hearing within a reasonable time’ guaranteed by Article 6 § 1. The applicant argued that Article 13 should be interpreted as requiring such an ‘effective remedy’; the Government disputed that. The Commission did not find it necessary to determine this issue’.

30 Ibid.

31 Ibid.

32 *Kudla v. Poland*, Application no. 30210/96, Judgment 26 October 2000, §157.

33 Recommendation REC (2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, p. 4.

remain, including the lack of a clear methodology in the Court's approach to the examination of Article 13 complaint.

3. Requirements for Applicability of the Right to an Effective Remedy – General Principles

Specific requirements for the applicability of the right to an effective remedy may be identified by examining the text of Article 13 and the relevant case-law of the Court on this Article. A significant number of these requirements are linked to different State obligations, as well as to the applicant's obligation under Articles 13 and 35. These obligations, converted into requirements for the applicability of the right to an effective remedy, will be discussed in the next section and will provide some broad guidelines. As previously stated, the main obligation of the State under Article 13 of the Convention is to ensure that the applicant enjoys at the domestic level access to an effective domestic remedy for any arguable claim of a violation of the Convention's rights. In relation to this, the State also has an obligation to determine a national authority that will decide on the applicant's claim, thus defining the main institutional requirement for the applicability of this right.

3.1. Notion of 'A National Authority' – Institutional Requirement

Based on Article 13 of the Convention, the State has a duty to determine at the national level a 'national authority' in order both to have the applicant's claim decided and, if appropriate, to obtain redress.³⁴ This authority does not necessarily have to be judicial.³⁵ According to the case-law of the Court,³⁶ while a remedy before a judicial authority can be essential, that authority may also be a quasi-judicial body such as an ombudsman,³⁷ an administrative authority such as a government minister,³⁸ or a political authority such as a parliamentary commission.³⁹ These elements are essential: the first determining element for fulfilling the institutional requirement of an effective remedy concerns the powers and procedural guarantees entrusted to that national authority, as well as procedural safeguards afforded to the applicant;⁴⁰ the

34 *Klass and Others v. Germany*, Application No. 5029/71, Judgment 6 September 1978, § 64; *Silver and Others v. UK*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, § 113.

35 See Guide on Article 13 of the European Convention, 2023, p. 25. 'According to the *travaux préparatoires* in respect of the European Convention on Human Rights, the national authority before which a remedy will be effective may be a judicial or non-judicial body'. Also, in *Klass and Others v. Germany*, Application no. 5029/71, Judgment 6 September 1978, § 67; *Rotaru v. Romania* [GC], Application no. 28341/95, Judgment 4 May 2000, § 69.

36 Guide on Article 13 of the European Convention, 2023, p. 28.

37 *Leander v. Sweden*, Application no. 9248/81, Judgment 26 March 1987, § 83.

38 *Boyle and Rice v. UK*, Application nos. 9659/82; 9658/82, Judgment 27 April 1988, § 87.

39 *Klass and Others v. Germany*, Application no. 5029/71, Judgment 6 September 1978, § 67.

40 Harris, O'Boyle, and Warbrick, 2023, p. 763.

second element relates to the independence of this ‘national authority’ from the other national authority allegedly responsible for the violation of Convention right(s).

The place of the national authority within the national legal system is not decisive; an authority can provide effective protection even if it is part of the executive or legislative branches of power, as long as it is independent.⁴¹ Since judicial authorities are presumed to be independent, the ECtHR will verify whether nonjudicial authorities are independent.⁴² For example, in *Khan v. the United Kingdom*, the Court examined the independence of non-judicial authorities – the various avenues open to the applicant in respect of the Article 8 complaint – and decided that ‘the system of investigation of complaints did not meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority and thus provide an effective remedy within the meaning of Article 13’.⁴³

In *Mugemangango v. Belgium*,⁴⁴ the Court examined an Article 13 complaint in conjunction with Article 3 of Protocol 1 and Belgium’s failure to provide an effective remedy by which applicants could challenge election results and seek a recount. The Court found the absence of ‘a procedure offering adequate and sufficient safeguards to prevent arbitrariness and to ensure (...) effective examination’ of the complaint of the applicant, a candidate for election to the Parliament of the Walloon Region in 2014, who sought a recount of the ballot papers for his electoral constituency, after having lacked 14 votes to obtain a seat. The Court found that applicant’s complaint ‘was examined by a body which did not provide the requisite guarantees of its impartiality (...) and whose discretion was not circumscribed with sufficient precision by provisions of domestic law’ and ‘the safeguards afforded to the applicant during the procedure were likewise insufficient, having been introduced on a discretionary basis’.⁴⁵

The power granted to the ‘authority’ represent an additional institutional requirement of an effective remedy. For a non-judicial authority to be recognised as a competent national authority, it must have the power to hand down legally binding decisions.⁴⁶ The Court has analysed different types of bodies that have advisory powers and concluded that authorities that have only advisory powers cannot be regarded as providing an effective remedy. For example, in *Chahal v. the United Kingdom*, the Court recognised deficiencies in non-judicial proceedings before a panel reviewing a terrorism suspect’s deportation order.⁴⁷ In *Silver and Others v. the United Kingdom*,⁴⁸ the Court examined different remedies that were available to the applicants – four channels of

41 *Leander v. Sweden*, Application no. 9248/81, Judgment 26 March 1987, § 77 b.

42 *Ibid.*

43 *Khan v. UK*, Application no. 35394/97, Judgment 12 May 2000, §§ 44–47.

44 *Mugemangango v. Belgium* [GC], Application no. 310/15, Judgment 10 July 2020, § 137–139.

45 *Mugemangango v. Belgium* [GC], Application no. 310/15, Judgment 10 July 2020, 2020, § 122.

46 *Silver and Others v. UK*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, §§ 114–115; *Chahal v. UK*, Application no. 22414/93, Judgment 15 November 1996, § 154.

47 *Chahal v. UK* [GC], Application no. 22414/93, Judgment 15 November 1996, § 154.

48 *Silver and Others v. UK*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, §§ 114–115.

complaints against abuse of the powers to control prisoners' correspondence. The ECtHR found that these authorities cannot be viewed as providing an appropriate remedy because they lacked the authority to render legally binding decisions.

3.2. *Notion of 'An Arguable Claim'*

It has already been already mentioned that in the interpretation of Article 13, the Court established the notion of 'an arguable claim', stating that this Article cannot reasonably be interpreted so as to require a remedy in domestic law in respect of every supposed grievance under the Convention that an individual may have, no matter how unmeritorious complaint may be and that the grievance must be an arguable one in terms of the Convention.⁴⁹

However, the case-law of the ECtHR has not provided an abstract or general definition of the notion of 'an arguable claim', which makes the 'precise delimitation' of an arguability test challenging.⁵⁰ From the early case-law, the Court has adopted the approach that this notion must be determined in the light of the particular facts and the nature of the legal issue or issues raised,⁵¹ thus introducing the so-called concretisation principle. The right to a remedy provided in Article 13 applies only to alleged violations which may be considered arguable within the meaning of the Convention. Since Article 13 has a subsidiary nature and is only applicable in conjunction with other Convention rights, in order to rely on Article 13, the applicant must have an arguable claim under another Article of the Convention.⁵²

Considering the concretisation principle that the Court applies in the arguability test, the Court will determine whether an Article 13 complaint is arguable and applicable in relation to a possible infringement of the Convention rights for which the right to a domestic remedy is raised under Article 13. If the Court finds a violation of an Article of the Convention or the Protocols in response to the complaint for which the right to a domestic remedy is raised under Article 13, the Court will find the Article 13 complaint to be arguable. However, a finding of a violation of another Convention right is not a requirement for the application of Article 13. Article 13 may be applicable and arguable even without a violation of another substantive Convention right.⁵³

An additional question arises concerning the distinction between the notions of 'manifestly ill founded' and 'arguable claim'. Under Article 35 of the Convention, which will be discussed later, at the admissibility stage, the ECtHR has to examine whether the application is manifestly ill founded, which essentially means taking a position on the merits of the case. The fact that a complaint has been declared admissible under Article 35 of the Convention may be an indication that it can be regarded

49 Beširević et al., 2017, p. 343.

50 Rainey, McCormick, Ovey, Wicks, 2021, p. 138.

51 *Boyle and Rice v. UK*, Application nos. 9659/82; 9658/82, Judgment 27 April 1988, § 55.

52 Regarding the Court's case-law on an arguable claim See Guide on Article 13 of the European Convention, 2023, Points 10–23.

53 *Klass and Others v. Germany*, 1978, § 64, Beširević et al., 2017, p. 346.

as ‘arguable’. ‘The admissibility of a complaint is not so much about a *prima facie* violation but rather a *prima facie* ‘arguability’”.⁵⁴

The inadmissibility of a complaint under another Article of the Convention may be an indication of the inapplicability or non-violation of Article 13. In *Boyle and Rice*⁵⁵, the Court established that ‘it was difficult to conceive how a ‘manifestly ill-founded’ claim could nevertheless be ‘arguable’ and *vice versa*’. Later, in *Powell and Rayner*,⁵⁶ the Court explained that

‘Article 13 and Article 35 § 1 are concerned, within their respective spheres, with the availability of remedies for the enforcement of the same Convention rights and freedoms. The coherence of this dual system of enforcement is at risk of being undermined if Article 13 is interpreted as requiring national law to make available an ‘effective remedy’ for a grievance classified under Article 35 as being so weak as not to warrant examination on its merits at international level. Whatever threshold the Commission has set in its case-law for declaring claims ‘manifestly ill-founded’ under Article 35, in principle it should set the same threshold in regard to the parallel notion of ‘arguability’ under Article 13’.⁵⁷

For Article 13 to be applicable, the complaint must also be arguable. A complaint that has been declared manifestly ill founded by the Court will not satisfy the threshold test for reliance on Article 13, and there will be no violation of that provision.⁵⁸

54 Morawska, 2019, p. 170.

55 *Boyle and Rice v. UK*, Application no. 5029/71, Judgment 6 September 1978, § 54.

56 In case of *Powell and Rayner*, Application no. 9310/81, Judgment 21 February 1990, §§ 31–33, the Court emphasized that ‘each one of the claims of violation forming the basis of the applicants’ complaints under Article 13 (the ‘substantive’ claims) was declared inadmissible by the Commission as being ‘manifestly ill-founded’. The majority of the Commission, however, drew a distinction between the notions of ‘manifestly ill-founded’ and lack of ‘arguability’. It was ‘implicit in the Commission’s established case-law that the term ‘manifestly ill-founded’ extends further than the literal meaning of the word ‘manifest’ would suggest at first reading’. Thus, some serious claims might give rise to a *prima facie* issue but, after ‘full examination’ at the admissibility stage, ultimately be rejected as manifestly ill-founded notwithstanding their arguable character. ‘This does not mean, however, that in the present case the Court is bound to hold Article 13 (art. 13) Inapplicable solely as a result of the Commission’s decisions declaring the applicants’ substantive claims under Articles 6 § 1 and 8 to be manifestly ill-founded. Whilst those decisions as such are unreviewable, the Court is competent to take cognisance of all questions of fact and law arising in the context of Article 13 complaints duly referred to it, including the ‘arguability’ or not of each of the substantive claims. In order to determine the latter question, the particular facts and the nature of the legal issues raised must be examined, notably in the light of the Commission’s admissibility decisions and the reasoning contained therein’.

57 *Powell and Rayner v UK*, Application no. 9310/81, Judgment 21 February 1990, § 33.

58 *Čonka v Belgium*, Application no. 51564/99, Judgment 5 February 2002, § 76. In *Čonka* case, the complaints of a violation of Article 3 which the Court declared manifestly ill-founded were not arguable. Accordingly, the Court found that there has been no violation of Article 13 of the Convention taken in conjunction with Article 3.

3.3. Notion of ‘An Effective Remedy’ and Its Exhaustion – Substantive Requirement

The question of what constitutes ‘an effective remedy’ under Article 13 of the Convention and what makes a remedy effective arises together with fulfilment of different types of State obligations, as well as the applicant’s obligations.⁵⁹ ‘Something has to fulfil its intended goal in order to be effective. Consequently, a remedy is considered ‘effective’ if it achieves its goal or goals.’⁶⁰

The main goal of an effective remedy is its capability to directly resolve the impugned state or condition, either by preventing the alleged violation or its continuation, or by providing adequate redress, fair compensation, and satisfaction for any violation that has already occurred.⁶¹

‘The protection afforded by Article 13 is not absolute. The context in which an alleged violation or category of violations occurs may entail inherent limitations in the conceivable remedy. In such circumstances Article 13 is not treated as being inapplicable but its requirement of ‘an effective remedy’ is to be read as meaning ‘a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in [the particular context]’.⁶²

In this sense, the Court emphasised that ‘the remedy required by Article 13 must be ‘effective’ both in law and in practice.’⁶³ This establishes a primary obligation on the part of the State to set up an efficient remedial system for safeguarding Convention rights in domestic procedural legislation, as well as in the practice of administrative and judicial authorities. This State obligation comes with a degree of discretion. The Convention does not specify how the Contracting States are to ensure that any of its provisions are implemented effectively within their internal laws. As a result, the States are free to choose how they wish to implement an effective remedy under Article 13.⁶⁴ Nevertheless, as will be explained later, the nature of the right to issue affects the type of remedy that the State must offer in accordance with Article 13.⁶⁵

The provisions of Article 13 do not provide a remedy by which a Contracting State’s legislation may be contested before a national authority on the grounds of being contrary to the Convention *in abstracto*, nor do they allow a challenge to a general policy

59 See for this section of the paper more on Guide on Article 13 of the European Convention, 2023, pp. 14–20.

60 Reijers, 2022, p. 28.

61 Etinski, 2004, p. 437 and *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 158.

62 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 151. See Shelton, 2015, pp. 7–21.

63 *Ibid.*, § 157; *Vilho Eskelinen and Others v. Finland* [GC], Application no. 63235/00, Judgment 19 April 2007 § 80.

64 *Silver and Others v. UK*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, § 113.

65 Zombory, 2023, pp. 205–244.

as such.⁶⁶ The effectiveness of the remedy is assessed *in concreto*, in the light of the particular facts of the case and the nature of the legal issue or issues raised.

A strong indicator of the effectiveness of a remedy is that the domestic authorities consider the merits of complaints under the Convention.⁶⁷ The substance of the complaint alleging infringement of the Convention must be taken into account by a domestic authority; otherwise, the remedy will be insufficient.⁶⁸ Remedies must be directly accessible and available for the person concerned – Article 13 does not mean an accessible remedy guaranteed to succeed, but rather an accessible and available remedy before an authority competent to examine the merits of the Convention complaint. The ‘effectiveness’ of a remedy for the purposes of Article 13 does not depend on the certainty of a positive outcome for the applicant⁶⁹, but it must ‘offer reasonable prospects of success.’⁷⁰

If there is a weak likelihood of success in the light of the particular circumstances of the case, or if the applicant’s complaint was dismissed, this by itself does not weaken the ‘effectiveness’ of a remedy in general nor is it sufficient to declare a remedy ineffective.⁷¹ Additionally, the existence of mere doubts as to the prospects of the success of a particular remedy is not a valid reason for failing to exhaust that avenue of redress, which is the main obligation of the applicant under Article 35 of the Convention and will be discussed later. Furthermore, in order to be effective, a domestic remedy must fulfil the obligation of promptness and must present minimum guarantees of speed in the decision-making process.⁷² A successful outcome of an effective remedy will vary, and mainly depends on the circumstances of the case, such as the annulment of an act or action, removal or amendment of an act breaching the Convention, repeating the procedure, compensation for damage sustained, or sanctions imposed on the person responsible for the act or action.⁷³

Regarding the date of the remedy’s introduction into the national legal system and the availability of case-law pertaining to it, there are specific rules in place. The general rule is that an effective remedy must exist and be in place on the date the application is submitted to the Court in order for the exhaustion rule under Article 35 of the Convention to be applicable. Nevertheless, there may be exceptions to this rule, which may be justified by the particulars of each case. The Court acknowledges that this can be the case when a new national law is introduced with a retroactive effect to address a structural issue that existed in the national legal system before that law was

66 *Hatton and Others v. UK* [GC], Application no. 36022/97, Judgment 8 July 2003, § 138.

67 *Hatton and Others v. UK* [GC], Application no. 36022/97, Judgment 8 July 2003, § 141.

68 *Glas Nadezhda EOOD and Elenkov v. Bulgaria*, Application no. 14134/02, Judgment 11 October 2007, § 69.

69 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 157.

70 *Selahattin Demirtaş v. Turkey* (No. 2) [GC], Application no. 14305/17, Judgment 22 December 2020, § 205.

71 *Ibid.*

72 *Pine Valley Developments Ltd and Others v. Ireland*, Application no. 12742/87, Judgment 29 November 1991, § 47.

73 Zombory, 2023, pp. 205–244.

adopted. The law, with retroactive effect, should provide direct redress for violations of fundamental procedural rights.⁷⁴

The Court has determined that it is not required to consider remedies that were either unavailable at the relevant time or inapplicable given the circumstances of the case. The Court may still examine the effectiveness of a remedy before the practice of the domestic courts can be determined,⁷⁵ as it cannot be satisfied that an effective remedy was available in theory and in practice by a single final court decision, no matter how thorough the reasoning may be⁷⁶. Finally, the combined remedies provided under domestic law may meet the requirements of Article 13, even where no single remedy may itself entirely satisfy them.⁷⁷

For a remedy to be effective, it must also be used by the applicant in a proper manner – this creates an obligation for the applicant under Article 35§1 of the Convention to exhaust domestic legal remedies in accordance with the applicable rules and procedures of domestic law.⁷⁸ It has previously been stated that Articles 13 and 35§1 of the Convention express the subsidiary nature of the Convention system, with Article 13 generating positive obligations for the States and Article 35§1 generating obligations for the applicant; these obligations are in direct correlation.

The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights.⁷⁹ According to the wording of Article 35§1 of the Convention, the applicant has an obligation to exhaust all domestic remedies in order to submit application to the Court, giving the national authorities, mainly the courts, the opportunity to prevent the alleged violations of the Convention or to provide appropriate redress for any violation that has already occurred⁸⁰. Thus, an applicant who fails to use and exhaust all appropriate and relevant domestic remedies cannot rely on Article 13 separately or in conjunction with another Article of the Convention.

‘States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. Those who wish to invoke the supervisory jurisdiction of

74 *Stoica v. Romania*, Application no. 42722/02, Judgment 4 March 2008, § 104, *Muratović v. Serbia*, Application no. 41698/06, Judgment 21 March 2017, §§ 13–16, and Practical Guide on Admissibility Criteria, 2023, pp. 38–40

75 *Slaviček v. Croatia* (dec.), Application no. 20862/02, Judgment 4 July 2002.

76 *Sürmeli v. Germany* [GC], Application no. 75529/01, Judgment 8 June 2006, § 113.

77 *Silver and Others v. the United Kingdom*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, § 113, *Kudła v. Poland* [GC], 2000, § 157.

78 *Vučković and Others v. Serbia* [GC], Applications nos. 17153/11... 17443/11, Judgment 25 March 2014, § 90.

79 Schabas, 2015, pp. 546–555.

80 For more on Exhaustion of remedies requirement see Practical Guide on Admissibility Criteria, 2023, pp. 27–38.

the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system.’⁸¹

When it comes to applying the exhaustion of domestic remedies rule under Article 35§1, the Court has a well-established case-law that mostly corresponds to the concepts already discussed under Article 13. First, an individual is only obliged to exhaust domestic remedies that are available in theory and in practice at the relevant time ‘remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success’.⁸² In determining whether any particular remedy meets the criteria of availability and effectiveness, the particular circumstances of the individual case are decisive. Although the rule of exhaustion is flexible and is not apply automatically, the applicant must comply with the applicable rules and procedures of domestic law⁸³ and the Convention right complaint has to be raised in domestic proceedings ‘at least in substance’⁸⁴. In the presence of several potentially effective remedies which an individual can pursue, the individual is only required to use one of them and is entitled to choose a remedy which addresses his or her essential grievances.⁸⁵

Regarding the burden of proof,

‘it is incumbent on the Government pleading non-exhaustion to satisfy it that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success. Once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances exempting him or her from this requirement’.⁸⁶

To summarise, the state is required by Article 13 of the Convention to provide, in theory and in practice, at the national level, an effective legal remedy for the protection of rights under the Convention – the State has an obligation to enact the law establishing an effective remedy and to provide credible evidence that this remedy is effective in practice. The nature of the right and the circumstances of the case

81 *Andelka Bistrović-Nastić v. Serbia*, Application no. 47040/07, Judgment 11 September 2018, § 20.

82 *Sejdović v. Italy*, [GC], Application no. 56581/00, Judgment 1 March 2006, § 46.

83 *Vučković and Others v. Serbia* [GC], Applications nos. 17153/11... 17443/11, Judgment 25 March 2014, § 90.

84 *Vučković and Others v. Serbia* [GC], Applications nos. 17153/11... 17443/11, Judgment 25 March 2014, §§ 72, 79 and §§ 81–82;

85 *Jeličić v. Bosnia and Herzegovina* (dec.), Application no. 41183/02, Judgment 15 November 2005.

86 *Selahattin Demirtaş v. Turkey* (No. 2) [GC], Application no. 14305/17, Judgment 22 December 2020, § 205.

regarding the infringement will essentially determine the specific legal remedy. Preventive and compensatory legal remedies are the most commonly identified in the present classifications of legal remedy types, primarily because of the Court's case-law and their nature and legal effects. Another important, but more general, remedy is the constitutional complaint or appeal.

At the same time, before submitting an application to the Court, the applicant has an obligation to exhaust all effective domestic remedies in accordance with the applicable rules and procedures of domestic law – that is, remedies that are effective and capable of redressing the alleged violation, that are accessible and available to the applicant and offer reasonable prospects of success.

4. Article 13 of the Convention and Other Substantive Provision of the Convention and Its Protocols

The right to an effective remedy has a supplementary nature. This right does not exist in and of itself; rather, it is applicable in conjunction with complaints alleging infringement of all Convention rights, and can only be considered in connection with other substantive Convention rights. As mentioned, the existence of other Convention rights, namely Articles 5 §§ 4 and 5 and 6 § 1 of the Convention, which have incorporated *in texto* remedial requirements and guarantees of a specific remedy,⁸⁷ creates a special relationship between Article 13 and these rights, generating either separate or coexisting application of these Convention rights, but most likely resulting in the absorption of Article 13.⁸⁸ This correlation between Article 13 and the said Articles of the Convention is recognised in terms of *lex generalis* and *lex specialis*. Article 13 is a more general provision, while other articles may provide a stronger guarantee of procedural rights and specific remedies.⁸⁹

Additionally, as previously indicated, with the 'proceduralisation' of the Convention, the ECtHR has acknowledged the existence of procedural rights derived from various substantive Convention rights.⁹⁰ For example, although there are no explicit procedural rights in Articles 2 or 3 of the Convention, the Court has acknowledged implicit procedural guarantees in these Articles to conduct an effective investigation, suggesting that Article 13 requirements are broader than a Contracting State's obligation under Articles 2 or 3 of the Convention.⁹¹

87 Reiertsen, 2015, p. 31.

88 Chanturia, 2023, p.19. Beširević et al., 2017, p. 346.

89 Grabenwarter Ch., 2014, p. 328. cited in Chanturia, 2023, p. 19, *A and others v. the UK [GC]*, 2009, § 202.

90 See Footnote 15.

91 *Lyanova and Aliyeva v. Russia*, Applications nos. 12713/02 and 28440/03, Judgment 2 October 2008, § 134, *Khashiyev and Akayeva v. Russia*, Application nos. 57942/00 and 57945/00, Judgment 24 February 2005, § 183.

Both these variants, depending on the circumstances of a specific case, could enable Article 13 of the Convention to overlap with other Convention rights or be absorbed into them. In the following section of this paper, the interplay of Article 13 with other important and often discussed rights of the Convention – specifically Art. 2, 3, 5, 6 and 8 of the Convention⁹² – will be examined, and it will be analysed how the nature of the ‘main’ right essentially determines the nature and type of remedies under Article 13 of the Convention.⁹³

4.1. Article 13 of the Convention in Conjunction With or in the Light of Article 2

The wording of Article 2 of the Convention does not mention any procedural rights; yet, the Court’s case-law has recognised additional rights within Article 2 of the Convention, including the right to compensation and the right to an effective investigation into the circumstances of one’s death. Specifically,

‘the obligation to protect the right to life under this provision, read in conjunction with the state’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in the Convention,’ requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alias*, agents of the State,’⁹⁴

by private persons,⁹⁵ or where the cause of death is unknown or self-inflicted.⁹⁶ Moreover, the Court considered that the State’s obligation to set up an effective judicial system capable of providing victims (or their next of kin) with appropriate redress for the purposes of Article 2 – that is, a remedy in the civil courts to claim compensation for the non-pecuniary damage, either alone or in conjunction with a remedy in the criminal courts – facilitate any responsibility to be established and any appropriate civil redress to be obtained.⁹⁷

Regarding Article 13 in the context of the right to life, the notion of an effective remedy under Article 13 demands a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for relatives to the investigatory procedure and the payment of compensation where appropriate. ‘Seen in these terms, the requirements of Article 13 are broader

92 The scope of this study is focused on most often examined and analyzed Articles. For the other Articles of the Convention and relationship with Article 13 see Guide on Article 13 of the European Convention, 2023.

93 Guide on Article 13 of the European Convention, 2023, p. 25,

94 *McCann and Others v. UK*, Application no. 18984/91, Judgment 27 September 1995, Series A no. 324, § 161.

95 *Opuz v. Turkey*, Application no. 33401/02, Judgment 9 June 2009, § 150.

96 *Trubnikov v. Russia*, Application no. 49790/99, Judgment 5 July 2005, § 68.

97 *Hubert Nowak v. Poland*, Application no. 57916/16, 16 February 2023, § 86.

than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation.⁹⁸

Since both Articles guarantee the right to an effective investigation and payment of appropriate redress, it is often the case that, after examining the alleged violation of Article 2 of the Convention, the Court considers it unnecessary to examine the complaints separately under Article 13 in conjunction with Article 2 of the Convention.⁹⁹ Still, if the Court decides to separately examine the alleged violation of Article 13 in conjunction with Article 2, Article 13 may not always require the authorities to assume responsibility for investigating the allegations regarding the person's death. However, a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the violation of Convention rights must be available to the victim or the victim's family.¹⁰⁰ In other words,

'What is important is the impact the State's failure to comply with its procedural obligation under Article 2 had on the deceased's family's access to other available and effective remedies for establishing liability on the part of State officials or bodies for acts or omissions entailing the breach of their rights under Article 2 and, as appropriate, obtaining compensation'.¹⁰¹

As a consequence of these positions, if a criminal investigation in a specific case does not meet the requirements of State's procedural obligation to conduct an effective investigation under Article 2, this does not automatically mean there has been a breach of Article 13 of the Convention; for example, the Court found no violation of Article 13 of the Convention, 'since the existing civil actions were effective remedies capable of providing redress for fatal shootings by police officers'.¹⁰²

4.2. Article 13 of the Convention in Conjunction With or in the Light of Article 3

Similar to Article 2 of the Convention, no procedural rights are mentioned explicitly in Article 3; nonetheless, the Court's case-law has acknowledged a number of special procedural rights. The main one is the right to an effective investigation into allegations of ill treatment, which is triggered under Article 3 whenever someone has an arguable claim. Additionally, Article 3 of the Convention recognises the right to compensation, just like Article 2 does.

98 *Kaya v. Turkey*, Application no. 158/1996/777/978, 19 February 1998, § 107.

99 *Budayeva and Others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment 20 March 2008, § 195.

100 *Centre for legal resources on behalf of Valentin Câmpeanu v. Romania*, [GC], Application no. 47848/08, Judgment 17 July 2014, § 149.

101 *Budayeva and Others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment 20 March 2008, § 19.

102 Guide on Article 13 of the European Convention, 2023, p. 26, for Selected examples of examination of Article 13 by the Court see Guide on Article 13 of the European Convention, 2023, p. 26.

Regarding Article 13 in the context of the prohibition of torture, the requirements of Article 13 for an effective legal remedy are broader than a State's obligation under Article 3 to conduct an effective investigation. The Court emphasised that,

'The nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture. Accordingly, as regards Article 13, where an individual has an arguable claim that he has been tortured by agents of the state, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a 'prompt and impartial' investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an 'effective remedy' under Article 13'.¹⁰³

Regarding the question of compensation, Article 13 of the Convention provides a remedy to claim compensation for the non-pecuniary damage sustained as a result of a violation of Article 3 of the Convention. The Court underlined that,

'Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should, however, be available to the victim or the victim's family a mechanism for establishing any liability of state officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should, in principle, be part of the range of available remedies'.¹⁰⁴

In addition, the Court emphasised that given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised, and the importance the Court

103 *Aksoy v. Turkey*, Application no. 21987/93, Judgment 18 December 1996, §98.

104 *Z and others v. UK* [GC], Application no. 29392/95, Judgment 10 May 2001, §109.

attaches to Article 3, the notion of an effective remedy under Article 13 requires an independent and rigorous scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3.¹⁰⁵

Because of the broad scope of Article 3's *ratione materiae* applicability to various situations of potential ill treatment, the Court has developed additional conclusions on the relation between Article 13 of the Convention and Article 3.¹⁰⁶

For example, since Article 3 is applicable to asylum, expulsion, and extradition cases, the Court established a case-law regarding the requirements under Article 13 to ensure an effective domestic remedy in the context of these issues. The Court emphasises that that an applicant's complaint alleging that his or her removal to a third state would expose him or her to treatment prohibited under Article 3 of the Convention must imperatively be subject to close scrutiny by a 'national authority. The notion of 'effective remedy' within the meaning of Article 13, taken together with Article 3 requires, firstly, 'independent and rigorous scrutiny' of any complaint made by a person in such a situation, where 'there exist substantial grounds for fearing a real risk of treatment contrary to Article 3,' and, secondly, 'the possibility of suspending the implementation of the measure impugned.'¹⁰⁷ The Court considers that the notion of an effective remedy under Article 13 requires that the remedy be capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible¹⁰⁸. Furthermore, in the circumstances of expulsion cases, an efficient remedy must have an automatic suspensive effect.¹⁰⁹

The Court's case-law concerning conditions of detention and an effective legal remedy for prisoners' complaints recognises that both preventive and compensatory remedies have to be complementary in order to be effective. The ECtHR underlined that two types of remedy are possible regarding complaints under Article 3 about inhuman or degrading conditions of detention: improvement in these conditions by prompt termination of violation and compensation for any damage sustained as a result.

'Therefore, for a person held in such conditions, a remedy capable of rapidly bringing the ongoing violation to an end is of the greatest value and, indeed, indispensable in view of the special importance attached to the right under Article 3. However, once the impugned situation has come to an end because this person has been released or placed in conditions that meet the

105 *El-Masri v. the Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Judgment 13 December 2012, § 257.

106 For selected examples of examination of Article 13 by the Court see Guide on Article 13 of the European Convention, 2023, pp. 29-38.

107 *Hirsi Jamaa and Others v. Italy* [GC], Application no. 27765/09, Judgment 23 February 2012, § 198.

108 *Čonka v. Belgium*, Application no. 51564/99, Judgment 5 February 2002, § 79.

109 *A.M. v. the Netherlands*, Application no. 29094/09, Judgment 5 July 2016, § 66.

requirements of Article 3, he or she should have an enforceable right to compensation for any breach that has already taken place.’¹¹⁰

4.3. Article 13 of the Convention in Conjunction With or in the Light of Article 5¹¹¹

Article 5 of the Convention explicitly embeds procedural rights regarding the review of the lawfulness of detention and the right to compensation, thus guaranteeing specific legal remedies. Namely, paragraph 4 of this Article guarantees ‘proceedings’ conducted ‘by a court’ that shall decide ‘speedily’ on ‘lawfulness of detention’ and that can ‘order a release’ in case of unlawful detention, thus describing at the same time the legal nature of this remedy. Also, paragraph 5 of Article 5 provides ‘an enforceable right to compensation’ in the case of unlawful detention.

In relation to Article 13 of the Convention, the Court has a well-established case-law holding that Article 5 §§ 4 and 5 of the Convention constitute *lex specialis* in relation to the more *lex generali* norm of Article 13 – meaning that Article 5 §§ 4 and 5 of the Convention absorb Article 13,¹¹² and that the Court will not examine separately the complaint under Article 13 if it has already examined and found a violation of Article 5 §§ 4 and 5 of the Convention.¹¹³

4.4. Article 13 of the Convention in Conjunction With, or in the Light of, Article 6

The *Kudla* case represents one of the most significant cases on Article 13; this judgment reconsidered the ECtHR’s position on overlapping rights and the need to examine separately a complaint under Article 13 in conjunction with Article 6 of the Convention. In *Kudla*, the Court examined several complaints, including a complaint under Article 5 § 4 of the Convention regarding the length of the applicant’s detention on remand and a complaint under Article 6 § 1 of the Convention regarding the length

110 *Volodya Avetisyan v. Armenia*, Application no. 39087/15, Judgment 3 May 2022, § 29.

111 Similar regarding Article 4 of the Convention. Where Article 13 complaint is incorporated by a complaint alleging a violation of the positive procedural obligations under Article 4 of the Convention, those obligations form *lex specialis* in relation to the general obligations under Article 13. See Guide on Article 13 of the European Convention, 2023, p. 38.

112 Chanturia, 2023, p. 20.

113 *Chahal v. the United Kingdom* [GC], Application no. 22414/93, Judgment 15 November 1996, § 126 and See Guide on Article 13 of the European Convention, 2023, p. 41.

of criminal proceedings; the Court found violations of both rights.¹¹⁴ When examining the complaint regarding applicant right to an effective remedy in respect of a complaint about the length of court proceedings before a national authority, the Court first assessed whether it was necessary to examine the complaint under Article 13, since it already found violation of Article 6§1 of the Convention regarding the length of criminal proceedings.

In *Kudla* the ECtHR first reaffirmed that in many previous cases, in which the Court has found a violation of Article 6 § 1 of the Convention, it did not consider it necessary to rule on an additional complaint made under Article 13, since Article 6 § 1 was considered to constitute a *lex specialis* in relation to Article 13. The Court further underlined that where the Convention right asserted by the individual is a ‘civil right’ or ‘criminal’ recognised under domestic law, the protection afforded by Article 6 § 1 will also be available. ‘In such circumstances the safeguards of Article 6 § 1, implying the full panoply of a judicial procedure, are stricter than, and absorb, those of Article 13’ and ‘there is no legal interest in re-examining the same subject matter of complaint under the less stringent requirements of Article 13’.¹¹⁵

However, in *Kudla*, the Court emphasised that there was

‘no overlap and hence no absorption where, as in the present case, the alleged Convention violation that the individual wishes to bring before a ‘national authority’ is a violation of the right to trial within a reasonable time, contrary to Article 6 § 1. The question of whether the applicant in a given case did benefit from trial within a reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from that of whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground. In the present case, the issue to be determined before Article 6 § 1 ‘tribunals’ was the criminal charges brought against the applicant, whereas the complaint that he wanted to have examined

114 The applicant was detained on remand in August 1991. The detention order was quashed in June 1992, on the basis of a psychiatric report on applicant’s medical state. Since the applicant failed to attend a hearing in his case in February 1993, an arrest warrant was issued and he was arrested in connection with a traffic offence in October 1993 and placed in detention on remand. Numerous applicant’s requests for release were refused and in January 1995 the applicant attempted to commit suicide. The applicant was convicted in June 1995, but the conviction was quashed in February 1996 and a retrial ordered. In May 1996 the detention order was quashed, subject to payment of bail of 10,000 zlotys. The applicant’s appeals against the amount, in which he invoked the risk of suicide, was rejected. He was released in October 1996 after bail had been lodged. He was again convicted in December 1998, the sentence imposed was reduced on appeal in October 1999 and a cassation appeal was pending before the Supreme Court in the time of Court’s judgment. The Court examined several complaints, including complaints on alleged failure to provide adequate medical care for detainee applicant, length of applicant’s detention on remand, length of criminal proceedings and right to an effective remedy in respect of a complaint about the length of court proceedings.

115 *Kudla v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 146.

by a ‘national authority’ for the purposes of Article 13 was the separate one of the unreasonable length of the proceedings’.¹¹⁶

The above-mentioned distinction, together with the growing frequency of the cases with violation due to ‘excessive delays in the administration of justice’ ‘in respect of which litigants have no domestic remedy,’ as well as backlog of cases before the Court, were the reasons for the reevaluation of the Court’s case-law in *Kudła* and conclusion to examine the applicant’s complaint under Article 13 separately, apart from its earlier finding of a violation of Article 6 § 1 for failure to have a trial within a reasonable time.¹¹⁷

The Court highlighted that,

‘the object of Article 13, as emerges from the *travaux préparatoires*, is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6 § 1, rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings’.¹¹⁸

All these findings represent guidelines for understanding the relationship between complaints about the length of proceedings under Article 6 § 1 of the Convention and the lack of an effective legal remedy complaint under Article 13 of the Convention. Although Article 6 § 1 of the Convention is *lex specialis* in relation to Article 13, the precise understanding of Article 13 is that this provision guarantees an effective remedy before a national authority for an alleged violation of the requirement under Article 6 § 1 to hear a case within a reasonable time.¹¹⁹

Since the Contracting States are afforded some discretion as to the manner in which they provide individuals with the relief required by Article 13 and conform to their Convention obligation under that provision, the different types of remedies may redress the violation appropriately.¹²⁰ According to the Court’s case-law, remedies

116 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, §147. In previous cases, the Court, as a rule, declined to decide on additional complaint of the absence of an effective remedy as guaranteed by Article 13, considering it unnecessary in view of its prior finding of a breach of the ‘reasonable time’ requirement laid down in Article 6§1 of the Convention.

117 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, §§ 148, 149.

118 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 152.

119 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 156 and *Vilho Eskelinen and others v. Finland*, Application no. 63235/00, Judgment 19 April 2007, §§ 79–83.

120 Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, pp. 20–23.

available to a litigant at domestic level for raising a complaint about the length of proceedings are ‘effective’ within the meaning of Article 13 of the Convention if they can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred – that is preventive (expediting) and compensatory (reparatory) remedy,¹²¹ which must be available in theory and in practice in order to be effective.¹²²

‘Some states, such as Austria, Croatia, Spain, Poland, and Slovakia, have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation.’¹²³

Finally, the Court has also examined complains of Article 13 in conjunction with or in the light of Article 6 § 1 concerning the absence of effective domestic remedies by which to complain about the length of all types of domestic proceedings – that is criminal, civil including enforcement, and administrative proceedings.¹²⁴

4.5. Article 13 of the Convention in Conjunction With, or in the Light of, Article 8

The *ratione materie* scope of Article 8 of the Convention includes various substantial rights that have been developed by the ECtHR under the notions of ‘private’ and ‘family’ life.¹²⁵ In addition, although Article 8 contains no explicit procedural requirements, the Court has recognised that Article 8 encompasses procedural rights – the decision-making process leading to measures of interference must be fair and must afford due respect to the interests safeguarded to the individual by Article 8 of the Convention.¹²⁶ This requires, in particular, that the applicant be involved in that process¹²⁷ and that the competent authorities carry out a proportionality test of the competing interests at stake and give due consideration to the relevant rights protected by Article 8 of the Convention.¹²⁸

In a number of cases, the ECtHR has examined complaints under Article 13 in conjunction with, or in the light of, Article 8. However, often, when the Court finds a violation of Article 8 on procedural aspects, it may decide not to separately examine the complaint under Article 13, even though it is closely related to the admissible

121 *Sürmeli v. Germany*, [GC], Application no. 75529/01, Judgment 8 June 2006, § 99.

122 *Burdov v. Russia* (No. 2), Application no. 33509/04, Judgment 15 January 2009, § 104. More on preventive remedies and compensatory remedies for the length of proceedings complaint and selected examples see Guide on Article 13 of the European Convention, 2023, pp. 42–45.

123 *Scordino v. Italy* (no. 1) [GC], Application no. 36813/97, Judgment 29 March 2006, § 186.

124 More on selected examples regarding all type of domestic proceedings in Guide on Article 13 of the European Convention, 2023, pp. 45–46.

125 See Guide on Article 8 of the European Convention on Human Rights, 2024

126 *Fernández Martínez v. Spain* [GC], Application no. 56030/07, Judgment 12 June 2014, § 147.

127 *Lazoriva v. Ukraine*, Application no. 6878/14, Judgment 17 April 2018, § 63.

128 *Liebscher v. Austria*, Application no. 5434/17, Judgment 6 April 2021, §§ 64–69.

complaint under Article 8 of the Convention¹²⁹. Although there are various subjects arising under Article 8 concerning the effectiveness of remedies for complaints related to respect for the right to private life or the right to family life, this paper refers only to a few key examples. The Court examined the important question of covert surveillance and personal data retention under Article 8 in the landmark cases of *Klass and Others v. Germany* and *Leander v. Sweden*.¹³⁰

In *Klass and others*¹³¹ the Court emphasised,

‘that it is the secrecy of the measures which renders it difficult, if not impossible, for the person concerned to seek any remedy of his own accord, particularly while surveillance is in operation. Secret surveillance and its implications are facts that the Court, albeit to its regret, has held to be necessary, in modern-day conditions in a democratic society, in the interests of national security, and for the prevention of disorder or crime. The Convention is to be read as a whole and therefore, any interpretation of Article 13 must be in harmony with the logic of the Convention. The Court cannot interpret or apply Article 13 so as to arrive at a result tantamount in fact to nullifying its conclusion that the absence of notification to the person concerned is compatible with Article 8 in order to ensure the efficacy of surveillance measures. Consequently, the Court, consistently with its conclusions concerning Article 8, holds that the lack of notification does not, in the circumstances of the case, entail a breach of Article 13’.

129 *Roman Zakharov v. Russia* [GC], Application no. 47143/06, Judgment 4 December 2015, § 307.

130 *Leander v. Sweden*, Application no. 9248/81, Judgment 26 March 1987.

131 In *Klass and other v. Germany*, the applicants, German attorneys, contested the legality of the legislation that allowed authorities to listen in on phone calls and open and examine mail in order to safeguard state security. The applicants disputed the law on the grounds that it hindered legal action against the order and execution of the measures and that it did not require notice of the individuals once the surveillance had ended. The applicants claim that the contested legislation, notably because the person concerned is not informed of the surveillance measures and cannot have recourse to the courts when such measures are terminated, violates Article 8. The applicants also alleged a breach of Article 13.

In *Leander*,¹³² the Court reaffirmed that an effective remedy under Article 13 must mean a remedy that is as effective as can be, having regard to the restricted scope for recourse inherent in any system of secret surveillance for the protection of national security. It further decided on the combination of several remedies and found that the aggregate of the remedies set out above satisfied the conditions of Article 13 in the particular circumstances of the instant case, endorsing two principles important for Article 13: the particularities of specific case principles and the aggregate of the remedies principle.

Since the topic of covert surveillance measures potentially carries the risk of abuse, the Court emphasised that, it is, in principle, desirable to entrust supervisory control to a judge, as judicial control offers the best guarantees of independence, impartiality, and proper procedure. As soon as notice can be issued without exposing the purpose of the control, information should be provided to the concerned persons after termination of the surveillance measures. In principle, it is necessary to provide that person with a minimum amount of information about the decision that may be challenged, such as its date of adoption and the authority from which it originates, to allow them to request a review of the proceedings regarding interference with their right to exercise their right to private life.¹³³

5. Some Challenges Regarding Article 13 of the Convention and Final Remarks

According to Article 1 of the Convention, the primary responsibility for implementing and enforcing rights and freedoms guaranteed by the Convention lies with the national authorities. Safeguarding human rights at the national level implies respect for guaranteed rights and protection in case of violation; that is, the existence of an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights.

132 In *Leander* case, the applicant had been refused employment as a carpenter at a Naval Museum, having been assessed as a security risk on the basis of information stored on a register maintained by State security services that had not been disclosed him. The Applicant complained that he should have been provided with the information in question, and should have been given the chance to contest it. The applicant claimed that the personnel control procedure, as applied in his case, gave rise to a breach of Article 8. he applicant further maintained that the same facts as constituted the alleged violation of Article 8 (Art. 8) also gave rise to a breach of Article 10. Finally, he complained under Article 13 of the Convention of the fact that neither he nor his lawyer had been given the right to receive and to comment upon the complete material on which the appointing authority based its. He also objected that he had not had any right to appeal to an independent authority with power to render a binding decision in regard to the correctness and release of information kept on him.

133 *Roman Zakharov v. Russia* [GC], Application no. 47143/06, Judgment 4 December 2015, §§ 233, 287 and 291.

‘In that way, Article 13, giving direct expression to the States’ obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires*, is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaints before the Court.’¹³⁴

The growth and progress of the Court’s case law under Article 13 have been mostly focused on the scope of Article 13 and explanation of general notions connected to it – ‘a national authority,’ ‘an arguable claim’ and ‘an effective remedy.’ The Court has also developed a case-law on the applicability of complaints under Article 13 and the relationship of this provision with other provisions of the Convention. However, this right’s supplementary role and its dependent nature have determined the relationship of Article 13 with other significant rights, as it can only be considered and examined in relation to other substantial Convention rights.

Although Article 13 of the Convention represents one of the most significant tools for implementing the Convention in practice at the national level, the ECtHR, in interpreting Article 13 of the Convention, has offered limited principled reasoning in its approach regarding the applicability of this right, focusing more on the issue of overlapping and absorption of this more general Convention provision by other, more specific (*lex specialis*) provisions. Moreover, the ‘proceduralisation’¹³⁵ of some Convention rights has led to an overlapping of Article 13 with other Convention rights and to uncertainty in the Court’s approach as to whether and when Article 13 complaint will be examined. Some guidelines and methodology exist; but it is still occasionally unclear if the Court will separately have examined ‘an effective remedy’ complaint. Although there is a continuous tendency toward consistency in the interpretation of this clause, there are still outstanding issues such as the Court’s unclear methodology for examining Article 13 complaints.

In cases of systemic violation of substantive Convention rights, the Court, at times, in the framework of the ‘pilot’ judgment procedure, chooses to separately examine the complaint under Article 13 of the Convention, while simultaneously giving indications under Article 46 of the Convention and ordering adoption of general measures that would provide an effective domestic remedy.¹³⁶

‘Several options with this objective are possible, depending, among other things, on the nature of the structural problem in question and on whether the

134 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 152.

135 See footnote 15.

136 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, Application no. 60642/08, Judgment 16 July 2014, §§ 131–136 and 144–150 and *Kurić and others v. Slovenia*, Application no. 26828/06, Judgment 26 June 2012, §§ 369–374 and 406–415.

person affected by this problem has applied to the Court or not. One alternative might be to adopt an *ad hoc* approach, whereby the state concerned would assess the appropriateness of introducing a specific remedy or widening an existing remedy by legislation or by judicial interpretation.¹³⁷

The real purpose of Article 13 of the Convention is most evident in the work of the Committee of Ministers in supervising the execution of Court's judgments. Namely, the question of the existence of an effective legal remedy arises in communications that respondent states submit in the process of executing the Court's judgments. Given the importance of avoiding repetitive applications before the Court, the question of the existence of an effective remedy before national authorities should always be addressed in the action plans or action reports, especially in systemic and structural problems, even where no violation of Article 13 has been found or has not been examined by the Court.¹³⁸

This is also reflected in the declarations adopted in Interlaken process – specifically the Interlaken declaration, which emphasised that regarding the implementation of the Convention at the national level, States must commit themselves to

‘ensuring, if necessary by introducing new legal remedies, whether they be of a specific nature or a general domestic remedy, that any person with an arguable claim that their rights and freedoms as set forth in the Convention have been violated has available to them an effective remedy before a national authority providing adequate redress where appropriate’.¹³⁹

A similar conclusion derives from the Brighton declaration, which affirms the strong commitment of States Parties to fulfil their primary responsibility to implement the Convention at national level ‘considering the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention’.¹⁴⁰ The Brussels Declaration called upon the States Parties, prior to and independently of the processing of cases by the Court, to

‘ensure the effective implementation of the Convention at national level, take effective measures to prevent violations and to provide effective domestic remedies to address alleged violations of the Convention’.¹⁴¹ Finally, the Copenhagen declaration called upon the States Parties to continue strengthening the

137 Recommendation REC(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, pp. 13–19.

138 See Guide for the drafting of action plans and reports for the execution of judgments of the European Court of Human Rights, p. 9.

139 Interlaken declaration, p. B4 d).

140 Brighton declaration, p. 9 III.

141 Brussels declaration, p. B1 e.

implementation of the Convention at the national level in accordance with previous declarations Brighton declaration adopted in the Interlaken process ‘in particular by creating and improving effective domestic remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention, especially in situations of serious systemic or structural problems’.¹⁴²

Lastly, the purpose of Article 13 is aligned with another supplementary tool: Recommendation REC(2004)6 of the Committee of Ministers to Member States on the Improvement of Domestic Remedies. This document, although non-legally binding, represents an important instrument for the accomplishment of the key objectives of Articles 1 and 13: to ensure that the rights guaranteed by the Convention are effectively enjoyed at the domestic level and that, in the event that a protected right is violated, a domestic remedy is provided. It provides additional guidelines for each Member State on how to improve existing domestic legal remedies and make them more effective or create new ones.

All this, along with the Court’s case-law, gives States a clearer framework for fulfilling their responsibilities to provide, with an effective domestic legal remedy, sufficient protection against the violation of Convention rights, and to ensure that everything will function in practice as intended in theory.

142 Copenhagen declaration, p. 16a.

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Prohibition of Discrimination

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ABSTRACT

This study analyses the prohibition of non-discrimination within the framework of the European Convention on Human Rights, focusing thus on Article 14 of the Convention and Article 1 of Protocol No. 12. To facilitate a comprehensive understanding, the study will first provide a concise overview of the relationship between these provisions and other international instruments, particularly those adopted within the European context, followed by a brief examination of the historical evolution of the prohibition of discrimination. Subsequently, the analysis will delve into the scope of the provisions, the elements of discrimination, its various forms, and the conditions under which it operates, all considered in light of the jurisprudence of the European Court of Human Rights. In supporting the theoretical explanations, the study will prioritise the case law concerning Central and Eastern European countries.

KEYWORDS

Prohibition of discrimination, Article 14, Protocol No. 12, European Court of Human Rights

1. Introduction

The idea of equality and inequality has been a concern for humanity since the beginning of time. As Aristotle pointed out, ‘In fact, this is the very source of all the quarrelling and wrangling in the world, when either they who are equal have and get awarded to them things not equal, or being not equal those things which are equal.’¹ Since the Age of the Enlightenment, the idea that all human beings are equal and thus deserve to be treated equally has gained an increasingly important role in national constitutions and international instruments,² and the principle of non-discrimination has been developed accordingly. As has been observed, virtually every liberal democratic state’s constitution³ and every international human rights instrument includes

1 Aristotle, 1911, p. 108.

2 Moeckli, 2022, p. 151.

3 Moeckli, 2022, p. 151. See also Rainey, McCormick and Ovey, 2020, p. 647.

Réka Laczkó (2026) ‘Prohibition of Discrimination’ in Paczolay, P. (ed.) *The European Convention on Human Rights A Central and Eastern European Perspective*. Miskolc–Budapest: Central European Academic Publishing, pp. 499–536. https://doi.org/10.71009/2026.pp.tecohr_16



a non-discrimination clause,⁴ often placed at beginning of the source of law, due to its fundamental role in the legal system it forms the part of.⁵

The prohibition of discrimination in international law is rooted in the United Nations Charter, which articulates a commitment to the promotion of human rights for all individuals without distinction.⁶ In pursuit of this goal, a range of instruments has been adopted under the UN's auspices to promote equality and non-discrimination.⁷ Furthermore, several specialised treaties directly confront particular forms of discrimination on international and regional levels as well.⁸

In Europe, the prohibition of discrimination is guaranteed at three levels. The aforementioned constitutional provisions, the international instruments – adopted mainly under the auspices of the Council of Europe – and, for the Member States of the European Union, the EU sources of law.

With regard to the latter two, it should be noted that, although legal protection exists in parallel for the 27 EU Member States, the two international organisations do not, in principle, wish to create a situation of competition. This is demonstrated by the fact that the European Court of Human Rights (henceforth: the Court) systematically refers to EU sources of law,⁹ and the Court of Justice of the European Union refers to instruments adopted under the auspices of the Council of Europe¹⁰ as a source of inspiration.

Since the entry into force of the Amsterdam Treaty, the European Union has acquired competence to combat discrimination on a multiple grounds. Today, the principle of equality is a fundamental value of the EU, enshrined at the very beginning

4 Smith, 2021, p. 194.

5 Rainey, McCormick and Ovey, 2020 p. 647.

6 United Nations Charter, Article 1.

7 See, for example, Articles 1, 2, and 7 of the Universal Declaration of Human Rights; Articles 2, 3, and 26 of the International Covenant on Civil and Political Rights; and Articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights. In 1993 the principle of equality and non-discrimination were included in the Vienna Declaration and Programme of Action and adopted by the World Conference on Human Rights. See Moeckli, 2022, pp. 151. and 155.

8 See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It is also worth mentioning that the right to non-discrimination on the grounds of race, sex and religion has evolved into customary international law, thus binding all states regardless of whether they have ratified specific treaties. Moeckli, 2022, pp. 155–156.

9 See, for example, *D.H. and Others v. Czech Republic*, Application. no. 57325/00, Judgment 13 November 2007, para. 187; *Biao v. Denmark*, Application. no. 38590/10, Judgment 24 May 2016, paras. 134–135.

10 See, for example, C-510/11 P, *Kone Oyj and Others v. European Commission*, 24 October 2013, paras. 20–22; Joined cases C-395/08 and C-396/08, *Istituto nazionale della previdenza sociale (INPS) v. Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci*, 10 June 2010, paras. 31–32.

of the Treaty on European Union¹¹ and elaborated in the Treaty on the Functioning of the European Union.¹² The prohibition of discrimination is also provided for in the Charter of Fundamental Rights of the European Union,¹³ which binds the EU institutions and Member States when implementing EU law. Furthermore, a range of secondary sources of law¹⁴ have been adopted to implement the non-discrimination policy of the EU and new bodies, such as the European Union Agency for Fundamental Rights, have been established to promote fundamental rights and equality.¹⁵

In the system of the Council of Europe, the cornerstones of the non-discrimination principle are found in the European Convention on Human Rights and the European Social Charter; however, several other thematic instruments of the Council of Europe provide for the non-discrimination principle as well.¹⁶ Article E of the Revised Charter prohibits discrimination in a form similar to the prohibition in Article 14 of the Convention. The European Committee of Social Rights ensures compliance with the Charter.

The European Convention on Human Rights provides for the prohibition of discrimination in two articles – Article 14 and Article 1 of Protocol 12. The main difference between the two provisions lies in their material scope: while the protection afforded by Article 14 extends only to the rights set out in the Convention, Article 1 of Protocol No. 12 provides for a truly general principle of non-discrimination covering all rights provided for by national law. However, to date, only a total of 20 states have signed and ratified Protocol 12, and a further 18 states have not followed up their signatures with ratifications.¹⁷

The purpose of this study is to analyse the prohibition of discrimination in the light of the two provisions of the Convention.

11 See Articles 2, 3(3) and 9 of the TEU.

12 See Article 10 of the TFEU.

13 See Article 21 of the Charter.

14 See, for example, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

15 For further details, see European Union Agency for Fundamental Rights, Council of Europe, 2018, p. 23.

16 See, for example, the Framework Convention for the Protection of National Minorities, the Convention on Action against Trafficking in Human Beings and the Convention on Access to Official Documents, the Protocol to the Convention on Cybercrime, the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) or the Convention on Human Rights and Biomedicine. For further details, see European Union Agency for Fundamental Rights, Council of Europe, 2018, pp. 19–20.

17 See Council of Europe, 2005.

2. Characterisation of Article 14

Article 14 of the Convention provides that

‘The enjoyment of the rights and freedoms set forth in this 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.’

The notion “Convention” includes the First, Fourth, Sixth, Seventh and Thirteenth Protocols, as provided in the relevant articles of the Protocols.¹⁸ Thus, the prohibition of discrimination enshrined in Article 14 can be applied in relation to any human right contained in the Convention and its Protocols, with the observation that Article 5 of the Seventh Protocol concerning the equal rights of spouses supersedes the general provision of Article 14 as a special rule.¹⁹

It has been argued that three main features emerge after the first reading of the text. These are the ancillary nature of the right enshrined in Article 14 – as opposed to the text of the additional protocol – the rather outdated but non-exhaustive nature of the list of prohibited grounds, and the lack of definition of the concept of discrimination.²⁰ Before discussing these three features in more detail, it is worth noting a further point concerning the wording of the text, i.e. that Article 14 does not mention the notion of equality, but ensures that the relevant rights are protected without discrimination.

With regard to the relationship between the concept of equality and prohibition of discrimination, various opinions can be found in the literature. According to some commentators, they are used as synonyms,²¹ while others claim that the prohibition of discrimination corresponds only to the more limited concept of formal equality, covering the negative obligation not to discriminate; meanwhile, the more inclusive term equality shifts the focus to the ‘duty to recognise differences between people and to take positive action to achieve real equality,’ mirrored by the concept of substantive equality.²² The difference between the right to equality and non-discrimination is also characterised as ‘pragmatic rather than logical,’ as most constitutional and international instruments guarantee equality in terms of one or both. Different jurisdictions delineate the distinctions between the two concepts in different manners.²³

18 See Article 5 of Protocol 1, Article 6 of Protocol 4, Article 6 of Protocol 6, Article 7 of Protocol 7, Article 5 of Protocol 13.

19 Szalayné Sándor, 2021, p. 338.

20 Fredman, 2016a, p. 275.

21 See, for example, Smith, 2021, p. 194.

22 See, for example, Moeckli, 2022, p. 152. For a comparative analysis of the concepts of formal equality and substantive equality see Moeckli, 2022, pp. 151–153; Fredman, 2016b, pp. 712–738.

23 See Fredman, 2016b, p. 715

It should also be borne in mind that the adoption of the European Convention on Human Rights took place in the post-war period, when the protection of human rights was gaining ground. Thus, a concise, non-controversial document was prepared that governments could quickly accept it in a timely manner. As a consequence, the protection of the Convention limits itself to the civil and political rights considered ‘essential for a democratic way of life’.²⁴ Considering the small number of countries that have ratified Protocol 12, the initial limitation of the scope of Article 14 proved to be a sensible decision. However, as will be seen below, although the Convention only obliges State Parties to ensure the *stricto sensu* prohibition of discrimination, the case-law of the Court reveals an attempt to develop a genuine principle of substantive equality through the so-called positive action or affirmative measures.

The objective of this chapter is to examine the main features and scope of Article 14.

2.1. The Ancillary Nature of Article 14

As mentioned above, the prohibition of discrimination enshrined in Article 14 is ancillary in nature. This means that its application is limited to the rights and freedoms set out in the Convention,²⁵ including its Protocols, it can only be invoked in connection with another right provided for in the Convention. Article 14 has often been considered in the literature to be of “parasitic” nature, with no existence in its own right,²⁶ as opposed to the right provided for in Article 1 of Protocol No. 12. Article 14 does not extend the list of guaranteed rights but strengthens their protection.²⁷ According to the Court, Article 14 forms ‘an integral part of each of the Articles [of the Convention] laying down rights and freedoms’.²⁸

In most cases,²⁹ especially older ones,³⁰ the Court has refrained from considering the applicability of Article 14 in cases where it found a violation of the substantive right regarding which question of discrimination had been raised.

For example, in the *Dangeville v. France*, the applicant company alleged a violation of its right of property set out in Article 1 of Protocol 1, citing failing to reimburse VAT paid on the basis of national legislation, which was contrary to Community law. Moreover, the applicant claimed the infringement of Article 14 as well, citing the authorities’ decision to abandon proceedings against companies that had not paid the

24 Pierre-Henri Teitgen, CE Consult. Ass, Debates, 1st Session, p 408., 19 August 1949 cited in Harris et al., 2023, p. 5.

25 Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (“the Belgian linguistic case”), Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment 23 July 1968, para. 9.

26 See Harris et al., 2023, p. 775; Fredman, 2016a, p. 275.

27 Chiriță, 2008, p. 606.

28 Case “relating to certain aspects of the Laws on the use of languages in education in Belgium” v. Belgium (“the Belgian linguistic case”), Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment 23 July 1968, para. 9.

29 See Szalayné Sándor, 2021, p. 338.

30 Harris et al., 2023, p. 775; Rainey, McCormick, Ovey, 2020, p. 649; Fredman, 2016a, p. 275.

VAT at all. Having found a violation of Article 1 of Protocol No. 1, the Court found that no separate examination of the second complaint was necessary.³¹

In *Evans v. United Kingdom*, concerning the right of the applicant to become a parent in the genetic sense after the withdrawal of her formal partner's consent to use the embryos created together, the Court did not consider it necessary to analyse the potential infringement of Article 14 as 'the reasons given for finding that there was no violation of Article 8 also afford a reasonable and objective justification under Article 14'.³² The Court took into account that the applicant herself had submitted that her complaints under Articles 8 and 14 were inextricably linked.

In *Fedotova and Others v. Russia*,³³ concerning Russian law preventing same-sex couples from marrying or entering into any other form of legally recognised and protected union, the Court stated that it was unnecessary to consider Article 14 as it had found a violation of Article 8.³⁴

However, there are examples of the opposite situation, as well, where the Court first analyses the applicability of Article 14 and, if it finds a violation of the prohibition of discrimination, does not proceed to analyse the substantive right in respect of which the discrimination claim was made.³⁵

In *Gaygusuz v. Austria*, the authorities refused to grant an advance on his pension in the form of emergency assistance to an unemployed man who had exhausted entitlement to unemployment benefit on ground that he did not have Austrian nationality. The Court, having concluded that there has been a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, did not consider it necessary to examine the case under Article 6 and Article 8 of the Convention.³⁶

The Court reached a similar conclusion in *Burghartz v. Switzerland*.³⁷ In this case the applicant husband was not able to put his own surname in front of his wife's. According to the Swiss law, only a wife had the right to put her own surname before the shared family name.

In certain cases – particularly serious ones, or where the discrimination constitutes a new and decisive element in the overall facts of the case – the Court conducts

31 *S.A. Dangeville v. France*, Application no. 36677/97, Judgment 16 April 2002, para. 66.

32 *Evans v. United Kingdom*, Application no. 6339/05, Judgment 10 April 2007.

33 *Fedotova and Others v. Russia*, Application nos. 40792/10, 30538/14 and 43439/14, Judgment 17 January 2023, para. 230.

34 Harris et al., 2023, 775–776. For a similar solution, see *Olari and Others v. Italy*, Application nos. 18766/11 and 36030/11, Judgment 21 July 2015, para. 188.

35 See also Szalayné Sándor, 2021, p. 338. See also Chiriță, 2008, pp. 606–607.

36 *Gaygusuz v. Austria*, Application no. 17371/90, Judgment 16 September 1996, paras. 55 and 57. Another example would be the case *Thlimmenos v. Greece*, Application no. 34369/97, Judgment 6 April 2000, para. 53: after finding a breach of Article 14 of the Convention taken in conjunction with Article 9, the Court did analyse whether there had been a violation of Article 9 on its own.

37 *Burghartz v. Switzerland*, Application no. 16213/90, Judgment 22 February 1994, para. 30. For further examples see *Pla and Puncernau v. Andorra*, Application no. 69498/01, Judgment 13 July 2004, para. 64. *Sidabras and Džiautas v. Lithuania*, Application nos. 55480/00 and 59330/00, Judgment 27 July 2004, para. 63. *L. and V. v. Austria*, Application nos. 39392/98 and 39829/98, Judgment 9 September 2003, para. 55.

an analysis under Article 14 after finding a violation of the specific substantive right.³⁸ In these cases, the Court usually finds a violation of both the substantive provision taken alone and the provision read in conjunction with Article 14.³⁹

Chassagnou and Others v. France was one of the first cases in which the Court considered it necessary to analyse the violation of the right to non-discrimination, after having found a violation of the substantive provision, namely Article 1 of Protocol No. 1. The case involved ten French landowners who opposed hunting on ethical grounds but were forced to transfer hunting rights to municipal hunters' associations, infringing on their rights to freedom of conscience and peaceful enjoyment of possessions. They argued that this system discriminated against smaller landowners, who faced obligations that larger landowners could avoid, and that hunters received favourable treatment without compensating non-hunters for the loss of their rights. Additionally, while hunters were granted automatic rights over private land, conservation groups could no longer obtain such rights voluntarily. The Court stated that:

‘Where a substantive Article of the Convention has been invoked both on its own and together with Article 14, and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.’⁴⁰

In *Kurić and Others v. Slovenia*, eight applicants, previously citizens of the former Yugoslavia, were erased from Slovenia's Register of Permanent Residents in 1992 without notification, leading to statelessness, eviction, and severe hardships. Approximately 25,000 other people were in the same situation. Additionally, the applicants claimed they had been discriminated against on the ground of their national origin, when compared to other foreign citizens (the so-called “real” aliens) who continued to live in Slovenia on the basis of temporary or permanent residence permits. Due to the importance of the discrimination issue in the case, the Grand Chamber considered that the complaint under Article 14 of the Convention should be examined as well.⁴¹

On similar grounds, in the *Velikova v. Bulgaria* case, after finding a violation of Article 2, the Court examined the applicant's complaints separately based on Article 14 in conjunction with Article 2, as ‘The applicant's complaint under Article 14 is

38 Szalayné Sándor, 2021, p. 339.

39 For a similar opinion see Rainey, McCormick, Ovey, 2021, p. 650.

40 *Chassagnou and Others v. France*, Application nos. 25088/94, 28331/95 and 28443/95, Judgment 29 April 1999, para 89. In the same paragraph, the Court referred to an earlier case in which the same allegation had been made. In that case, however, the Court didn't consider it necessary to examine specifically the violation of Article 14. See *Dudgeon v. the United Kingdom*, Application no. 7525/76, Judgment 22 October 1981, paras. 67–70.

41 *Kurić and Others v. Slovenia*, Application no. 26828/06, Judgment 26 June 2012, para. 383. The Court found a violation of Article 8 and a violation of Article 14 taken in conjunction with Article 8 of the Convention.

grounded on a number of serious arguments.⁴² The applicant's long-term partner, who belonged to the Romani (Gypsy) ethnic group, died in police custody shortly after his arrest and an autopsy revealed that his death had been caused by trauma resulting from a deliberate beating. The investigation concerning the victim's death circumstances unduly stalled, and the authorities eventually suspended the criminal proceedings without identifying those responsible. Nevertheless, the Court found no violation of Article 14 as the applicant's allegations of racial prejudice on the part of the authorities couldn't be proven beyond reasonable doubt.⁴³

Surprisingly, the Court did not find it necessary to consider Article 14 after having found a violation of Articles 3 and 8 in *V.C. v. Slovenia*, concerning the sterilisation of a Roma woman without prior informed consent. Although the applicant's medical papers related to her sterilisation mentioned her Roma origin, and the applicant submitted statistical evidence regarding the history of sterilisation of Roma women, the Court held that 'The objective evidence is not sufficiently strong in itself to convince the Court that it was part of an organised policy or that the hospital staff's conduct was intentionally racially motivated'.⁴⁴

2.2. The "Ambit-Test" and Relative Autonomy

In a *stricto sensu* interpretation, the scope of Article 14 is limited to discrimination regarding 'the rights and freedoms set forth' in the Convention, including its Protocols. As some commentators rightfully observed, in 'practice, this is a significant restriction because a great deal of discrimination law is concerned with the enjoyment of economic and social rights'.⁴⁵ Furthermore, the Court's early case law indicated that a violation of a substantive provision had to be established before Article 14 could be invoked. This condition rendered Article 14 frequently superfluous, as, if a right was breached, there was no need to examine Article 14 further; and conversely, if there was no breach, Article 14 was irrelevant.⁴⁶ Consequently, in light of the comprehensive scope of the right enshrined in Protocol 12, which also encompasses the right set forth in Article 14, it was suggested in the academic literature of the early 2000s that Article 14 was at risk of being marginalised and potentially rendered obsolete.⁴⁷ Due to the reluctance of the States to sign and ratify Protocol 12, this threat did not materialise. Meanwhile the Court has been extending the scope of Article 14 and as a consequence, according to some commentators, the case law of the Court from 2003–2004 has marked such a remarkable extension of the scope of Article 14, that it

42 *Velikova v. Bulgaria*, Application no. 41488/98, Judgment 4 October 2000, para. 94.

43 *Velikova v. Bulgaria*, Application. no. 41488/98, Judgment 4 October 2000, para. 94.

44 *V.C. v. Slovakia*, Application no. 18968/07, Judgment 8 November 2011, paras. 177–180.

45 Harris et al., 2023, p. 777.

46 Fredman, 2016a, p. 275.

47 See Renucci, 2009, 149.

has reached a point at which one might question the dependent character of the right contained in Article 14.⁴⁸

At present, the scope of Article 14 is not strictly limited to that of the substantive provision,⁴⁹ but covers a larger spectrum of rights as long as they fall within the wider *ambit* of a right provided for in the Convention.⁵⁰ The foundations of the so-called “ambit-test”, with the consequence of moving away from the requirement that there must be a violation of a substantive right provided for in the Convention in order to find a violation of Article 14, were laid down in the *Belgian Linguistic* case as early as 1968.

The case concerns the application of French-speaking Belgian parents of over 800 children, arguing that the lack of French-language education in their municipalities violates their rights and forces them to pursue inadequate alternatives. The Court first analysed the applicability of Article 2 of Protocol No. 1 and Article 8 of the Convention, and then concluded that Article 2 of Protocol No. 1 did not ensure the right of the parents’ linguistic preferences, but only their religious and philosophical convictions,⁵¹ and that Article 8 by itself in no way did guarantee either a right to education or a personal right of parents relating to the education of their children.⁵² However, the Court examined the applicability of Article 14, and despite the Belgian Government’s submission – according to which a violation of Article 14 without simultaneous violation of one of the substantive provisions of the Convention is “legally impossible” – reached the following conclusions:

‘While it is true that this guarantee has no independent existence [...], a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 (Article 14) for the reason that it is of a discriminatory nature.’⁵³

48 See Chiriță, 2008, p. 607; Sudre, 2005, p. 203. Chiriță believes that the sudden change in the Court’s optics was the Court’s response to the States’ refusal to ratify Protocol 12, and, in practice, this is the Court’s way of including a general non-discrimination clause in Article 14. See Chiriță, 2008, p. 607.

49 European Court of Human Rights, 2024. Guide on Article 14 of the Convention (prohibition of discrimination) and on Article 1 of Protocol No. 12 (general prohibition of discrimination), p. 6.

50 On this topic see Harris et al., 2023, pp. 775–778; Fredman, 2016a, pp. 275–278.

51 Case “relating to certain aspects of the Laws on the use of languages in education in Belgium” v. Belgium, para. 6.

52 Case “relating to certain aspects of the Laws on the use of languages in education in Belgium” v. Belgium, para. 7.

53 Case “relating to certain aspects of the Laws on the use of languages in education in Belgium” v. Belgium, para. 9.

Recognising the applicability of Article 14 in cases where there was no violation of the substantive right itself became a settled case law of the Court,⁵⁴ consequently extending the reach of Article 14 to many areas, such as employment, membership of trade union, social security, education, right to respect for home, access to justice, inheritance rights, access to children, paternity, freedom of expression, assembly and association, right to an effective investigation eligibility for release on parole, and eligibility for tax relief.⁵⁵

In the context of the relative autonomy of Article 14, the Court has interpreted the *ambit* of the right enshrined in Article 1 of Protocol 1 particularly broadly when considering the applicability of Article 14. A very remote connection between one of the elements of the facts with the applicant's property has been sufficient to establish a link with the scope of Article 1 of Protocol 1 in order to examine the role of Article 14.⁵⁶ In *Gaygusuz v. Austria*, for example, the Court considered the right to emergency assistance to be a pecuniary right protected under Article 1 of Protocol No. 1.⁵⁷

2.3. Additional Rights

The *Belgian Linguistic* case is also notable for the development of the doctrine of additional rights. In its 1968 judgment, the Court ruled that states were not obliged to grant additional rights falling within the general scope of the articles of the Convention. However, if they went beyond their obligations by creating such rights, they were obliged to grant them in a non-discriminatory manner, as though they 'formed an integral part of each of the Articles laying down rights and freedoms'.⁵⁸ With regard to the conditions of the additional rights which may be taken into account for the purpose of examining a possible violation of Article 14, the Court ruled that at least one of the three situations must be present: the contested measures falls within the ambit of the substantive article,⁵⁹ the contested measures constitutes one of the modalities of the exercise of a right guaranteed or is linked to the exercise of a right

54 See for instance *Inze v. Austria*, Application no. 8695/79, 28 October 1987, para. 36; *Marckx v. Belgium*, Application no. 6833/74, Judgment 13 June 1979, para. 32; *Thlimmenos v. Greece*, Application no. 34369/97, Judgment 6 April 2000, para. 40; *Sidabras and Džiautas v. Lithuania*, Application nos. 55480/00 and 59330/00, Judgment 27 October 2004, para. 38; *Beeler v. Switzerland*, Application no. 78630/12, Judgment 11 October 2022, para. 48.

55 European Court of Human Rights, 2024, p. 7.

56 Szalayné Sándor, 2021, p. 340. The author gave as an example the case *Gaygusuz v. Austria*, 16 September 1996, no. 17371/90, para. 41.

57 See *Gaygusuz v. Austria*, Application no. 17371/90, Judgment 16 September 1996, para. 41.

58 Case "*relating to certain aspects of the Laws on the use of languages in education in Belgium*" v. *Belgium*, para. 9. The Court even gives an example in para. 6 of the judgement, showing that States are not obliged to institute a system of appeal courts. However, a state that does set up such courts, going beyond its obligations under Article 6, would violate that Article, read in conjunction with Article 14, if it deprived certain persons from these remedies without a legitimate reason.

59 *Zarb Adami v. Malta*, Application no. 17209/02, Judgment 20 June 2006, para. 49.

guaranteed,⁶⁰ or that at least the contested measure does not fall completely outside the ambit of the substantive article.⁶¹

Within these limits, the Court has succeeded in extending the scope of Article 14 and, implicitly, of the other substantive articles, far beyond their literal meaning.⁶² For example, in *Stec and Others v. the United Kingdom*, a case concerning inequalities in a welfare system, the Court examined the violation of Article 14 in conjunction with Article 1 of Protocol No. 1. According to the Court, although the latter did not include a right to acquire property, since the State had created a benefits or pension scheme, it was obliged to do so in a manner that was compatible with Article 14.⁶³

In *E.B. v. France*, a case concerning the refusal of the State to grant approval for the purposes of adoption, on the basis of the applicant's life-style as a lesbian living with another woman, the Court found a violation of Article 14 in conjunction with Article 8. The Court underlined that Article 8 did not entail the right to adoption; nevertheless, the state had gone beyond its obligations under Article 8 in creating such a right,⁶⁴ and thus was obliged to ensure the enjoyment of the right in a non-discriminatory manner.

In *Genovese v. Malta*, an illegitimate child of a British mother and Maltese father had been denied a Maltese citizenship because according to Maltese law, an illegitimate child was only eligible for Maltese citizenship if their mother was Maltese. The Court reiterated that although the provisions of Article 8 do not guarantee a right to acquire a particular nationality or citizenship, an arbitrary denial of citizenship might raise an issue under Article 14 and the granting of citizenship can be viewed as an additional right falling within the general scope of Article 8 for the purposes of examining a possible breach of the prohibition of discrimination in Article 14.⁶⁵

2.4. The Horizontal Effect of the Right

The Court comprehensively summed up the essence of the horizontal effect of Article 14 in the *Pla and Puncernau v. Andorra* case, stating that although the Court was not in theory required to settle disputes of a purely private nature,

‘it cannot remain passive where a national court’s interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or [...]s blatantly inconsistent with the prohibition of discrimination

60 *Konstantin Markin v. Russia*, Application no. 30078/06, Judgment 22 March 2012, para 129.

61 *Van der Mussele v. Belgium*, Application no. 8919/80, 23 November 1983, para. 43. See European Court of Human Rights, 2024, p. 8.

62 See also Harris et al., 778, Fredman, 2016a, pp. 276–277.

63 *Stec and Others v. the United Kingdom*, Application nos. 65731/01 and 65900/01, Judgment 12 April 2006, para. 53.

64 *E.B. v. France*, Application no. 43546/02, Judgment 22 January 2008, para. 51. See also *Fretté v. France*, Application no. 36515/97, Judgment 26 February 2002, para. 32.

65 *Genovese v. Malta*, Application no. 53124/09, Judgment 11 October 2011, paras. 30–32.

established by Article 14 and more broadly with the principles underlying the Convention'.⁶⁶

The Court thus obliges the Contracting States to ensure that the right to non-discrimination is also respected in relations between private individuals, thereby imposing both negative and positive obligations on the States. In other words, Contracting States are obliged to refrain from any arbitrary interference with the private and family life of individuals and must also take the necessary positive measures inherent in an effective “respect” for private or family life.⁶⁷

The Court has found violations of Article 14 in numerous cases where discriminatory violence between private parties was not sufficiently investigated by the public authorities or punished by the State. For example, in the *Šečić v. Croatia* case, the Court found a violation of Article 14 in conjunction with Article 3. This was because the investigation into acts of violence committed against the applicant, who was of Roma origin, by assailants believed to belong to a group of skinheads, dragged on for more than seven years without any serious steps being taken to identify or prosecute those responsible. However, the attack was likely to have been the result of ethnic hatred.⁶⁸

In the *Milanović v. Serbia* case, the applicant filed several complaints with the national authorities about a series of religiously motivated attacks perpetrated against him by private individuals. Although the authorities suspected that the attacks had been committed by individuals belonging to one or more extreme right-wing organisations and that there was no guarantee that the attacks wouldn't be repeated in the future, they allowed the investigation to drag on for many years without taking adequate measures to identify and prosecute the perpetrators. *Inter alia*, the Court found a violation of Article 14 in conjunction with Article 3.⁶⁹

The Court also found that several Contracting States failed to take necessary actions to prevent or address discrimination among private parties, leading to breaches of Article 14 in cases involving issues such as trade-union membership,⁷⁰

66 *Pla and Puncernau v. Andorra*, para 59. The Court considered that the national court violated Article 14 in conjunction with Article 8 by inferring that the meaning of the notion “child” used in the contested testamentary disposition concerned only biological children, although the wording of testamentary disposition made no distinction between biological and adopted children. See also *Deaconu and Alexandru Bogdan v. Romania*, Application no. 66299/12, Judgment 29 January 2019, para. 24.

67 *Pla and Puncernau v. Andorra*, paras. 43–44.

68 *Šečić v. Croatia*, Application no. 40116/02, Judgment 31 May 2007, paras. 69–70. See also *Abdu v. Bulgaria*, Application no. 26827/08, Judgment 11 March 2014.

69 *Milanović v. Serbia*, Application no. 44614/07, Judgment 14 December 2010, para. 92. See also *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, Application no. 71156/01, Judgment 3 May 2007.

70 *Danilenkov and Others v. Russia*, Application no. 67336/01, Judgment 30 July 2009.

gender discrimination,⁷¹ parental leave rights,⁷² and enforcement of judicial judgments.⁷³

3. Article 1 of Protocol No. 12

Article 1 of Protocol No. 12 contains a general prohibition of discrimination, which reads as follows: 1. The enjoyment of any right set forth by law 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.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The Protocol refers to the principle of equality in its preamble as a fundamental principle and commits to take steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination. The first paragraph extends the prohibition of discrimination to any right laid down by law, but leaves untouched the non-exhaustive list of protected grounds. In this respect, the Explanatory Report states that the protected grounds have not remained the same because of a lack of awareness of the emergence of additional grounds, but rather in order to avoid possible *a contrario* interpretations as regards discrimination on grounds that are not included. With regards to the meaning of the notion of discrimination the Court has ruled that the same term “discrimination” has been used in Article 14 and in Article 1 of Protocol No. 12. As it has been mentioned in the Explanatory Report, as well,⁷⁴ the meaning of the term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14. As a consequence, the Court does not see any reason to depart from the settled interpretation of “discrimination” in applying Article 1 of Protocol No. 12.⁷⁵

Concerning the scope of the protection of Article 1 of Protocol No. 12, the Court holds that the scope goes beyond “any right set forth by law,” as follows in particular from paragraph 2, providing that no one may be discriminated against by a public authority.⁷⁶ According to the Explanatory Report, the scope of protection of Article 1 concerns four categories of cases enlisted in paragraph 22 of the Explanatory Report. It was considered unnecessary to specify which of these four elements were covered by the first paragraph of Article 1, and which by the second. The two paragraphs are

71 *García Mateos v. Spain*, Application no. 38285/09, Judgment 19 February 2013.

72 *Hulea v. Romania*, Application no. 33411/05, Judgment 2 October 2012.

73 European Court of Human Rights, 2024, p. 9.

74 Explanatory Report, para. 16.

75 *Sejdić and Finci v. Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06; Judgment 22 December 2009, para. 55.

76 *Savez crkava “Riječ života” and Others v. Croatia*, Application no. 7798/08, Judgment 9 December 2010, para. 104.

complementary and the distinctions between the four categories are not clear-cut.⁷⁷ Therefore, in order to determine whether Article 1 of Protocol 12 is applicable, the Court only needs to establish whether the applicant complaint falls within one of the four categories mentioned above.⁷⁸

So far, the Court has had few opportunities to examine the application of Article 1 of Protocol No. 12. In its first case concerning these provisions, the Court found that the constitutional provisions that rendered the two applicants of Roma and Jew ethnicity ineligible to stand for election to the Presidency – as they hadn’t declared affiliation to any of the “constituent people,” namely Bosniacs, Croats or Serbs – amounted to discrimination.⁷⁹

In *Napotnik v. Romania*, the Court concluded that the early termination of a diplomatic posting abroad of a pregnant woman fell within the scope of Article 1 of Protocol No. 12. However, the Court held that the measure taken by the State constituted a proportionate interference for achieving the legitimate aim of the protection of the rights of others, notably Romanian nationals in need of consular assistance in Slovenia.⁸⁰

In *Ádám and Others v. Romania*, the applicants, ethnic Hungarian pupils, alleged discrimination in the baccalaureate qualification process, as they were required to take additional examinations in their mother tongue, which limited their preparation and recovery time compared to Romanian pupils. They argued that the difficulty of the Romanian language exams exacerbated their disadvantage and reduced their overall chances of success. The Court held that the difference in treatment they experienced vis-à-vis their Romanian peers was not sufficiently significant for the purposes of Article 1 of Protocol No. 12 to the Convention.⁸¹

4. Elements of Discrimination

As mentioned above, the Convention does not define the concept of discrimination. Therefore, the Court has developed a multi-step test when deciding cases of discrimination:

Has there been a difference in treatment of persons being in an identical or relevantly similar situations, or a lack of difference in treatment of persons finding themselves in different situation?

77 Explanatory Report, para. 23.

78 *Savez crkava “Riječ života” and Others v. Croatia*, para. 104.

79 *Sejdić and Finci v. Bosnia and Herzegovina*, para 56. See also *Kovačević v. Bosnia and Herzegovina*, Application no. 43651/22, Judgment 29 August 2023.

80 *Napotnik v. Romania*, Application no. 33139/13, Judgment 20 October 2020, para. 87.

81 *Ádám and Others v. Romania*, Application nos. 81114/17 and 5 others, Judgment 13 October 2020, para. 107.

If so, was the difference – or the lack of difference – justified: does it pursue a legitimate aim, and; are the means employed reasonably proportional to the aim pursued?⁸²

Under the following headings the elements of the discrimination-test shall be considered.

4.1. Difference in Treatment

The first step in a discrimination test is to establish whether there is a difference in treatment between people in analogous or relevantly similar situations. There are many nuances to this apparently simple statement. Depending on the form of distinction, several types of discrimination are recognised in the case law of the Court and in the literature. While other conditions must be met in addition to the difference in treatment in the broad sense for discrimination to occur, I will discuss the different forms of discrimination under this heading for educational purposes.

4.1.1. Direct Discrimination

According to the case law of the Court, the standard form of discrimination refers to the ‘difference in treatment of persons of analogous, or relevantly similar situation’.⁸³ This is, by the way, the basic form of discrimination, called direct discrimination. It is normally for the applicant to prove this when alleging a violation of Article 14.⁸⁴

For example, in the *Ēcis v. Latvia* case, the applicant complained that he had been discriminated against on the grounds of his sex with respect to the applicable prison regime. The applicant was convicted of murder and sentenced to 20 years’ imprisonment. His request of permission to attend his father’s funeral was denied. Nevertheless, had he been a female prisoner in analogous circumstances, he would have been eligible for such prison leave. The Court found a violation of Article 14 taken in conjunction with Article 8.⁸⁵

In *Varnas v. Lithuania*, the Court found a violation of Article 14 taken in conjunction with Article 8 as the applicant – a prisoner held in pre-trial detention for more than three years – had been systematically denied conjugal visits from his wife, while convicted prisoners were allowed such visits.⁸⁶

82 European Court of Human Rights, 2024, p. 16. For a slightly different structuring of the questions of the discrimination-test see Rainey, McCormick, Ovey, 2021, pp. 652–653.

83 *Carson and Others v. United Kingdom*, Application no. 42184/05, Judgment 16 March 2010, para. 61; *Biao v. Denmark*, para. 89. For a slightly different phrasing, yet similar meaning see *D.H. and Others v. Czech Republic*, para. 175; *Burden v. the United Kingdom*, Application no. 13378/05, Judgment 29 April 2008, para. 60; *Okpysz v. Germany*, Application no. 59140/00, Judgment 25 October 2005, para 33; *Fredin v. Sweden*, Application no. 12033/86, Judgment 18 February 1991, para. 60.

84 *D.H. and Others v. Czech Republic*, para. 177; *Timishev v. Russia*, Application nos. 55762/00 and 55974/00, Judgment 13 December 2005, para. 57; *Şerife Yiğit v. Turkey*, Application no. 3976/05, Judgment 2 November 2010, para. 71.

85 *Ēcis v. Latvia*, Application no. 12879/09, Judgment 10 January 2019, para. 94.

86 *Varnas v. Lithuania*, Application no. 42615/06, Judgment 9 July 2013, para. 122.

In *Fabris v. France*, the applicant, a child born out of wedlock, could only claim a share in his mother's estate equal to half the share of his mother's legitimate children. The Grand Chamber found a violation of Article 14 in conjunction with Article 1 of Protocol No. 1.⁸⁷

In certain cases, the parties may disagree with the existence or the cause of the different treatment. In *E.B. v. France*, the applicant alleged that 'at every stage of her application for authorisation to adopt, she had suffered discriminatory treatment that had been based on her sexual orientation'.⁸⁸ The Government held that the applicant's request for adoption was refused in view of 'the child's interests alone and had been based on two grounds: lack of a paternal referent and the ambivalence of the applicant's partner's commitment to her adoption plans'.⁸⁹

The logical consequence of the above-mentioned definition – or the other side of the coin – is that treating people who are in significantly different situations in the same way also amounts to discrimination. One of the first cases in which the Court enhanced this definition was the *Thlimmenos v. Greece* case. The applicant, a Jehovah's Witness who had been convicted of insubordination for refusing to wear the military uniform at a time of general mobilisation, was refused appointment to a chartered accountant's post by the Greek Institute of Chartered Accountants because of his previous conviction. The applicant complained that the Greek law did not distinguish between persons convicted as a result of their religious beliefs and persons convicted on other grounds.⁹⁰ The Court argued that the 'right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'⁹¹ and found a violation of Article 14 in conjunction with Article 9 regarding freedom of thought, conscience and religion.

In *Selygenenko and Others v. Ukraine* the applicants, originally from Crimea and Donetsk, relocated to Kyiv as internally displaced persons (IDPs) after the events of 2014 but maintained their registered residences in their home regions. They applied to vote in local elections in Kyiv, but their applications were rejected because their registered addresses were outside the city. The applicants submitted that they could not be compared to other people who did not reside at their own registered places of residence, as they had been forced to leave their homes and could not go back. Additionally, no elections were held at their registered places of residence so they could not participate in local elections at all. The Court found that the applicants, as well as any other IDPs, were in a significantly different situation from citizens living at their registered places and thus,

⁸⁷ *Fabris v. France*, Application no. 16574/08, Judgment 7 February 2013, para. 73.

⁸⁸ *E.B. v. France*, para. 2.

⁸⁹ *E.B. v. France*, para. 37. For further examples see European Court of Human Rights, 2024, p. 17; Harris et al., 2023, pp. 778–779.

⁹⁰ *Thlimmenos v. Greece*, para. 33.

⁹¹ *Thlimmenos v. Greece*, para. 44.

‘measures to put them on an equal footing with others in order to be able effectively to enjoy a right guaranteed by national law – the right to vote in local elections – were necessary in order to avoid discriminating against them’.⁹²

Harassment and instruction to discriminate can be viewed as forms of discrimination as well.⁹³ The *Oganezova v. Armenia* case involved a prominent LGBT community member facing severe harassment and an arson attack on her bar, fuelled by a homophobic campaign and public endorsement of the violence from politicians. Following the attack, she and her staff endured ongoing intimidation and death threats, which ultimately forced her to seek asylum in Sweden. The Court concluded that Armenian authorities failed to protect her from the harassment and did not conduct an effective investigation into the incidents, resulting in the violation of Article 3 of the Convention taken in conjunction with Article 14.⁹⁴

4.1.2. Indirect Discrimination

In some cases, even a seemingly neutral rule can lead to discrimination in practice, if it affects a group of people characterised by a common feature. The concept of indirect discrimination is usually illustrated by the case of *D.H. and Others v. Czech Republic*.⁹⁵ While this case is a perfect example for grasping the intricacies of the concept, the seeds of the definition of indirect discrimination were sown in the Court’s earlier case law.⁹⁶

In the *D.H. and Others v. Czech Republic*, 18 Czech nationals of Roma origin born between 1985 and 1991, along with a large number of Roma children, were placed in special schools on the basis of tests measuring intellectual ability, which they claim were influenced by their Roma origin. The Court found that the tests used to place children in special schools were designed with the mainstream Czech population in mind and did not take into account the cultural and linguistic differences of Roma. As a result, Roma children performed poorly on the tests and were placed in special schools in a disproportionate number. With regard to the definition of indirect

92 *Selygenenko and Others v. Ukraine*, Application nos. 24919/16 and 28658/16, Judgment 21 October 2021, para. 52.

93 European Court of Human Rights, 2024, p. 12.

94 *Oganezova v. Armenia*, Application nos. 71367/12 and 72961/12, Judgment 17 May 2022, para. 124. See also *Bączkowski and Others v. Poland*, Application no. 1543/06, Judgment 3 May 2007.

95 *D.H. and Others v. Czech Republic*.

96 The *Hugh Jordan v. the United Kingdom*, Application no. 24746/94, Judgment 4 May 2001, case concerns the shooting and killing of the applicant’s son by a police officer in unclear circumstances. The applicant alleged, on the basis of statistical data, that there was a discriminatory use of lethal force and a lack of legal protection against a section of the community on the grounds of national origin or association with a national minority. In considering a possible violation of Article 14, the Court concluded that a general policy or measure may be regarded as discriminatory if a general policy or measure had disproportionately prejudicial effects on a particular group, even if it is not specifically aimed at or directed at that group (see para. 154). In this particular case, however, the Court considered that statistics could not in themselves reveal a practice which could be classified as discriminatory within the meaning of Article 14.

discrimination, the Grand Chamber stated that ‘a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group’.⁹⁷ Moreover, indirect discrimination doesn’t necessarily require a discriminatory intent.⁹⁸ The Court concluded that the tests were biased and could not justify the differential treatment of Roma children, as their particular characteristics were not taken into account in the evaluation. The Court also took into account the general practice of placing Roma children in special schools in that period of time.

In *Biao v. Denmark*, the applicants, a Danish citizen of Togolese origin and his Ghanaian wife, were faced with the rejection of their application for family reunification in Denmark on the basis of legal compliance issues. According to Danish law, they could have been granted the right if they could demonstrate that their aggregate ties to Denmark were stronger than their attachment to any other country or if they had held Danish citizenship for at least 28 years. The Court found that the law favoured Danish nationals of Danish ethnic origin, and placed at a disadvantage – or had a disproportionately prejudicial effect on – persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish.⁹⁹

Furthermore, as a response to the criticism of its initial refusal of admitting statistical data as proof of indirect discrimination,¹⁰⁰ the Court strengthened its more recent case law¹⁰¹ in light of which reliable statistics could be taken into account as a prima facie indication that an apparently neutral rule negatively affects a certain group. In such cases, if the evidence submitted can be regarded as ‘sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination,’¹⁰² the burden of proof shifts to the Government, which must prove that the negative effects of the measure were the result of objective factors unrelated to the characteristic of the certain group.

4.1.3. Discrimination by Association

According to the Court, the expression “other status” has generally been given a wide meaning in its case law and their interpretation has not been limited to characteristics that are personal – in the sense that they are innate or inherent to the applicant. Article 14 of the Convention also covers instances in which an individual is treated

97 *D.H. and Others v. Czech Republic*, para. 184. See also *Horváth and Kiss*, Application no. 11146/11, Judgment 29 January 2013, para. 105; *Oršuš and Others v. Croatia*, Application no. 15766/03, Judgment 16 March 2010, para. 150.

98 *D.H. and Others v. Czech Republic*, para. 184. See also *Horváth and Kiss*, para. 105. This was reinforced in *Biao v. Denmark*, para. 103, *Oršuš v. Croatia*, para. 150.

99 *Biao v. Denmark*, para. 138.

100 *Hugh Jordan v. the United Kingdom*, para. 154.

101 See for example *Hoogendijk v. The Netherlands*, Application no. 58641/00, Judgment 6 January 2005, para. 2 of the part ‘the Law’.

102 *D.H. and Others v. Czech Republic*, para. 195. See also *Di Trizio v. Switzerland*, Application no. 7186/09, Judgment 2 February 2016, paras. 85–90.

less favourably on the basis of another person's status or protected characteristics.¹⁰³ Based on the settled case law of the Court, Article 14 also covers discrimination by association – that is, situations where the protected ground relates to another person who is related to the applicant.¹⁰⁴

In *Guberina v. Croatia*, the Court found a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 because of the national authorities' failure to take account of the needs of a child with disabilities when determining the applicant father's eligibility for tax relief on the purchase of suitably adapted property. In excluding him from tax exemption, authorities had not given any consideration to the specific needs of the applicant's family related to the child's disability.¹⁰⁵

In *Weller v. Hungary*, the second and third applicants, the children of a Hungarian father and a Romanian mother, argued that their exclusion from maternity benefit on the basis of their mother's foreign nationality – despite the fact that they were both Hungarian by birth – constituted an unjustified difference in treatment compared with other Hungarian children. The Court considered that the entitlement to an allowance due to a family cannot be dependent on which of the two biological parents of the children is a Hungarian national¹⁰⁶ and found a violation of Article 14 read in conjunction with Article 8.

In the *Molla Sali v. Greece* case, the applicant's Muslim husband left his entire estate to his wife in a will drawn up before a notary in accordance with the provisions of the Greek Civil Code. The sisters of the deceased challenged the will before the national courts, arguing that, in view of the deceased's Muslim religion, Sharia law applied to the inheritance. The Court of Cassation applied Islamic inheritance law on the basis of a provision of international law and deprived the applicant of three quarters of her inheritance. After noticing that the two treaties signed and ratified by Greece and applied by the Court of Cassation did not require Greece to apply Sharia law, the Court claimed that

'It cannot be assumed that a testator of Muslim faith, having drawn up a will in accordance with the Civil Code, has automatically waived his right, or that of his beneficiaries, not to be discriminated against on the basis of his religion'.¹⁰⁷

Applying Sharia law against the wishes of the testator amounted to discrimination. The Court found a violation of Article 14 read in conjunction with Article 1 of Protocol No. 1.¹⁰⁸ It is important to note that the Court did not compare the applicant's situation with that of a non-Muslim woman married to a non-Muslim husband, but rather with

103 *Molla Sali v. Greece*, Application no. 20452/14, Judgment 19 December 2018, para. 138

104 European Court of Human Rights, 2024, p. 13.

105 *Guberina v. Croatia*, Application no. 23682/13, Judgment 22 March 2016, paras. 93–99.

106 *Weller v. Hungary*, Application no. 44399/05, Judgment 31 March 2009, para. 38.

107 *Molla Sali v. Greece*, Application no. 20452/14, Judgment 19 December 2018, para. 156.

108 *Molla Sali v. Greece*, para. 162.

that of a beneficiary of a will made by a non-Muslim testator in accordance with the Greek Civil Code.¹⁰⁹

4.1.4. Positive Action

In certain cases, in order to respect Article 14, the Contracting States are required to correct “factual inequalities” by different treatment.¹¹⁰ In these circumstances, not the difference in treatment, but a failure to attempt to correct such inequalities may result in a breach of the prohibition of discrimination.¹¹¹ This orientation of the Court can be regarded as a step towards the idea of *substantial equality*.¹¹²

The Court pays particular attention to the inadequate investigation by the authorities of violence on racial, ethnic or religious grounds. For example, the *Abdu v. Bulgaria* case concerns the failure of the authorities to take reasonable steps to investigate plausible evidence that the violent assault inflicted upon the applicant and one of his friends – both Sudanese nationals – by two Bulgarian youths, alleged skinheads, was racially motivated. The Court stated that in case of investigating violent incidents triggered by suspected racist attitudes, the State authorities are required to take all reasonable action to identify the potential racist motives of the attack and added that treating ‘racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights’.¹¹³

The case law of the Court reflects an increasingly evident expectation of a strong State role against racial or ethnic discrimination, particularly in cases involving persons of Roma origin.¹¹⁴ For this purpose, the Court has repeatedly underlined that that as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority and thus require special protection.¹¹⁵

The indifference and lack of effective action on the part of certain States in matters relating to domestic violence – in the context of the effective prevention and combating of gender-based violence – is considered by the Court, in conjunction with Articles 2 and 3 of the Convention, to be a violation of the prohibition of discrimination in Article 14.¹¹⁶

109 European Court of Human Rights, 2024, pp. 18–19.

110 *D.H. and Others v Czech Republic*, para. 175; *Thlimmenos v Greece*, para. 44; *Stec and Others v UK*, Application nos. 65731/01 and 65900/01, Judgment 12 April 2006, para. 51.

111 European Court of Human Rights, 2024, p. 14.

112 For further details see Szalayné Sándor, 2021, p. 346.

113 *Abdu v. Bulgaria*, para. 44. See also *Milanović v. Serbia*, para. 97, *Angelova and Iliev v. Bulgaria*, Application no. 55523/00, Judgment 26 July 2007, para. 115; *Nachova and Others v. Bulgaria*, Application nos. 43577/98 and 43579/98, Judgment 6 July 2005, para. 160.

114 Szalayné Sándor, 2021, p. 347.

115 *D.H. and Others v. Czech Republic*, para. 182; *Oršuš and Others v. Croatia*, para. 147; *Horváth and Kiss v. Hungary*, para. 102.

116 Szalayné Sándor, 2021, p. 347.

The positive obligations of the States to stop, prevent, or punish such discrimination is mentioned in the case law of the Court as “positive measures,” “reverse discrimination,” “positive action,” or “affirmative action”.¹¹⁷

4.2. Comparable Situations

The second step in determining whether discrimination has occurred is to examine whether the people who claim to have been discriminated against are in a relevantly similar situation to another group that has been treated differently, or on the contrary, are in a different situation from the group that has been treated similarly. The other person or group of persons is called the “comparator”.¹¹⁸

The comparability should be assessed in light of the aim of the subject-matter, objective of the contested provision, and the context in which the alleged discrimination is occurring, not *in abstracto*. As such, two groups of people may be considered as being in an analogous situation for the purpose of one particular complaint but not another.¹¹⁹ Furthermore, the comparison between the two groups or situations does not require a strict identity between the two situations, the applicant has to prove that concerning the particular nature of their complaint they were in a relevantly similar situation.¹²⁰

Example of situations considered comparable by the Court include prisoners held in pre-trial detention and convicted prisoners with regards to conjugal visits¹²¹ and access to television,¹²² legitimate and illegitimate children in regard to succession,¹²³ and men and women in regard to parental leave.¹²⁴

The Court however held that lawyers and notaries on the one hand, and other legally trained persons on the other, are not in comparable situations for the purposes of their appointment as a guardian in cases where legal representation was necessary.¹²⁵ Furthermore, a person who resists the police is not in a relevantly similar situation to a person who assaults a private individual,¹²⁶ nor are taxpayers who had challenged a social contribution before it was declared unconstitutional to those who challenged it afterwards.¹²⁷ Privately-owned and public kindergartens aren’t in a relevantly similar or analogous position for the purpose of payment of subsidies¹²⁸

117 European Court of Human Rights, 2024, p. 14.

118 See European Court of Human Rights, 2024, p. 16.

119 European Union Agency for Fundamental Rights, Council of Europe, 2018, p. 47. See also European Court of Human Rights, 2024, p. 17.

120 European Court of Human Rights, 2024, p. 17.

121 *Varnas v. Lithuania*, Application no. 42615/06. Judgment 9 July 2013.

122 *Laduna v. Slovakia*, Application no. 31827/02, Judgment 13 December 2011.

123 *Fabris v. France*.

124 *Konstantin Markin v. Russia*, Application no. 30078/06, Judgment 22 March 2012.

125 *Graziani-Weiss v. Austria*, Application no. 31950/06, Judgment 18 October 2011, para. 65.

126 *P.W. v. Austria*, Application no. 10425/19, Judgment 21 June 2022, para. 81.

127 *Frantzeskaki and Others v. Greece*, Application nos. 57275/17, 58549/17, 58631/17 et al., Judgment 12 February 2019, para. 42.

128 *Špoljar and Dječji Vrtić Pčelice v. Croatia*, Application no. 68320/13, Judgment 22 September 2020, para. 45.

and pensioners employed in the civil service are not in a relevantly similar situation to pensioners employed in the private sector.¹²⁹

With regards to the situation of beneficiaries of social security systems, in *Carson and Others v. The United Kingdom*, the Court considered that social security benefits, including State pensions, are part of a system of social welfare that exists to ensure certain minimum standards of living for residents of a certain state in that certain state. Furthermore, the pension system is primarily designed to serve the needs of those resident in a certain state, characterised by a range of economic and social variables, which renders it hard to draw any genuine comparison with the position of pensioners living elsewhere.¹³⁰

Another interesting case in which the Court ruled that the applicants were not in a similar or analogous situation to their comparators is *Burden v. the United Kingdom*. The applicants were elderly, unmarried sisters who had lived together all their lives in a house they owned together. They submitted to the Court that if one of them died, the survivor would face a large inheritance tax bill, unlike the survivor of a marriage or civil partnership, who would be exempt from paying such tax. The Grand Chamber emphasised that sibling relationships are qualitatively different from those of married couples and civil partners because of the nature of consanguinity, which does not exist in the latter and the intent of entering into the formers. The Court reaffirmed that marriage had a unique status under Article 12 of the Convention, with social and legal implications that did not extend to other forms of cohabitation.¹³¹

4.3. Protected Grounds

Article 14 states that discrimination is prohibited “on any ground,” giving a list of examples as prohibited ground for discrimination. The last item on the list is “other status”. It is clear from the first reading that the list is illustrative and not exhaustive, and the Court of Justice has confirmed this.¹³² However, it is important to note that not all protected grounds will carry the same weight. This means that in some cases, such as discrimination based on sex or gender, nationality, race, religion, legitimacy, sexual orientation, and disability, the Court will look very closely at the discriminatory treatment and only very weighty reasons are accepted as justifications.¹³³

According to the well-established case law of the Court, not every difference in treatment will amount to a violation of Article 14, but only those based on an identifiable characteristic or “status” based on which persons or groups of persons are

129 *Fábián v. Hungary*, Application no. 78117/13, Judgment 5 September 2017, para. 133.

130 *Carson and Others v. the United Kingdom*, Application no. 42184/05, Judgment 16 March 2010, paras. 85–86. See also *Efe v. Austria*, Application no. 9134/06, Judgment 8 January 2013, paras. 52–53 with regard to family allowance for children living in Austria and abroad. For further details see Szalayné Sándor, 2021, p. 343.

131 *Burden v. the United Kingdom*, Application no. 13378/05, Judgment 29 April 2008, paras. 62–63. For further examples see European Court of Human Rights, 2024, p. 18.

132 *Clift v. the United Kingdom*, Application no. 7205/07, Judgment 13 July 2010, para. 55.

133 See Rainey, McCormick, Ovey, 2020, p. 661.

distinguishable from one another.¹³⁴ The Court also stated that asking the victim to alter their personal situation in order to avoid discrimination – for example, by acquiring a nationality – would render Article 14 devoid of substance.¹³⁵

In view of the limitations of this study, only three categories of the protected ground will be discussed. Nevertheless, case studies for the other protected grounds are presented in the study under a number of different topics.

4.3.1. Sex

As the advancement of gender equality is a major goal for member States of the Council of Europe, the Court has emphasised that only for “very weighty reasons” can a difference of treatment on the sole ground of sex be regarded justifiable.¹³⁶ Therefore, references to traditions, general assumptions or prevailing attitudes are not accepted by the Court as justifications.¹³⁷ For example, the Court found that States are prevented from imposing traditions that derive from the man’s primordial role and the woman’s secondary role in the family in a case concerning the obligation of married women to bear their husband’s surname.¹³⁸ Similarly, gender stereotypes – such as the perception that women are the primary child-carers and men the primary breadwinners – cannot in themselves be considered sufficient to justify a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.¹³⁹

However, the Court recognised that in certain fields, the difference of treatment between men and women is acceptable if the difference takes the form of positive action aimed at compensating women for existing inequalities.¹⁴⁰

For example, in *Andrle v. Czech Republic*, the Court found that the lower retirement age for women who have brought up more than one child was an objectively and reasonably justified measure to compensate for the factual inequality between men and women,¹⁴¹ resulting from the expectation that women will work full time in addition to looking after the home and bringing up children.¹⁴² On the other hand, in *Moraru and Marin*, the Court considered that not giving the applicants the option to continue

134 *Carson and Others v. the United Kingdom*, para. 61; *Molla Sali v. Greece*, para. 134; *Fábián v. Hungary*, para. 113; *Kiyutin v. Russia*, Application no. 2700/10, Judgment 10 March 2011, para. 56.

135 *Andrejeva v. Latvia*, Application no. 55707/00, Judgment 18 February 2009, para. 91.

136 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Application nos. 9214/80; 9473/81; 9474/81, Judgment 28 May 1985, para. 78; *Burghartz v. Switzerland*, para. 27; *Konstantin Markin v. Russia*, para. 127.

137 *Konstantin Markin v. Russia*, para. 127.

138 *Ünal Tekeli v. Turkey*, Application no. 29865/96, Judgment 16 November 2004, para. 63.

139 *Konstantin Markin v. Russia*, para. 143; *Carvalho Pinto de Sousa Morais v. Portugal*, Application no. 17484/15, Judgment 25 July 2017, para. 52.

140 European Court of Human Rights, 2024, p. 14.

141 *Andrle v. Czech Republic*, Application no. 6268/08, Judgment 17 February 2011, paras. 59–60. See also *Stec and Others v. the United Kingdom*, Application nos. 65731/01 and 65900/01, Judgment 12 April 2006, para. 61.

142 European Court of Human Rights, 2024, p. 14.

to work past their retirement age, until they reached the retirement age set for men constituted discrimination based on sex.¹⁴³

Furthermore, in *Alexandru Enache v. Romania*, the Court considered that the national legislation permitting a deferral of prison sentence for mothers, but not fathers, of children under the age of one year did not amount to a violation of Article 14, as the difference in treatment was justified by the ‘special ties that exist between the mother and child during that period’¹⁴⁴ and in view of protecting the specific features of motherhood.¹⁴⁵

The Court also scrutinises domestic violence laws under Articles 2 and 3 in conjunction with article 14, considering failures to protect women from such violence as forms of gender-based discrimination. In *Opuz v. Turkey*, the applicant’s mother was shot and killed by the applicant’s husband. In the years preceding the shooting, the husband had subjected both the applicant and her mother to a series of violent assaults and threats. The applicant made multiple reports to the authorities that led to some criminal proceedings; however, these were discontinued after the women withdrew their complaints under pressure. Despite convictions for earlier violent incidents resulting in minimal penalties, the situation escalated to the fatal shooting of the applicant’s mother, for which the husband received a life sentence in 2008 but was released pending appeal. The applicant’s renewed threats and subsequent need for protection were only addressed seven months later, following intervention from the Court. The Court observed that although the Turkish law then in force did not make explicit distinction between men and women in the enjoyment of rights and freedoms, the alleged discrimination at issue was based on the passive attitude of the authorities with regards to the reported domestic violence.¹⁴⁶ Additionally, the applicant managed to show ‘the existence of a *prima facie* indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence’.¹⁴⁷

An interesting observation has been made in the literature, namely that the majority of gender discrimination cases have been related to men’s equality, rather than to measures taken by the State to promote women’s equality. Cases before the Court had

143 *Moraru and Marin v. Romania*, Application nos. 53282/18 and 31428/20, Judgment 20 December 2022, para. 123. On the same note, in *Paják and Others v. Poland* the Court considered that a newly instituted difference in age between men and women concerning the early termination of their terms as judges amounted to discrimination based on sex. *Paják and Others v. Poland*, Application nos. 25226/18, 25805/18, 8378/19 and 43949/19, Judgment 24 October 2023, para. 260–263. See also European Court of Human Rights, 2024, p. 27.

144 *Alexandru Enache v. Romania*, Application no. 16986/12, Judgment 3 October 2017, para. 76.

145 *Alexandru Enache v. Romania*, para. 77.

146 *Opuz v. Turkey*, para. 192.

147 *Opuz v. Turkey*, para. 198. See also *Eremia v. the Republic of Moldova*, Application no. 3564/11, Judgment 28 May 2013, para. 82; *Volodina v. Russia*, Application no. 41261/17, Judgment 9 July 2019, para. 132.

mostly raised issues of family law, such as a father's right to see his children, his right to participate in their upbringing or his right to parental leave.¹⁴⁸

4.3.2. *Race, Ethnicity and Colour*

The *Timishev v. Russia* case is a perfect illustration and summary of the main principles of the Court on ethnic and racial discrimination. The applicant – a Russian citizen of Chechen origin living as a forced migrant in Nalchik – in the Russian Republic of Kabardino-Balkaria, alleged that he had been refused entry into Kabardino-Balkaria by police officers at a checkpoint on the basis of an oral instruction not to admit persons of Chechen origin. His legal attempts to obtain compensation had been unsuccessful. Furthermore, his children were denied schooling because he could not produce a migrant card, which he had surrendered in exchange for compensation, leading to an informal and precarious solution for their education.

The Court clarified that in its view

‘[e]thnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds’.¹⁴⁹

The Court added that discrimination based on actual or perceived ethnicity is a form of racial discrimination. Since racial discrimination is a “particularly invidious kind of discrimination” with dangerous consequences, it requires special vigilance and a vigorous response by the authorities. Therefore, the authorities must use all available means to combat racism.¹⁵⁰ The Court also reiterated that in a modern democratic society founded on the principles of pluralism and respect for different cultures, no difference of treatment based exclusively or to a decisive extent on a person's ethnic origin can be objectively justified.¹⁵¹

As shown above, the Court has underlined the importance of a strong State role in combating racial or ethnic discrimination, particularly in cases involving persons of Roma origin, as the Roma are a disadvantaged and vulnerable minority in need of special protection.¹⁵² It is important to note that it is generally accepted that Convention does not directly guarantee the civil and political rights of members of minority groups.¹⁵³ Nevertheless, the Court has succeeded, through the development of indirect

148 Szalayné Sándor, 2021, p. 354.

149 *Timishev v. Russia*, para. 55. See also *Sejdić and Finci v. Bosnia and Herzegovina*, para. 43.

150 *Timishev v. Russia*, para. 56. See also *Nachova and Others v. Bulgaria*, Application nos. 43577/98 and 43579/98, Judgment 6 July 2005, para. 145.

151 *Timishev v. Russia*, para. 58.

152 See subchapter 4.1.2.

153 Harris et al., 2023, p. 5.

discrimination and the doctrine of positive action, in interpreting the scope of the Convention in an expansive manner, going beyond the strictly personal interests of the applicants and discussing the discrimination of certain minorities.¹⁵⁴

The Court also underlined the duty of the authorities to investigate racially motivated acts of violence with vigour and impartiality, requiring State authorities to take all reasonable action to ascertain the existence of racial motivation.¹⁵⁵ Nonetheless, the Court admitted that ‘proving racial motivation will often be extremely difficult in practice’.¹⁵⁶

The Court has also dealt with a number of cases of racial discrimination in relation to political rights, as the right to vote or stand for election.¹⁵⁷ For example, in *Aziz v. Cyprus* the applicant, a resident of Nicosia, was denied the right to vote in the parliamentary elections of 27 May 2000 on the basis of constitutional provisions which prevented members of the Turkish Cypriot community from being registered on the Greek Cypriot electoral roll. After having found a violation of Article 3 of Protocol No. 1, the Court proceeded to the analysis of the complaint under Article 14, considering that it ‘is not a mere restatement of the applicant’s complaint under Article 3 of Protocol No. 1’.¹⁵⁸

4.3.3. Other Cases

The Court has developed a rich body of case law that has extended the number of protected grounds by interpreting the concept of “other status” broadly.¹⁵⁹ As such, the Court has found that “other status” covers age,¹⁶⁰ gender identity,¹⁶¹ sexual orientation,¹⁶² place of residence,¹⁶³ property,¹⁶⁴ health and disability,¹⁶⁵ parental

154 See for example *D.H. and Others v. Czech Republic*, *Horváth and Kiss; Oršuš and Others v. Croatia*; *Lavida and Others v. Greece*, Application no. 7973/10, Judgment 30 May 2013. For further arguments and examples see Harris et al., p. 812; Rainey, McCormick and Ovey, 2021, p. 677.

155 See subchapter 4.1.4. See also *Burlya and Others v. Ukraine*, Application no. 3289/10, Judgment 6 November 2018, *Paketova and Others v. Bulgaria*, Application nos. 17808/19 and 36972/19, Judgment 4 October 2022.

156 *Nachova and Others v. Bulgaria*, para. 159.

157 See for example *Sejdić and Finci v. Bosnia and Herzegovina*; *Bakirdzi and E.C. v. Hungary*, Application nos. 49636/14 and 65678/14, Judgment 10 November 2022.

158 *Aziz v. Cyprus*, Application no. 69949/01, Judgment 22 June 2004, para. 36.

159 European Court of Human Rights, 2024, p. 25.

160 See for example, *Schwizgebel v. Switzerland*, Application no. 25762/07, Judgment 10 June 2010, para. 85; *Carvalho Pinto de Sousa Morais v. Portugal*, para. 45.

161 *Identoba and Others v. Georgia*, Application no. 73235/12, Judgment 12 May 2015, para. 96.

162 *Salgueiro da Silva Mouta v. Portugal*, Application no. 33290/96, Judgment 21 December 1999, para. 28; *Fretté v. France*, Application no. 36515/97, Judgment 26 February 2002.

163 *Carson and Others v. United Kingdom*, para. 70.

164 *Chassagnou and Others v. France*, Application nos. 25088/94, 28331/95 and 28443/95, Judgment 29 April 1999, para. 95; *Clift v. the United Kingdom*, Application no. 7205/07, Judgment 13 July 2010, para. 56.

165 *Glor v. Switzerland*, Application no. 13444/04, Judgment 30 April 2009, para. 80, *Kiyutin v. Russia*, para. 57.

status,¹⁶⁶ marital status,¹⁶⁷ immigration status¹⁶⁸ or status related to employment.¹⁶⁹ But even less obvious circumstances can count as protected ground under the broad concept of “other status”, such as being a prisoner¹⁷⁰ or a collaborator of the political police.¹⁷¹

Essentially, in order for discrimination to take place, it has to be established that the less favourable treatment is due to a “protected ground” that cannot be separated from the particular factor,¹⁷² which is usually related to a personal characteristic of the victim, but not exclusively. The *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy* case, for example, concerns the application of an Italian Masonic Order enjoying the status of an association governed by private law, which complained of measures affecting its members, namely the legal prohibition on freemasons holding public offices. The protected ground was, thus, membership of the organisation.¹⁷³

It should be noted that the application of the principle of dynamic interpretation can also be spotted in this area. One of the best illustrations of the functioning of this principle is the margin of appreciation given to the States in assessing discrimination on grounds of sexual orientation. The *Dudgeon v. The United Kingdom* case concerned the existence of legislation in Northern Ireland, which had the effect of criminalising certain homosexual acts between consenting adult males. In its 1981 judgment, the Court, when considering the need to uphold the contested legislation in a democratic society, held that the margin of appreciation should be wider where the protection of morals is at stake, and it was only because the particular case concerned a most intimate aspect of private life that the Court required particularly serious reasons before interference by the public authorities could be legitimate.¹⁷⁴

In its more recent case law, the Court has significantly reduced the States' margin of appreciation holding that ‘discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour”’¹⁷⁵ and that ‘[d]ifferences based solely on considerations of sexual orientation are unacceptable under the Convention.’¹⁷⁶ In line with these findings in the *Beizaras and Levickas v. Lithuania* case concerning the authorities' refusal to prosecute the authors of serious homophobic comments, including calling for undisguised violence and incitement to hatred, after a picture

166 *Weller v. Hungary*, para. 38.

167 *Şerife Yiğit v. Turkey*, Application no. 3976/05, Judgment 2 November 2010, para. 79.

168 *Hode and Abdi v. the United Kingdom*, Application no. 22341/09, Judgment 6 November 2012, para. 47.

169 *Valkov and Others v. Bulgaria*, Application nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, Judgment 25 October 2011, para. 115.

170 *Stummer v. Austria*, Application no. 37452/02, Judgment 7 July 2011, para. 90.

171 *Naidin v. Romania*, Application no. 38162/07, Judgment 21 October 2014, paras. 30–36.

172 European Union Agency for Fundamental Rights, Council of Europe, 2018, pp. 49–50.

173 *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, Application no. 35972/97, Judgment 2 August 2001, para. 26.

174 *Dudgeon v. the United Kingdom*, paras. 48–52.

175 *Vejdeland v. Sweden*, Application no. 1813/07, Judgment 9 February 2012, para. 55.

176 *Salgueiro da Silva Mouta v. Portugal*, para. 36; *X. and Others v. Austria*, Application No. 19010/07, Judgment 19 February 2013, para. 19.

of the applicant couple kissing was posted on social media, the Court held that the applicants suffered discrimination on the grounds of their sexual orientation. By downplaying the seriousness of the comments, the authorities, at the very least, tolerated them.¹⁷⁷

With regard to private and family life being protected under Article 8, the Court has held that the relationship between a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of “family life”, just as the relationship of a different-sex couple.¹⁷⁸ However, the Court added that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples.¹⁷⁹ With regard to the right to adopt the Court pointed out in *E.B. v. France* that where national law allows single persons to adopt a child, the grounds based on the absence of a “paternal referent” cannot be regarded as justifying the refusal to authorise homosexual couples to adopt.¹⁸⁰

4.4. Lack of Justification

Difference in treatment or, where appropriate, the absence of it can lead to discrimination only if there has no ‘objective and reasonable justification’.¹⁸¹ Based on the restrictive interpretation of Article 14, the Contracting States enjoy a considerable margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment,¹⁸² and the Convention planned to condemn only the ‘really serious, abusive, invidious discrimination’.¹⁸³

The Court also explained that this condition entails two elements, namely the absence of a “legitimate aim” and the absence of a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised.¹⁸⁴ Under the following headings, these two conditions will be analysed.

4.4.1. Legitimate Aim

First of all, in order for different – or, in some cases, identical – treatment to be justified, the Contracting State must prove the existence of a legitimate aim. Unlike Articles 8 to 11 of the Convention, Article 14 does not list the grounds for intervention by the Contracting States with a view to restricting the exercise of the particular right. Therefore, the aim of the State measure does not have to be linked to a specific objective of the Convention, which gives the States a rather wide margin of appreciation.¹⁸⁵

177 *Beizaras and Levickas v. Lithuania*, Application no. 41288/15, Judgment 14 January 2020, para. 129.

178 *Schalk and Kopf*, Application no. 30141/04, Judgment 24 June 2010, para. 94.

179 *Schalk and Kopf*, para. 108.

180 *E.B. v. France*, paras. 87 and 94. See also Szalayné Sándor, 2021, p. 361.

181 *D.H. and Others v. Czech Republic*, para. 175; *Molla Sali v. Greece*, para. 135.

182 Rainey, McCormick, Ovey, 648.

183 Szalayné Sándor, 2021, p. 350.

184 *Molla Sali v. Greece*, para. 135; *Fabris v. France*, para. 56; *Fábián v. Hungary*, para. 113.

185 Szalayné Sándor, 2021, p. 351.

Furthermore, the State has to show that there is a link between the legitimate aim and the difference in treatment alleged by the applicant.¹⁸⁶ As such, the Court has shown that there is no link between the obligation of married women to bear their husband's surname and the achievement of family unity. As a result, the Court found that there was 'no objective and reasonable justification' for this obligation.¹⁸⁷

The Court has identified a number of aims that can be accepted for the purpose of justification under Article 14 and several that cannot. With regard to the former, the Court considered to be legitimate aims, amongst others, the followings: the protection of the health and rights of the children,¹⁸⁸ facilitation of the rehabilitation of juvenile delinquents,¹⁸⁹ protection against gender-based violence, abuse and sexual harassment in the prison environment,¹⁹⁰ conditions of employment in the public service,¹⁹¹ protecting national security,¹⁹² or restoration of peace.¹⁹³

Regarding the aims that the Court did not consider acceptable as legitimate justifications, it was not persuaded by the general and abstract considerations that the precedence given to legitimate children corresponded to what could be presumed to be the deceased's intentions when choosing the successor of a farm.¹⁹⁴ The Court also considered that tradition¹⁹⁵ or general assumptions or prevailing social attitudes in a particular country¹⁹⁶ are insufficient to be accepted as legitimate aims for a difference in treatment on grounds of sex.

On some issues, the case law of the Court of Justice reflects changes in the society's values. For example, in the earlier case law of the Court, the aim of supporting and encouraging a traditional family used to be in itself a "legitimate or even praiseworthy" purpose.¹⁹⁷ Later, the Court considered that the same aim was in the same time "a weighty and legitimate reason which might justify a difference in treatment"¹⁹⁸ and "rather abstract".¹⁹⁹ In even more recent cases, the very same aim has become only "rather abstract"²⁰⁰ and "may, in some circumstances, amount to a legitimate aim".²⁰¹

186 European Court of Human Rights, 2024, p. 19.

187 *Ünal Tekeli v. Turkey*, para. 66.

188 *Hoffman v. Austria*, Application no. 12875/87, Judgment 23 June 1993, para. 34.

189 *Khamtokhu and Aksenchik v. Russia*, Application nos. 60367/08 and 961/11, Judgment 27 January 2017, para. 80.

190 *Khamtokhu and Aksenchik v. Russia*, para. 82.

191 *Naidin v. Romania*, para. 49.

192 *Konstantin Markin v. Russia*, para. 137.

193 *Sejdić and Finci v. Bosnia and Herzegovina*, para. 45. For further examples see European Court of Human Rights, 2024, pp. 1–20, Szalayné Sándor, 2021, p. 351.

194 *Inze v. Austria*, Application no. 8695/79, Judgment 28 October 1987, paras. 42–43.

195 *Ünal Tekeli v. Turkey*, para. 63.

196 *Konstantin Markin v. Russia*, para. 127.

197 *Marckx v. Belgium*, para. 139; *Mata Estevez v. Spain*, second to last para. of part of 'the Law'.

198 *Karner v. Austria*, Application no. 40016/98, Judgment 24 July 2003, para. 40.

199 *Karner v. Austria*, Application no. 40016/98, Judgment 24 July 2003, para. 41.

200 *X and Others v. Austria*, para. 139.

201 *Taddeucci and McCall v. Italy*, Application no. 51362/09, Judgment 30 June 2016, para. 93. See also European Court of Human Rights, 2024, p. 20.

4.4.2. Proportionality

The second requirement for a justification to be considered objective and relevant is that the difference in treatment must strike a fair balance between the protected value, which is usually to safeguard a public interest, and respect for the rights and freedoms of the individual. In other words, the Court requires a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realise’.²⁰²

The Court made it clear that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment.²⁰³ The scope of the margin of appreciation of the Contracting States varies according to the ‘circumstances, the subject-matter and the background’ of the case.²⁰⁴ As such, a wide margin is usually allowed to the States when it comes to general measures of economic or social strategy. The Court assumes that due to the direct knowledge of their society and its needs, national authorities are better placed than the international judge to appreciate what is in the public interest on these grounds. It usually accepts the legislature’s policy choice, interfering only if it is “manifestly without reasonable foundation”.²⁰⁵ On the contrary, concerning, for example, a difference in treatment based exclusively on the ground of sex very weighty reasons would have to be put forward before the Court to accepted by the Court as compatible with the Convention.²⁰⁶

It has been observed that where the protected characteristic is one that the person concerned can in some way control, such as immigrant status, the Court does not require the State to provide an overly stringent explanation to justify the distinction. However, if the discrimination is linked to an intrinsic characteristic of the person concerned – for example, race, ethnicity, or gender, or to a circumstance beyond his or her control, such as refugee status – the Court requires a much stronger explanation from the State.²⁰⁷

The existence or non-existence of common ground between the laws of the Contracting States also influences the width of the margin of appreciation of the States,²⁰⁸ in the sense that the Court’s scrutiny is more rigorous if a common ground between the different national laws can be established. For example, in *S.A.S. v. France*, the applicants argued that the blanket ban on wearing the burqa and niqab in public under criminal sanctions was a seemingly neutral rule that mainly disadvantaged

202 *Larkos v. Cyprus*, Application no. 29515/95, Judgment 18 February 1999, para. 29; *Fabris v. France*, para. 56; *Molla Sali v. Greece*, para. 135.

203 *Larkos v. Cyprus*, para. 29; *Mollas Sali v. Greece*, para. 136.

204 *Carson and Others v. the United Kingdom*, para. 61, *Stec and Others v. the United Kingdom*, para. 52.

205 *Carson and Others v. the United Kingdom*, para. 61, *Stec and Others v. the United Kingdom*, para. 52.

206 *Stec and Others v. the United Kingdom*, Application nos. 65731/01 and 65900/01, Judgment 12 April 2006, para 52.

207 Szalayné Sándor, 2021, p. 353.

208 *Petrovic v. Austria*, Application no. 156/1996/775/976, Judgment 27 March 1988, para. 38.

Muslim women, claiming the violation of Article 14 taken together with Articles 8 and 9. Somewhat surprisingly, the Court found that the aim pursued by the French government, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others” was a legitimate aim and that the measures taken to achieve that aim were proportionate. The fact that there was no common ground between the member states of the Council of Europe influenced the Court’s leniency.²⁰⁹

Furthermore, in order to satisfy the proportionality test, it is required that the measure that resulted in the different treatment is in principle suited for realising the legitimate aim and more importantly, that it was necessary in order to achieve that aim.²¹⁰ In *Karner v. Austria*, the applicant, asserted that the law in force entitled him as the surviving partner to succeed to the tenancy. Although the court of first instance and the court of appeal dismissed the landlord’s action for termination of the tenancy on the grounds that the provision in question protected persons who had lived together for a long time without being married against sudden homelessness and applied to homosexuals as well as heterosexuals, the Supreme Court upheld the landlord’s action, stating that it had not been the legislature’s intention to include protection for same-sex couples. The Court reiterated that it could accept that the protection of the family in the traditional sense could justify a difference in treatment. However, the Government had failed to demonstrate how the restriction in this case was necessary to achieve that aim.²¹¹

5. Burden of Proof

According to the practice of the Court, it is for the applicant to prove that there has been a difference in treatment and for the respondent State to show that the difference – or where appropriate, the lack of difference – is justified.²¹²

With regard to the assessment of evidence, the Court has adopted the standard of proof “beyond reasonable doubt”; however, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are supported by a free assessment of all the evidence. Proof may be established by the coexistence of sufficiently strong, clear and consistent inferences or similar unrebutted presumptions of fact. The degree of persuasion required to reach a particular conclusion and, in this context, the allocation of the burden of proof, are inextricably linked to the specificity of the facts, the nature of the claim made and the Convention right at stake.²¹³

209 *S.A.S. v. France*, Application no. 43835/11, Judgment 1 July 2014, paras. 153–159 and 162.

210 *Karner v. Austria*, para. 41. See also Chiriță, 2008, p. 615.

211 *Karner v. Austria*, paras. 40–41.

212 *D.H. and Others v. Czech Republic*, para. 177.

213 *Nachova and Others v. Bulgaria*, para. 147.

However, the burden of proof may be reversed, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities. In such cases, the Court expects the authorities to provide a satisfactory and convincing explanation.²¹⁴

The Court has also noted that applicants may have difficulty in proving discriminatory treatment. Therefore, in order to guarantee the effective protection of the victims' rights, it accepts less strict evidential rules in cases of alleged indirect discrimination.²¹⁵ Thus, when it comes to assessing the impact of a measure or practice on an individual or group, statistics that, on critical examination, appear to be reliable and significant, will suffice to establish the *prima facie* evidence which the applicant must establish. And once an applicant alleging indirect discrimination has established a rebuttable presumption of discrimination, the burden shifts to the respondent State to show that the difference in treatment is not discriminatory. This does not mean, of course, that indirect discrimination cannot be proved without statistical data.²¹⁶

6. Concluding Remarks

This study has examined the non-discrimination provisions of Article 14 of the Convention and Article 1 of Protocol No. 12 and the case law of the Court interpreting them. Since the aim of the book, of which this study is a part, is to focus on the implementation of the Convention in Central and Eastern Europe, the study has prioritised cases concerning Central and Eastern European countries in order to support the theoretical explanations.

In the light of the examination of Article 14 and Article 1 of Protocol No. 12, the following conclusions can be drawn: despite the limited scope of Article 14, the Court's broad interpretation has succeeded in extending the prohibition of discrimination beyond the limits set by the Convention. This has been achieved through the ambit-test, the recognition of additional rights and the generous interpretation of "other status" as a protected ground; the case law of the Court reveals an attempt to develop a genuine principle of substantive equality through the positive duties imposed on States, although the text of the Convention only provides for the prohibition of formal discrimination; due to the low number of ratifications, the general prohibition of discrimination in Article 1 of Protocol No. 12 has been of limited use; despite the Court's admirable efforts to extend the scope of Article 14, it has become difficult to predict which matters fall within the scope of the Convention or of Article 14, what circumstances constitute relevant similar situations and when objective and

214 *Salman v. Turkey*, Application no. 21986/93, Judgment 27 June 2000, para. 100; *Anguelova v. Bulgaria*, Application no. 38361/97, Judgment 13 June 2002, para. 111; *D.H. and Others v. Czech Republic*, para. 179.

215 *D.H. and Others v. Czech Republic*, para. 186.

216 *D.H. and Others v. Czech Republic*, paras. 188–189.

reasonable justification can be established;²¹⁷ the broad interpretation of discrimination has sometimes been used by the Court to send messages about the eradication of prejudice and intolerance on the part of state authorities in situations related to differences in treatment based on race, gender, and sexual orientation.²¹⁸ However, the Court has also been criticised for failing to ensure genuine protection against certain types of discrimination, such as those based on ethnicity.²¹⁹

217 Harris et al., 2023, p. 776.

218 Rainey, McCormick, Ovey, 2021, p. 677.

219 See Nagy, 2023, pp. 20, 24–27.

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Protection of Property

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ABSTRACT

The purpose of this paper contains establishing the genesis and evolution of the content of the peaceful enjoyment of the natural and legal person's possessions within the European Convention on Human Rights (ECHR) system. To achieve this goal, the paper proposes objectives such as defining “possessions” under the ECHR, determining the right to property content, exploring future extensions of Article 1 of Protocol No. 1 in light of the evolution of medical sciences, and examining the relevant jurisprudence, including cases from Central and Eastern Europe. As a case study, the cases vs. the Republic of Moldova were analysed. To determine the content and development of the property protection institution within the framework of the European Convention on Human Rights, we have utilised relevant scientific research methods in the field of legal sciences as a methodological support. Logical analysis was applied throughout the study to identify the legal content of the right, which is the subject of this scientific investigation, and to examine the principles of the protection mechanism for this right, examined in the article. The comparative analysis has allowed us to highlight aspects regarding the compatibility of national legislation on property protection with the standards of the ECHR. The historical method, inherent to research in the field of legal sciences, facilitates the examination of the factors that have influenced the development of legal norms concerning property protection. This method helps identify important material legal sources to understand the evolution of the legal reasoning behind the ECHR's decisions on property protection cases. As we will observe in this work, the European Court often engages in historical analysis when grounding its decisions, especially in cases of the nationalisation of private property. Dynamic analysis (from a forward-looking perspective) is relevant whenever we need to plan amendments to national legislation in the process of implementing the European Court of Human Rights' decisions concerning Article 1 of Protocol No. 1 to the European Convention on Human Rights.

KEYWORDS

Convention for the Protection of Human Rights and Fundamental Freedoms, expropriation, possessions, protection of property.

1. Introduction

Considered to have emerged alongside the individual, property is fundamental to the development of human society and represents one of the key issues of individual

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existence, in particular, and human society, in general.¹ Numerous scholars have developed the concept of private property and mechanisms for its protection, deeming it entirely justified that property, together with fundamental civil liberties, constitutes guarantees of well-being and enables the full realisation of dignity, which is itself conceived as, ... ‘the real foundation of human rights and freedoms,’ recognised through universally and regionally adopted instruments since 1948.²

After the adoption of the Universal Declaration of Human Rights, containing the provision that ‘Everyone has the right to own property...,’ regional intergovernmental cooperation structures and individual states initiated the process of implementing the provision of the Declaration at the regional and national levels. We must, however, acknowledge that this mission was extremely complicated at the time due to the ideological factor. The states belonging to antagonistic systems at the time had completely contradictory views regarding the concept and scope of private property.

The mass expropriations that occurred in the 20th century had disastrous consequences for thousands of families. The post-Soviet countries, upon declaring their independence, signed the European Convention on Human Rights, reaffirming their deep commitment to these fundamental freedoms, which constitute the very foundation of justice and peace in the world. The maintenance of these freedoms relies essentially, on the one hand, on a truly democratic political regime and, on the other hand, on a shared understanding and respect for human rights from which these freedoms derive. The internal normative framework underwent a difficult process of adjustment to social and economic realities, during which gaps were addressed, but human rights in general, and property rights in particular, were violated.³

Later, the collapse of the socialist system brought with it a series of new challenges. Thus, the guarantee of private property against arbitrary abuses becomes a common imperative for European states. Additionally, growing concerns about environmental protection have created a new conflict between property rights and environmental regulations. Innovative technologies have revealed aspects that might be considered possessions in the sense of the Convention, such as: human organs and tissues, human genetic material, information, programs, and cyberspace, among others.⁴

The European Convention on Human Rights is the first regional treaty to proclaim a list of fundamental rights and freedoms along with an effective mechanism for their enforcement. However, due to the post-war context, as with universal human rights instruments, the authors of the Convention were unable to reach a compromise on including all fundamental rights and freedoms from the first and second generations in the content of the regional treaty at the time of its drafting in 1950. In the years that followed, the original text of the Convention was supplemented with additional

1 Bîrsan, 2007, p. 27.

2 Dorul and Cazacu, 2022, pp. 10–15.

3 *Kopecký v. Slovakia*, Application no. 44912/98, Judgment 28 September 2004.

4 Coban, 2005, pp. 536–537.

protocols, which expanded the range of protected rights. Today, the text of the European Convention on Human Rights encompasses a wide range of civil and political rights, although it includes fewer economic and social rights.

In his work ‘Introduction générale à la Convention Européenne des Droits de l’Homme’, author J.F. Renucci expresses an opinion with which we concur: despite the fact that economic rights are marginally addressed in the European Convention on Human Rights, they cannot be ignored, as they often extend civil and political rights.⁵

The development of the content of fundamental rights and freedoms is important both for states and for the European Court of Human Rights itself, the unique guarantor of compliance by the High Contracting Parties to the Convention. The Court’s jurisprudential creations often drive research and legislative innovations in the Member States of the Council of Europe.

2. General Rule: The Protection of Property in the System of the European Convention on Human Rights

The European Convention on Human Rights and Fundamental Freedoms has succeeded in creating a system that has given rise to a genuine European public order, in which states have become debtors to creditors, who are simultaneously other states and individuals within an exclusive civic Europe. Technically, the European Convention on Human Rights represents an international treaty under which states assume certain legal obligations.⁶ The Convention encompasses 59 articles and has been extended and amended by 16 additional protocols. The first additional protocol to the European Convention was adopted on May 20, 1952, and supplemented the material content of the Convention with certain rights, thereby providing explicit regulation for the right to property in Article 1, which states:

‘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.’⁷

Three general rules for the application of the protected right can be derived from this legal text: the general principle of respect for property; the conditions under

⁵ Renucci, 2005, p. 273.

⁶ Balan and Sărcu, 2014, pp. 11–24, p. 18.

⁷ Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

which a natural or legal person may be deprived of possessions; and the states' right to control the use of property in accordance with the general interest, by implementing such laws as they deem necessary for this purpose.⁸

The right to property is classified under economic rights, historically considered an unquestionable right. However, coexistence in society also requires establishing limits, as property entails obligations and recognises the role of public interest. This creates a middle ground between individual excesses and socialising tendencies regarding property. It implies accepting the public law aspect of property relations and the interventionist role of the state, while being closely tied to the private law dimension of these relationships, necessitating firm guarantees for individuals. Thus, as mentioned earlier, the right to property is absolute and inviolable in relations between individuals, but becomes relative in relation to public authority⁹. The thesis presented is regulated by Article 1 para. 2 of the aforementioned Protocol No. 1.

2.1. The Meaning of the Concept of “Possession” in the System of the European Convention on Human Rights

The argument that Article 1 of Protocol No. 1 guarantees the right to property found in many of the ECtHR's judgements regarding the application of this provision. Examining this case law, as well as that developed by the former Commission, it shows that the issue of defining the object of the regulations in Article 1 is much more complex. The bodies of the Convention have extended the protection established by Article 1 to other real rights, to claims rights, and to “economic interests,” encompassing various patrimonial values. All of these fall under the notion of “property” in civil law.¹⁰

The practice of the European Court of Human Rights regarding the application of the Convention indicates that the terms used in the text of Article 1 of Protocol No. 1 have an autonomous meaning. In particular, the notion of “property” has a broad interpretation, encompassing both movable and immovable assets, real rights as well as claims rights, intellectual property rights, inheritances, the right to salary, pensions, social security¹¹ and more. The European Court of Human Rights, in its interpretations of Article 1 of Protocol No. 1, states that a claim can qualify as a “property” in the sense of Article 1 if the claimant can argue that they had at least a “legitimate expectation”¹² that they would obtain a property right. To determine whether the expectation is “legitimate,” the Court must assess whether the claimant's claim is based on a sufficient legal foundation and “examine whether there was a sufficient legal basis that would allow the claimant's claim to be considered possessions”.¹³ The European Court of Human Rights, referring to the notion of “possession,” states

⁸ Poalelungi et al, 2017, p. 329.

⁹ Baeşu, 2015, pp. 89–100, p. 98.

¹⁰ Birsan, 2005, p. 971.

¹¹ *Stec and Others v. the United Kingdom*, Application nos. 65731/01, 65900/01, Judgment 12 April 2006.

¹² *Cazacu v. Moldova*, Application no. 40117/02, Judgment 23 October 2007.

¹³ *Kopecký v. Slovakia*, Application no. 44912/98, Judgment 28 September 2004.

that the provisions of Article 1 of Protocol No. 1 do not apply to the right to acquire future property.¹⁴ The hope of seeing a property right that is impossible to effectively exercise cannot be considered “possession” in the sense of Article 1 of Protocol No. 1.¹⁵

The category of “possessions” primarily includes movable and immovable assets, a statement reiterated by the former Commission in the case of *Wiggins v. United Kingdom*.¹⁶ The protection provided by Article 1 of Protocol No. 1 also extends to real rights as well as claims rights. Real rights refer to the subjective right under which the holder directly and immediately exercises attributes over a specific asset, without the intervention of third parties. A claims right is a subjective right through which the creditor – the active subject – can demand that the debtor – the passive subject – either give, do, or refrain from doing something.¹⁷

The recognition of the right of easement as property in the sense of the Convention was articulated in the case of *S. v. United Kingdom*¹⁸, where the right to receive an annual rent as a result of establishing an easement over a property can constitute a «possession» in the sense of the Convention. This implies that a real right of contractual origin also qualifies as property.¹⁹

The notion of “possessions” also extends to claims recognised by a judicial decision, and the annulment of such a decision after it has become final and enforceable constitutes an interference with the beneficiary’s right to protection of property.²⁰ In the case of *Tudor-Auto S.R.L. v. Republic of Moldova*, the court reiterates that a debt based on a judicial decision can be considered “possessions” in the sense of Article 1 of Protocol No. 1. In this context, the enforcement claims resulting from judicial decisions that remained unexecuted for 8 years, including the time the Court examined the case, led to the claimant’s inability to obtain registration certificates necessary to conduct their insurance business. This constituted an interference with their right to protection of property as outlined in the first sentence of Article 1 para. 1 of Protocol No. 1 to the Convention.²¹

Immovable properties, even if unauthorised and not properly registered, can be classified as “possessions” in the sense of the Convention. In the case of *Hamer v. Belgium*, the court noted that the use of an unauthorised building for 37 years demonstrated the claimant’s substantial economic interest, which was sufficient to constitute a recognised and substantial interest, thus qualifying as “possessions.” Consequently,

14 *Marckx v. Belgium*, Application no. 6833/74, Judgment 13 July 1979.

15 *Kopecký v. Slovakia*, Application no. 44912/98, Judgment 28 September 2004.

16 *Paul Henry Wiggins v. the United Kingdom*, Application no. 7456/76, Decision on admissibility 8 February 1978. European Commission of Human Rights.

17 Adam, 2002, p. 26.

18 *S. v. United Kingdom*, Application no. 10741/84, Judgment 13 December 1984. European Commission of Human Rights.

19 Karadjova, n.d., p. 5.

20 Carss-Frisk, 2001.

21 *Tudor-Auto SRL and Triplu-Tudor SRL v. Moldova*, Application nos. 36344/03, 30346/05 and 36341/03, Judgment 9 December 2009.

the claimant had a “legitimate expectation” to continue enjoying these possessions.²² On the contrary, the fact that the claimant occupied public land for approximately five years does not transform them into the holder of rights that can be considered as “possessions.” However, the court opined that, disregarding the illegality of the disputed construction, the claimant was the owner of the structures and components of the shed they built, as well as all household and personal items located there. For these reasons, the court concluded that the residence constructed by the claimant, along with their and their relatives’ habitation within it, represented a substantial economic interest. Such an interest, whose persistence over time was tolerated by the authorities, constitutes “possessions” in the sense of the norm expressed in the first sentence of Article 1, para. 1 of Protocol No. 1.²³

Specific aspects of the subject matter may also surface regarding the rights derived from the exercise of a particular profession, typically a liberal profession. The former Commission decided that the volume of activity of a person engaged in such work does not constitute property in the sense of the provisions of Article 1, as it is subject to the inherent risks of economic life. Similarly, the expectation of public notaries that their fees will not be reduced by future applicable regulations does not fall under the protection established by this text. In turn, the court ruled that if a lawyer provides legal assistance without a contract with their client – specifically when designated to perform this activity by their bar association – they cannot claim protection under Article 1 of Protocol No. 1, given that the legal aid and defence office organised by the bar established that the individual being defended was genuinely in a state of necessity and lacked any material means. Thus, the court determined that, in this situation, no claim ever existed within the claimant’s patrimony. This conclusion was particularly relevant because the expenses incurred were not significant, and the work performed could be considered a socially beneficial activity. This aligns with the provisions of Article 4 of the Convention, which prohibits forced labour. Conversely, the Commission ruled that the right of doctors to demand the adjustment of fees paid by patients for medical consultations, arising from agreements with public social security bodies, constitutes property in the sense of Article 1 and is protected by the provisions it establishes.²⁴

The patrimonial aspects of intellectual property rights are encompassed within the notion of property, such as the right of an author to receive due remuneration from the execution of a publishing contract for their work or the right to remuneration for the performance of a literary or musical work. Personal non-patrimonial rights, on the other hand, are more likely to fall under the protection established by Article 8 of the Convention regarding the right to private life, as these pertain to private-social rights. When it comes to an intellectual property right that results not only from the creator’s activity but also from undergoing certain administrative procedures, the

22 *Hamer v. Belgium*, Application no. 21861/03, Judgment 27 November 2007.

23 *Oneryildiz v. Turkey*, Application no. 48939/99, Judgment 30 November 2004.

24 *Bîrsan*, 2005, pp. 976–977.

former Commission made some distinctions. Thus, to the extent that an inventor has obtained a patent under national legislation, the holder is designated as the owner of that patent with the right to assign or transfer it as provided by law. Therefore, it was concluded that a patent falls under the notion of “property” in the sense of Article 1 of Protocol No. 1 of the ECHR. In contrast, it ruled that as long as a patent has not been granted by the competent national authority, there can be no discussion of “a civil right,” and the patent registration procedure is essentially administrative in nature, which falls outside the scope of the provisions of the Convention.²⁵

In the sense of the Convention, a trademark is also considered as “possessions”. The court establishes that the concept of “possessions” in the first part of Article 1 of Protocol No. 1 has an autonomous scope that is not limited to the ownership of tangible assets and is independent of the formal qualifications of domestic law. Other rights and interests that constitute assets can also be regarded as “economic rights” and, therefore, “possessions” in the sense of this provision. In each case, it is important to consider whether the circumstances, taken as a whole, have granted the claimant a substantial interest protected by Article 1 of Protocol No. 1.²⁶

In the case of *Malmström v. Sweden*²⁷, the Court examined whether shares constituted “possessions” in the sense of Article 1 of Protocol No. 1. It assessed the complex nature of shares, which are certificates that grant the holder the right of ownership over a part of the company, along with associated rights (including the right to vote). This also involves an indirect claim to the company’s assets. It was undisputed that shares had an economic value. Therefore, the former Commission concluded that shares constituted “possessions”.

The Grand Chamber’s judgement in the *Ališić and Others v. Bosnia and Herzegovina*²⁸ case (App. no. 60642/08, 16 July 2014) offers a substantial interpretation of the notion of “possessions” under Article 1 of Protocol No. 1 to the European Convention on Human Rights. The case concerned the applicants’ inability to withdraw foreign-currency savings deposited prior to the dissolution of the Socialist Federal Republic of Yugoslavia, due to unresolved issues related to state succession and the banking reform.

The court reaffirmed that the term “possessions” encompasses not only physical property but also legitimate expectations arising from a proprietary interest. It held that the applicants’ deposits constituted “possessions” despite the systemic and political complexities following the state’s dissolution. The long-standing denial of access to these funds, combined with the absence of effective remedies, led to the violation of the applicants’ right to the peaceful enjoyment of their possessions. Moreover, the judgement underscored the requirement of legal certainty, stating that the ambiguity surrounding the responsibility for the deposits undermined the foreseeability and

25 Ibid, 2005, pp. 975–976.

26 *Anheuser-Busch Inc. v. Portugal*, Application no. 73049/01, Judgment 11 January 2007.

27 *Lars Bramelid and Anne-Marie Malmström v. Sweden*, Applications nos. 8588/79 and 8589/79, Decision of the European Commission on Human Rights on the admissibility of 12 October 1982.

28 *lišić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, Application no. 60642/08. Grand Chamber, Judgment 16 July 2014.

lawfulness of the interference. The court concluded that the disproportionate burden imposed on the applicants did not satisfy the requirement of a fair balance between individual rights and public interest.

We find it necessary, in the context of research on the content of the right to property, to express our disagreement with the recent trends in the works of certain contemporary scholars who endorse the concept of “biological property.” The individual’s freedom to freely dispose of their own tissues, organs, cells, and genes is not absolute and, in the opinion of contemporary jurists well-versed in international human rights law, contradicts the concept of human dignity. The Grand Chamber of the European Court of Human Rights had the opportunity to rule on such allegations in the case of *Parrillo v. Italy*²⁹, where the claimant argued, in particular, that the prohibition under Italian law against donating embryos created through assisted reproduction for scientific research was incompatible, among other things, with the provisions of Article 1 of Protocol No. 1 to the Convention.

In its ruling on the indicated case, the Court reiterated that the concept of “possessions” within the meaning of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the 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. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1.³⁰

Additionally, Article 1 of Protocol No. 1 applies only to a person’s existing possessions. Future income cannot be considered to constitute a “possession” unless it has already been earned or is definitely payable. Further, the hope that a long-extinguished property right may be revived cannot be regarded as a “possession”; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition. However, in certain circumstances a “legitimate expectation” of obtaining an asset may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a legitimate expectation if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence.

The Court notes that the present case raises the preliminary question of the applicability of Article 1 of Protocol No. 1 to the facts of the instant case. It notes that the parties have diametrically opposed views on this matter, especially regarding the status of the human embryo in vitro. Ultimately, the Court concluded that it is not necessary to examine here the sensitive and controversial question of when human life begins as Article 2 of the Convention is not in issue in the instant case. With regard

29 *Parrillo v. Italy*, Application no. 46470/11, Grand Chamber, Judgment 27 August 2015.

30 *Parrillo v. Italy*, Application no. 46470/11, Grand Chamber, Judgment 27 August 2015, para. 211.

to Article 1 of Protocol No. 1, the Court considers that it does not apply to the present case. Having regard to the economic and pecuniary scope of that Article, human embryos cannot be reduced to “possessions” within the meaning of that provision.³¹

3. State Obligations and the Control of Use of Property Under Article 1 of Protocol No. 1 to the ECHR

The commitment of states to ensure the right to respect for property entails both negative and positive obligations. The essential purpose of this provision is to protect individuals from unjustified interference by the state in the exercise of their right to respect for their property.³²

In the case of *Brumărescu v. Romania* (1999)³³, the European Court of Human Rights found a violation of Article 1 of Protocol No. 1 to the Convention, emphasising that the interference by the Romanian authorities with the applicant’s property rights contravened fundamental principles of legal certainty and the rule of law. The applicant had been granted ownership of a nationalised property through a final and enforceable court decision, which had been implemented by restoring possession and registering his title in the official land records. However, this right was later annulled following a “recurs în anulare” (extraordinary appeal) initiated by the Prosecutor General, resulting in the reversal of the final judgement and the restitution of the property to the state. The Court held that such interference, occurring after the right had been legally consolidated, lacked foreseeability, was arbitrary in nature, and was not justified by a legitimate public interest. Consequently, Romania failed to maintain a fair balance between the protection of individual property rights and the demands of the general interest. This led to a breach of the applicant’s right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1.

Negative obligations under the provisions of Article 1 of Protocol No. 1 are particularly relevant in cases of expropriation or destruction of immovable property, as well as in cases of inherent restrictions related to land use policies or confiscation.³⁴ In general, negative obligations require the state to refrain from forced expropriation, forced eviction, and excessive control over land use.³⁵

Positive obligations of the state to protect rights are opposed to the negative obligations of the state to refrain from interference. The latter function is the classic role of protecting human rights against state interference. Although the distinction between positive and negative obligations is expressed through active actions and omissions, it is clear that, in practice, this can be difficult to determine. Cases where interference

31 *Parrillo v. Italy*, Application no. 46470/11, Grand Chamber, Judgment 27 August 2015, paras. 212–215.

32 Grgic et al., 2007, p. 10.

33 *Brumărescu v. Romania*, Application no. 28342/95, Judgment 8 October 1999.

34 Grgic et al, 2007, p. 10.

35 Besson, 2003.

with the exercise of a fundamental right occurs solely as a result of an action or exclusively based on an omission are extremely rare, due to the ever-increasing presence of the state in all areas of society.³⁶

To illustrate the aforementioned points, it is useful to present the legal reasoning followed by the European Court of Human Rights in examining the case of *Broniowski v. Poland*. Following the alteration of Poland's borders at the end of World War II, the Polish state committed to providing compensation to Polish repatriates who were forced to abandon their properties located across the Bug River, now within the territories of Ukraine, Belarus, or Lithuania. When a Polish national complained that he had not received the compensation in kind to which he was entitled, the court found that this request revealed a systemic deficiency that deprived an entire category of individuals (nearly 80,000 people) of their property rights.³⁷ In this case, the Court found that the primary purpose of Article 1 of Protocol No. 1 is to protect individuals from unjustified interference by the state in the exercise of their property rights. However, under Article 1 of the Convention, each contracting party 'recognises the rights and freedoms defined [in] the Convention' for everyone under its jurisdiction. Fulfilling this general obligation may involve positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, these positive obligations may require the state to take necessary measures to protect property rights. However, the boundaries between the positive and negative obligations of the state under Article 1 of Protocol No. 1 of the ECHR cannot be precisely defined. The applicable principles are, however, similar. Whether the case involves a positive obligation of the state or the criteria for the application of the rule of law, in both contexts, there must be a balance between the competing interests of the individual and those of the community as a whole. The state enjoys a certain margin of appreciation in determining compliance with the Convention. The interconnection between the alleged omissions by the state and the related actions can be viewed as an "interference" with the claimant's property, making it difficult to classify them into a precise category. In the present case, the court did not find it necessary to strictly categorise the examination of the case as falling under the positive obligations of the state or the negative obligation to refrain from unjustified interference in the exercise of the right to property protection.³⁸

Article 1 of the Protocol No. 1 to the European Convention on Human Rights guarantees every person the right to respect for their possessions. Just as is provided for several other fundamental rights protected by the Convention, the state may impose restrictions on the right to property.³⁹ In this context, it is important to recall that para. 1 of Article 1 of Protocol No. 1 to the ECHR establishes the obligation of authorities to act in accordance with the law and the general principles of international law.

36 Klatt, 2011, pp. 64–65.

37 *Hotărâri pilot. Fișă tematică.*, 2020.

38 *Broniowski v. Poland*, Application no. 31443/96, Judgment 22 June 2004.

39 Gomien, 2000, p. 83.

It is noteworthy that, in its practice, the European Court of Human Rights rarely references general principles of international law in the context of property protection.

Furthermore, this provision is one of the most debated among both public international law specialists and practitioners of the European Convention on Human Rights. In the case of *James and Others v. the United Kingdom*, the claimants argued that by referring to the ‘general principles of international law,’ the second sentence of Article 1 of Protocol No. 1 imposes upon national authorities the requirement – stemming, in their view, from international law – for prompt, adequate, and effective compensation for foreigners deprived of their possessions. The European Commission of Human Rights consistently stated that these principles were designed to apply exclusively to foreigners and are not relevant in cases of expropriation by a state of its own nationals. The court considered that it is more natural to deduce from the text rather than refer to the general principles of international law, which are incorporated in Article 1 of Protocol No. 1, but exclusively for acts that fall under its scope, namely state actions towards foreigners. Furthermore, it is necessary to assign to the terms of a treaty their ordinary meaning (Article 31 of the Vienna Convention on the Law of Treaties). In the case of *Lithgow and Others v. the United Kingdom*, the court reiterated that the general principles of law under Article 1 of Protocol No. 1 apply exclusively to non-nationals. They were specifically developed for the benefit of non-citizens. As such, these principles do not pertain to the treatment afforded by the state to its own citizens. Therefore, in this case, the court concluded that the general principles of law do not entail, as the applicants claimed, the application of principles for prompt, adequate, and effective compensation to citizens of their own state for nationalised property.

4. Guarantees in Case of Deprivation of Possessions

The protection of property within the framework of the European Convention on Human Rights entails a system of guarantees against arbitrary or disproportionate forms of interference by authorities in the exercise of this right by individuals and legal entities. Interference with the right to respect for possessions may take the form of deprivation or limitation of rights.

Deprivation of a person’s possessions can only occur in cases of public utility. When such circumstances arise, the state is obligated to ensure just compensation. Both governments and private individuals are prohibited from taking property without just cause. The former owner of the land must be fairly compensated if the government appropriates it for public use.

The essence of deprivation of possessions lies in the removal of the property subject or the extinguishment of the legal rights of owners.⁴⁰ Determining what constitutes deprivation can be challenging. Generally, deprivation of possessions

40 Grgic, 2007, p. 10.

includes the transfer of ownership. The European Court of Human Rights has stated, whenever it has had the opportunity to address this issue that deprivation of the right to property is the most radical form of interference with the exercise of the right to respect for the property of individuals or legal entities. The Court has adopted a broad definition of “deprivation” to include expropriation and the loss of other rights arising from the right to property. To fall under the provisions of Article 1 of Protocol No. 1 to the ECHR, deprivation must be definitive and involve expropriation or a transfer of property rights.

In cases of interference with the right to property, the Court has applied a test of “fair balance” between individual interests (protection of the right to property) and public interest. Such a fair balance is not achieved when the individual owner is required to bear “an individual and excessive burden”.⁴¹

In *Beyeler v. Italy*⁴² (Application no. 33202/96), the European Court of Human Rights reaffirmed that any interference with property under Article 1 of Protocol No. 1 to the European Convention must meet three core requirements: it must be lawful, foreseeable, and must strike a fair balance between the demands of the general interest and the protection of individual rights.

The Court found that while the Italian legislation on the state’s right of pre-emption lacked clarity – particularly concerning deadlines for its exercise – it did not render the interference arbitrary per se. However, such uncertainty in the law, coupled with the broad discretion afforded to authorities, significantly impacted the assessment of whether a fair balance was achieved.

Ultimately, the court concluded that the prolonged uncertainty and disproportionate burden placed on the applicant violated his right to peaceful enjoyment of possessions. The judgement emphasises that legal certainty and predictability of the law are essential components of the protection of property under the Convention.

*Hutten-Czapska v. Poland*⁴³ represents a landmark Grand Chamber judgement addressing systemic issues in Poland’s landlord-tenant legal framework, particularly the extensive state controls on rent and property use. The applicant, a property owner, challenged Poland’s statutory regime that severely limited landlords’ ability to adjust rents or regain possession, which effectively diminished the value and enjoyment of their property.

The Court examined Poland’s compliance with Article 1 of Protocol No. 1 to the European Convention on Human Rights, which protects the right to the peaceful enjoyment of possessions. Central to the judgement was the court’s assessment of whether the domestic legislation struck a “fair balance” between the general interest (social protection of tenants) and the individual rights of landlords.

The court identified systemic deficiencies in the Polish legal framework: rigid rent controls, ineffective judicial remedies for landlords, and burdensome administrative

41 *Hentrich v. France*, Application no. 13616/88, Judgment 03 July 1995.

42 *Beyeler v. Italy*, Application no. 33202/96, Grand Chamber, Judgment 5 January 2000.

43 *Hutten-Czapska v. Poland*, Application no. 35014/97, Grand Chamber, Judgment 19 April 2006.

procedures that collectively imposed a disproportionate and unforeseeable interference with property rights. The Court emphasised the importance of legal certainty, proportionality, and effective safeguards in protecting property interests.

Consequently, it found a violation of Article 1 of Protocol No. 1, noting that Poland failed to provide adequate compensation or restitution mechanisms, thereby undermining the very essence of property rights. This case underscores the court's stance that states must carefully balance social and economic policies against individual property rights, ensuring that interventions remain within reasonable and predictable limits.

In its case law, the court has established that deprivation of possessions is essentially permissible only if it is based on law, the general principles of international law, and invokes public utility.

To be justified, any interference with the right to property must serve a legitimate objective in the public or general interest.⁴⁴ However, it is not enough for the interference to serve a legitimate objective, it must also be proportional. In the judgement of *Sporrong and Lönnroth v. Sweden*⁴⁵, the court detailed important aspects of the principle regarding the justification of an interference:

‘[...] The court must determine whether a fair balance has been struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights [...] The search for this balance is inherent in the entire Convention and is reflected in the structure of Article 1 [of Protocol No. 1].’

An interference with the exercise of the right to property must imperatively respect the requirements of the principle of legal certainty. This requirement is expressly mentioned in Article 1, para. 1 of Protocol No. 1, which states that deprivation of possessions must be “subject to the conditions provided by law.” Furthermore, we reiterate in the context of this research that the principle of legal certainty can be considered the cornerstone of the system of protection of human rights established under the European Convention on Human Rights. It is inherent to the Convention as a whole and must be respected in the implementation of all rights guaranteed by the Convention.

The phrase “subject to conditions provided for by law” concerning any and all interference with the right to the peaceful enjoyment of “possessions” is to be construed in the same manner as the phrase “in accordance with law” in Article 8 in respect of interference with the rights protected by this provision or “prescribed by

44 *James and Others v. the United Kingdom*, Application no. 8793/79, Judgment 21 February 1986, para. 46.

45 *Sporrong and Lönnroth v. Sweden*, Application nos. 151/75; 7152/75, Judgment 23 September 1982, para. 69.

law” relating to interferences with the rights protected under Articles 9, 10 and 11 of the Convention.⁴⁶

The European Court of Human Rights distinguishes between the concepts of “public interest” and “general interest,” but does not clearly differentiate between the two. At the same time, it acknowledges that public interest can be the interest of another person.

‘A taking of property carried out under social, economic, or other policies can be “in the public interest”, even if the community as a whole has no direct utility related to it or a benefit derived from the taken property.’⁴⁷

The Strasbourg Court has determined that the following purposes fall within the notion of “public interest” as defined by the relevant provision: elimination of social injustices in the housing sector; combating the effects of a foreign-currency loan crisis particularly in the context of preventing mass homelessness; nationalisation of specific industries; regulation of the energy sector; adoption of land and city development plans; securing land in connection with the implementation of the local land development plan; prevention of tax evasion; measures to combat drug trafficking and smuggling; protection of the interests of crime victims; restrictions on alcohol consumption; protection of morals; control of the legitimate provenance of vehicles in circulation; confiscation of sums of money acquired illegally; transition from a socialist economy to a market economy; proper functioning of the justice system, emphasising the importance of administering justice without delays that could undermine its effectiveness and credibility etc.⁴⁸

Although the Convention does not extend its applicability to the general protection of the environment, as its articles were not designed within this scope, environmental protection has become an increasingly important consideration in modern society.

Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the state has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective.⁴⁹

Consequently, environmental protection can be classified under the category of public interest, under certain conditions.

Moreover, we consider it relevant to mention that in the case of *Depalle v. France*⁵⁰ the European Court of Human Rights examined the compatibility of the French authorities’ decision to refuse renewal of temporary occupancy permits and order the

46 European Court of Human Rights, 2025, p. 27.

47 *James v. United Kingdom*, Application no. 8793/79, Judgment 21 February 1986, paras. 39, 45.

48 European Court of Human Rights, 2025, p. 31.

49 *Hamer v. Belgium*, Application no. 21861/03, Judgment 27 November 2007, para. 79.

50 *Depalle v. France*, Application no. 34044/02, Grand Chamber, Judgment 29 March 2010.

demolition of a house built on maritime public property with the rights guaranteed under Article 1 of Protocol No. 1 (protection of property) and Article 8 (right to respect for private and family life, and home) of the European Convention on Human Rights.

The applicants had constructed a residence on a coastal plot in Brittany, for which they had held successive temporary permits. Upon expiration of the last permit in 1992, the French State declined to renew the permit, subsequently ordering the house's demolition in 1998 on the grounds of protecting public maritime property. The court acknowledged that the applicants had "possessions" within the meaning of Article 1 of Protocol No. 1 and that their home was protected under Article 8. However, it emphasised the state's broad margin of appreciation in regulating access and use of public property, particularly in environmentally sensitive areas.

The court found the interference to pursue a legitimate aim – namely, the protection of public property and environmental interests – and stressed the proportionality of the measures. It was noted that the applicants were aware of the temporary nature of their occupancy and the legal status of the land, and alternative solutions, including relocation, were proposed and rejected. Consequently, the court held that the French authorities' actions did not constitute a violation of the applicants' property or home rights under the Convention. This judgement reinforces the principle that states possess a wide discretion in balancing individual property rights with public interests, particularly in contexts involving environmental protection and management of public land.

In the *Guiso-Galisay v. Italy case* (2009), the European Court of Human Rights examined whether Italy violated Article 1 of Protocol No. 1 of the European Convention on Human Rights concerning the applicant's property rights. The case concerned the Italian authorities' refusal to register the applicant's land ownership title due to a dispute over the validity of a cadastral map, effectively preventing the applicant from exercising ownership rights.

The court recognised the existence of a "possession" under Article 1 of Protocol No. 1 but emphasised the need to balance individual property rights with the requirements of legal certainty and public interest. The court underscored the margin of appreciation afforded to the state in land registration and property formalities to ensure the proper administration of land tenure.

Ultimately, the court concluded that the interference was lawful and pursued legitimate aims, including the prevention of legal uncertainty and protection of third parties' rights. It found no violation of the applicant's property rights, highlighting the necessity for procedural safeguards in property registration systems.

This case underscores the principle that procedural rules governing property registration may justify restrictions on property rights when aimed at preserving legal clarity and public interest.⁵¹

Proportionality, including assessing the legality of interference under Article 1 of Protocol No. 1, requires a just balance between conflicting interests: the public

51 *Guiso-Galisay v. Italy*, Application no. 58848/00, Grand Chamber, Judgment 22 December 2009.

interest and the private interest. This balance entails ensuring that neither of the interests involved receives absolute protection, which would lead to the general denial of protection for the other. At all times, there must be certain limits of protection for each interest involved, even if those limits vary in extent and content.⁵² A measure that interferes with the peaceful enjoyment, possession, and use of property must be necessary in a democratic society aimed at achieving a legitimate purpose. We reiterate that the measure must strike a fair balance between the requirements of the general interest of the community and the fundamental rights of the individual.⁵³

The purpose of the proportionality criterion is to determine, first and foremost, how and to what extent the claimant has been restricted in exercising the right affected by the alleged interference, and what the adverse consequences of that restriction are on the claimant's ability to exercise their right in their particular situation. Subsequently, this impact is weighed against the public interest served by the interference.⁵⁴ The time needed to contest the measures restricting the claimant's rights is also taken into consideration.⁵⁵

In cases of deprivation of possessions, proportionality is respected if the dispossessed owner is granted compensation.⁵⁶ This is why the examination of cases under Article 1 of Protocol 1 differs from the examination of other cases regarding the violation of fundamental human rights and freedoms as proclaimed by the ECHR. Only when the authorities' interference involves the payment of just compensation to the owner will it not be considered a violation of property protection in the sense of the ECHR.

In simple terms, the fair balance test can be satisfied in one of two ways: either the victim receives compensatory benefits that reduce the impact of the interference to a modest level, or the public interest served by the interference is so compelling that it justifies even a severe impact. The court favours the first option, as it mitigates the impact on the victim by providing monetary compensation as a substitute for the property.⁵⁷

In this context, questions arise regarding the use of money as a substitute for property, as money does not fulfil this role in relation to other human rights. For example, demonstrating that a compelling public interest outweighs individual interests may justify an interference with religious freedom, but showing that the state has paid money as a substitute for the opportunity to exercise one's beliefs does not suffice.⁵⁸ Compensations, on the other hand, are a form of restitution granted to owners

52 Morărescu, 2013, pp. 233–234.

53 Grgic et al., n.d., p. 14.

54 Grgic et al., n.d., p. 27, para. 129.

55 European Court of Human Rights, 2025, p. 24.

56 *Lithgow and Others v. the United Kingdom*, Application nos. 006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgment 8 July 1986, para. 120.

57 Allen, 2007, pp. 286–335.

58 Ibid, 2007, pp. 286–335.

when the conditions for interference with property have not been met.⁵⁹ The ECHR has noted that, in the legal systems of contracting states, expropriation of possessions without any compensation would be justified only in exceptional circumstances; otherwise, the right to property would be largely “illusory and ineffective”.⁶⁰

In the context of the present unit of content, we consider it relevant to present the case of *Jahn and Others v. Germany*⁶¹ (2005). The Grand Chamber of the European Court of Human Rights examined whether the revocation of property rights, originally granted under GDR legislation and later annulled by German reunification laws, violated Article 1 of Protocol No. 1 of the Convention. The applicants had received ownership of agricultural land during the land reform in the former East Germany (GDR). After German reunification, legislation was passed that retrospectively withdrew ownership rights from individuals who had acquired land under the GDR system but did not meet certain eligibility criteria. The applicants argued that this amounted to an unjustified deprivation of possessions.

The court acknowledged that the applicants had a “possession” under Article 1 of Protocol No. 1. However, it concluded that the interference pursued a legitimate aim in the public interest – namely, the rectification of irregular property allocations under the former regime and the re-establishment of legal continuity post-reunification.

Importantly, the Grand Chamber emphasised the wide margin of appreciation afforded to states in transitional contexts. It found that the means used were proportionate to the aim pursued and that the applicants could not have had a legitimate expectation of retaining their titles, as they were aware of the contested legal basis of their acquisition. The court held that there had been no violation of Article 1 of Protocol No. 1, affirming that retroactive legislative measures affecting property rights may be justified in exceptional historical and legal circumstances, particularly during systemic transitions such as reunification.

The content of Article 1 of Protocol 1 to the ECHR indicates that the public interest objective is also achieved by addressing certain errors made in the distribution within the pension system, such as unjustified or improperly obtained advantages. Through legislative intervention, enhanced equity within the pension system is ensured. The case of *Bélné Nagy v. Hungary*⁶² reached the Grand Chamber of the European Court of Human Rights with a landmark judgement on 13 December 2016, which significantly refined the court’s approach to the protection of social benefits under Article 1 of Protocol No. 1. The Grand Chamber reversed aspects of the earlier Chamber judgement of 10 February 2015 by placing stronger emphasis on the principle of legitimate expectation and the “essence” of property rights in the context of social security benefits.

59 Sermet, 1992, p. 38.

60 Carss-Frisk, 2001.

61 *Jahn and Others v. Germany*, Application nos. 46720/99 and 72203/01, Grand Chamber, Judgment 30 June 2005.

62 *Bélné Nagy v. Hungary*, Application no. 53080/13, Grand Chamber, Judgment 13 December 2016.

The applicant, Ms. Béláné Nagy, had initially been granted a disability pension. However, following a legislative change in the method of assessing disability, her pension was withdrawn despite no substantial change in her health condition. A subsequent reform introduced additional eligibility criteria for disability compensation. Although she met the medical requirements, after reassessment, Ms. Béláné Nagy was denied benefits because she failed to meet newly introduced administrative criteria related to social insurance contributions, which were beyond her control.

The Grand Chamber held that the refusal to grant the disability benefit constituted an ‘excessive and disproportionate individual burden,’ emphasising that the applicant had a legitimate expectation to receive the pension, given her prior entitlement and the stability of her medical condition. This expectation brought her interest within the protective scope of “property” under Article 1 of Protocol No. 1. The court acknowledged a state’s margin of appreciation in regulating social benefits but underscored that this discretion could not undermine the very essence of the right to property. The principle of *impossibilia nulla obligatio est* was invoked to highlight the unfairness of requiring contributions that the applicant could not reasonably make, given her situation.

This ruling marked an important development from the Chamber’s earlier decision, which was more restrictive and less focused on legitimate expectations and proportionality.

The Grand Chamber’s reasoning in the Béláné Nagy case also aligns with the court’s established jurisprudence on legitimate expectations in social benefits as seen in *Stec and Others v. United Kingdom* (2006) and *Moskal v. Poland* (2009). These cases similarly recognise that while states enjoy a margin of appreciation in social policy, once a benefit is conferred, applicants develop legitimate expectations that must be protected against arbitrary or disproportionate interference.

In conclusion, *Béláné Nagy v. Hungary* (Grand Chamber) broadened the scope of Article 1 of Protocol No. 1 to extend beyond traditional property rights to include social security benefits, stressing the protection of legitimate expectations and fairness in the face of legislative changes affecting those benefits.

5. Protection of Property in Armed Conflicts Under the European Convention on Human Rights

The first case in which the European Court of Human Rights examined the human rights implications of a situation of occupation was *Loizidou v. Turkey*⁶³, which ensued from the Turkish occupation of Northern Cyprus in 1974. In its reasoning, the court took into account the broader context of the occupation in order to assess the specific circumstances affecting the applicant’s rights under the Convention. In this case the claimant alleged that access to several of her land parcels was denied following the

63 *Loizidou v. Turkey*, Application no. 15318/89, Judgment 23 March 1995.

Turkish invasion, claiming a violation of Article 1 of Protocol 1. Despite the apparent military occupation, the ECHR did not apply the principles of international humanitarian law. This is surprising, as the court expressed in its judgement the importance of interpreting its decisions in accordance with the principles of the Vienna Convention on the Law of Treaties, particularly Article 31(3)(c) of that treaty, which states that ‘any relevant rules of international law applicable in the relations between the parties’ must be taken into account.

In cases where claimants complained about the destruction of their homes in the context of armed conflicts, the ECHR accepted the claim of property rights based on excerpts from an inventory of residences issued by the city administration after the alleged attack (*Kerimova and Others v. Russia*⁶⁴). In the case of *Damayev v. Russia*⁶⁵ the ECHR held that a claimant complaining about the destruction of their home should provide at least a brief description of the property in question. As additional examples of *prima facie* evidence regarding property rights or residence, the court accepted documents such as titles of ownership for the home or land, excerpts from land or tax registers, documents issued by local authorities, plans, photographs, and receipts for maintenance work, as well as evidence of postal deliveries, witness statements, or any other relevant evidence (*Prokopovich v. Russia, Elsanova v. Russia*).⁶⁶

The relationship between international humanitarian law and the European Convention on Human Rights has evolved significantly in the jurisprudence of the European Court of Human Rights, particularly in response to situations involving armed conflict and military occupation. A major turning point came with the *Hassan v. United Kingdom*⁶⁷ Grand Chamber judgement in 2014. The case commenced from the detention of an Iraqi civilian by British forces during the international armed conflict in Iraq. The applicant alleged violations of Article 5 of the Convention, which guarantees the right to liberty and security. In a landmark decision, the court held that the ECHR remained applicable even in the context of armed conflict conducted outside a state party’s territory. Crucially, the court interpreted Article 5 in light of relevant rules of international humanitarian law, particularly those governing the detention of civilians during armed conflict as set out in the Geneva Conventions. This marked the first time the court explicitly integrated international humanitarian law norms into the interpretative framework of the Convention, adopting a harmonised approach rather than treating the two legal regimes as mutually exclusive.

The Hassan judgement thus opened the door to a more nuanced understanding of how the Convention can function in situations where International humanitarian law is also applicable. It demonstrated the court’s willingness to acknowledge that certain procedural guarantees under the Convention may be read in light of the legal realities

64 *Kerimova and Others v. the Russian Federation*, Application nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Judgment 03 March 2011.

65 *Damayev v. Russian Federation*, Application no. 36150/04, Judgment 22 October 2012.

66 European Court of Human Rights, 2025.

67 *Hassan v. The United Kingdom*, Application no. 29750/09, Grand Chamber, Judgment 16 September 2014.

of warfare, provided that such interpretation does not undermine the essence of the rights protected.

This approach was further refined in the 2021 Grand Chamber judgement in *Georgia v. Russia (II)*⁶⁸, which concerned the international armed conflict between Georgia and the Russian Federation during the August 2008 war over South Ossetia and Abkhazia. In this case, the court was called to assess Russia's responsibility for widespread violations of human rights during and after the hostilities. Importantly, the court drew a sharp distinction between the period of active hostilities and the subsequent phase of military occupation. It concluded that the Convention does not apply during the conduct of hostilities in the absence of effective control by the respondent state, deferring to International humanitarian law as the *lex specialis* in that context. However, once hostilities cease and a state exercises effective control over a territory or population, the obligations under the Convention are fully re-engaged.

Through *Georgia v. Russia (II)*, the court clarified that while International humanitarian law governs the conduct of military operations and hostilities, the ECHR resumes (or continues) to apply in situations of occupation or prolonged control, allowing the court to assess potential violations under the Convention framework.

This jurisprudential development reflects the court's effort to maintain the relevance of the Convention in times of armed conflict without undermining the specific legal regimes governing the laws of war.

6. Derogation From the Provisions of Article 1 of Protocol No. 1 of the ECHR

Under Article 15 of the ECHR, 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.

Derogation is the legal right of a state, under a treaty, to limit the full application of certain rights in cases of emergency or crisis (including war).⁶⁹

The text of Article 15 of the ECHR grants the governments of States parties, in exceptional circumstances, the possibility to derogate, temporarily, in a limited and controlled manner, from the obligation to ensure certain rights and freedoms under the Convention. In connection with this, the application of Article 15 para. (1) shall be made in compliance with the following procedural and substantive conditions: the right to derogate can be invoked only in time of war or in other situations of public danger that threaten the life of the nation; a State may take measures derogating from its obligations under the Convention only to the extent that the situation so requires;

68 *Georgia v. Russia (II)*, Application no. 38263/08, Grand Chamber, Judgment 21 January 2021.

69 Ni Aolain, 2017, p. 42.

the derogations cannot be in contradiction with other obligations under international law.⁷⁰

In the context of the pandemic, several Central and Eastern European states among few other states that are members of the Council of Europe issued declarations of derogation from the provisions of the Convention.

Romania⁷¹ and Serbia⁷² took a similar approach in announcing their derogations. Both states announced derogation from the provisions of the ECHR without explicitly indicating which provisions of the Convention were being derogated, implying that they opted to derogate from all provisions of the Convention, except for those mentioned in Article 15, para. 2 of the ECHR.

Albania notified the Secretary General of the Council of Europe, that the application of measures taken by the Government gives reasons for the necessity to derogate from certain obligations of Republic of Albania under Articles 8 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 1 and 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of Protocol No. 4 to the Convention for the protection of Human Rights and Fundamental Freedoms.⁷³

Georgia announced the necessity to derogate from certain obligations of Georgia under Articles 5, 8 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 1 and 2 of Protocol to the ECHR, Article 2 of Protocol No. 4 to the Convention. Subsequently, Georgia extended the derogation from the stated provisions of the ECHR six times.

North Macedonia⁷⁴ made declarations regarding derogation under Article 15, however, the text of the declarations did not address the provisions of Article 1 of Protocol No. 1 to the ECHR.

The Republic of Moldova, in its declaration⁷⁵ did not formulate a derogation from the provisions of Article 1 of Protocol No. 1 to the Convention, even though the Decision on the declaration of the state of emergency, announced to the Secretary General of the Council of Europe through a Communication on April 6, 2021,⁷⁶ provided that, during the period of the state of emergency, the Commission for Emergency Situations of the Republic of Moldova shall issue decisions with a view to implementing

70 Cazacu and Nastas, 2021, pp. 9–23.

71 Notification – JJ9014C Tr./005-226, 18 March 2020, Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

72 Notification – JJ9025C Tr./005-234, 7 April 2020, Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

73 Notification – JJ9020C Tr./005-231, 1 April 2020, Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

74 Notification – JJ9021C Tr./005-232, 2 April 2020, Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

75 Notification – JJ9016C Tr./005-228, 20 March 2020, Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

76 Notification – JJ9209C Tr./005-275, 6 April 2021, Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

the following measures: ‘...carrying out, in the manner established by the law, the requisition of goods in order to prevent and liquidate the consequences of the situations which imposed the declaration of the state of emergency;’ (para. 11).

To date, the European Court of Human Rights has not ruled in any of the cases that COVID-19-related measures constituted a formal derogation from Article 1 of Protocol No. 1 under Article 15 of the European Convention on Human Rights. Although the applicant referred to a possible derogation in the case of *Georgia v. Russia II* (2021), the court did not rule on the existence or validity of any derogation from the provisions of Article 1 of Protocol No. 1 in the context of an armed conflict.

7. Standards Regarding Property Protection Established by the ECHR in Cases Against the Republic of Moldova

Since May 18, 2004, the day when the first judgement (case *Prodan v. Republic of Moldova*⁷⁷) was adopted under Art. 1 of Protocol 1 to the European Convention on Human Rights, the Republic of Moldova has been involved in over 100 cases to date in which a violation of the right to respect for property belonging to individuals or legal entities has been established by the Moldovan authorities.

Ab initio, we find it appropriate to describe the historical circumstances in which the national mechanism for property protection was created and functioned in the Republic of Moldova, as this contributes to a better understanding of the increased number of violations found by the ECHR under Article 1 of Protocol No. 1 to the Convention. During the period of Russian dominance over the current territory of the Republic of Moldova, private property was a concept that contradicted the policies and objectives of the regime at that time. Until the Republic of Moldova gained independence in 1991, the economic foundation of the Moldovan Soviet Socialist Republic was based on collective ownership of the means of production.⁷⁸ During the period of the complete establishment of Soviet power under mass collectivisation, the sense of ownership was lost amidst repression and mass deportations, and socialist property encompassed all large and small enterprises. In 1964, the Civil Code was adopted, which in Article 10 stated: ‘In accordance with the law, citizens may own property in personal ownership, may have the right to use housing and other property, and may inherit and bequeath property (...).’⁷⁹ The second title, entitled “Right to Property,” distinguished between two categories of property: socialist property and personal property. Socialist property was composed of ‘state property (of the entire people); cooperative and collective farm property; and property of trade union organisations and other public organisations.’

77 *Prodan v. Moldova*, Application no. 49806/99, Judgment 18 May 2004.

78 Simboteanu, 2012, pp. 9–19.

79 Civil Code of the R.S.S.M, repealed by Law no. 1107/06.06.02.

With the proclamation of independence and the recognition of the Republic of Moldova as a state, there was a rapid transition from a planned economy to a market economy. However, this process was compromised by the imperfections of the regulatory system and the difficulties in the implementation of the law.

The grounds for which the Republic of Moldova has been held liable by the ECtHR under Article 1 of Protocol No. 1 is essentially summarised as follows: deprivation of possessions through an additional ruling, deprivation of possessions following the annulment of privatisation, invalidation or unjustified withdrawal of licenses for conducting economic activities, rejection of judicial claims that were legitimate under national law, liability for payment of taxes and fines due to fraudulent actions of a third party with whom they had contractual relations, illegal confiscation of property, inability to recover goods seized by the police, non-enforcement of judicial decisions, deprivation of effect of certain court rulings regarding property rights through subsequent judicial procedures, and inadequate compensation for violations of Article 1 of Protocol No. 1 to the ECHR.

Most cases in which the Republic of Moldova has been held liable under Article 1 of Protocol No. 1 to the ECHR pertain to the non-enforcement of judicial decisions.

This category of cases typically refers simultaneously to violations of both the right to a fair trial concerning the enforcement of judicial decisions within a reasonable time and the right to property, particularly when a court ruling has awarded the individual certain sums or attributed property rights that they have not actually received or have only collected after a lengthy delay, exceeding reasonable time limits.⁸⁰

7.1. Non-Enforcement of Court Decisions

In the cases of *Prodan v. Moldova*⁸¹, *Popov v. Moldova (No. 1)*⁸², *Popov v. Moldova (no. 2)*⁸³ the claimants were descendants of parents who were deported in the 1940s, and whose properties were nationalised. In the context of the Parliament of the Republic of Moldova adopting the Law on the Rehabilitation of Victims of Political Repression committed by the occupying totalitarian communist regime, after several years of inspecting cases regarding the reclamation of nationalised property through the internal legal system, the claimants faced the issue of enforcing court decisions issued in their favour, with authorities citing a lack of financial resources. Before the Strasbourg Court, the claimants alleged, *inter alia*, a violation by the Moldovan authorities of the provisions of Article 6, para. 1 of the ECHR, and argued that due to the non-enforcement of court decisions issued in their favour, they were unable to benefit from their properties, thus their right to property protection under Article 1 of Protocol No. 1 to the Convention being violated.

80 Poalelungi et al., 2017.

81 *Prodan v. Moldova*, Application no. 49806/99, Judgment 18 May 2004.

82 *Popov (No. 1) v. Moldova*, Application no. 74153/01, Judgment 18 January 2005.

83 *Popov v. Moldova (No. 2)*, Application no. 19960/04, Judgment 6 March 2006.

In reference to these cases, the court reiterated that a “claim” can constitute a “possession” in the sense of Article 1 of Protocol No. 1 to the Convention if it is sufficiently established to be enforceable.

By failing to enforce the decisions of national courts, the national authorities prevented the claimants from receiving the money they could reasonably have obtained and from evicting tenants from their apartments. The Government provided no justification for this interference, and the court found that a lack of funds and alternative housing could not justify such interference. Consequently, Article 1 of Protocol No. 1 to the Convention was violated.

In the ruling on the aforementioned cases, the judges of the ECHR affirmed the existence of violations of Article 6, para. 1, and Article 1 of Protocol No. 1 to the Convention, ordering the respondent state to pay compensation to the claimants for the material and moral harm suffered.

Similarly, under Articles 6, para. 1, and Article 1 of Protocol No. 1 to the ECHR, the court found that the Republic of Moldova had failed to meet its obligations by not enforcing national court decisions made in favour of the claimants, who were seeking the recalculation of benefits⁸⁴, and the establishment of compensation for the material harm caused.⁸⁵

It is important to note that the non-enforcement of court decisions in the national system has also been reported to the ECHR by legal entities registered both in the Republic of Moldova⁸⁶ and abroad⁸⁷.

7.2. Legal Certainty and Abusive Extraordinary Remedies

Another reason for which the Republic of Moldova incurs liability before the European Court of Human Rights relates to the defective practices of national courts, specifically the abusive revision of court rulings that, in certain situations, lead to individuals being deprived of their possessions. This raises serious concerns regarding the principle of legal certainty, enshrined in the right to a fair trial under Article 6, para. 1 of the Convention.⁸⁸ For the same reasons, the ECHR upholds the claims of the applicants when they concern the improper execution of extraordinary appeals. The European Court of Human Rights, as a leading arbiter in the field of fundamental human rights and freedoms, meticulously examined cases involving the Republic of Moldova in which the extraordinary appeal was processed inconsistently with

84 *Sîrbu and Others v. Moldova*, Application nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01, 73973/01), Judgment 15 June 2004.

85 *Mazepa v. Moldova*, Application no. 1115/02, Judgment 10 May 2007; *Bulava v. Moldova*, Application no. 27883/04, Judgment 8 January 2008; *Istrate v. Moldova*, Application no. 53773/00, Judgment 13 June 2006; *Botezatu v. Moldova*, Application no. 17899/08, Judgment 14 July 2015; *Arzamazova v. Moldova*, Application no. 38639/14, Judgment 4 November 2020.

86 *Ofertă Plus SRL v. Moldova*, Application no. 14385/04, Judgment 19 December 2006.

87 *Unistar Ventures GMBH v. Moldova*, Application no. 19245/03, Judgment 9 December 2008.

88 *Balan v. Moldova* (No. 2), Application no. 49016/10, Judgment 28 February 2023; *Cereale Flor S.A. and Roșca v. Moldova*, Application nos. 24042/09, 3159/10, Judgment 14 February 2017; *Rusu Lintax SRL v. Moldova*, Application no. 17992/09, Judgment, 13 December 2016.

established legal principles, resulting in a negative impact on the property rights of the applicants.⁸⁹

7.3. Licenses as Possessions and Arbitrary Revocation

Several applications submitted by claimants from the Republic of Moldova concerned illegal procedures for the invalidation or withdrawal of licenses.⁹⁰ In this context, the case of *Megadat.com S.R.L. v. Moldova*,⁹¹ brought before the ECHR by the largest internet service provider in Moldova, is of particular interest. The company held approximately 70% of the market share for internet services in the country and had two licenses for providing internet and fixed-line telephone services. After changing its registered address, the licenses were not updated to reflect the new address. When the company failed to pay a license fee and update its address within the specified periods, the National Agency for Regulation in Telecommunications and Informatics (ANRTI) declared the licenses invalid. ANRTI argued that the company had operated for months with an invalid license and reported its actions to various authorities for potential sanctions. The claimant's license was the only one invalidated among the warned companies.

The court noted that the measure imposed on the claimant company was so severe that the largest internet service provider in Moldova was forced to terminate operations and sell all its assets within a few months. Not only did this measure have future consequences, but it was also applied retroactively. The arbitrariness of the procedure, the discriminatory treatment of the claimant company, and the disproportionately harsh measure applied led the court to conclude that it had not been demonstrated that the authorities followed genuine and consistent political considerations when invalidating the licenses of the applicant company. Given that the claimant company was burdened with an individual and excessive hardship, a violation of Article 1 of Protocol No. 1 was determined.

7.4. Denial of Legitimate Claims and Economic Rights

Other cases against the Republic of Moldova are based on the claimants' allegations regarding the denial of legitimate claims⁹², delayed payments of compensation for the depreciation of deposits from the *Banca de Economii*, which was owned by the

89 *Macovei and Others v. Moldova*, Application nos. 19253/03, 17667/03, 31960/03, 19263/03, 17695/03, 31761/03), Judgment, 25 July 2006; *Pîrnău and Others v. Moldova*, Application nos. 37225/07, 7456/08, 12255/08, Judgment 31 January 2012; *Iurii v. Moldova* Application no. 24446/09, Judgment, 13 December 2016.

90 *Bimer S.A. v. Moldova*, Application no. 15084/03, Judgment 10 October 2007; *Vitan v. Moldova*, Application No. 6901/03, Judgment 16 January 2008; *DONPRUT S.R.L. v. Moldova*, Application no. 45504/09, Judgment, 21 October 2015; *Tiramavia S.R.L. and Others v. Moldova*, Application nos. 54115/09, 55707/09, 55770/09, Judgment 04 September 2018.

91 *Megadat.com S.R.L. v. Moldova*, Application no. 21151/04, Judgment 8 July 2008.

92 *Cazacu v. Moldova*, Application no. 40117/02, Judgment 23 January 2008.

state during the Soviet period⁹³, and issues related to the protection of intellectual property.⁹⁴

Cases involving the annulment of privatisation in the Republic of Moldova have highlighted concerns regarding legality and fairness. The Court's examination underscores the potential for disputes over property rights and the necessity of adhering to proper procedures.⁹⁵

The Court's examination of the issue of investment recovery highlighted problems arising from state actions that impeded or obstructed the process. The analysis underscores the need to protect individuals' rights to peaceful possession and the pursuit of fair compensation.

7.5. Unlawful Interference With the Peaceful Enjoyment of Possessions Through Confiscation

The cases involving the illegal confiscation of possessions have been examined by the court, illustrating potential violations of property rights and guarantees of a fair trial. The analysis emphasises the importance of preventing arbitrary actions by the state and ensuring appropriate legal procedures. Thus, the ECHR found a violation by the Russian Federation, which exercises effective control over the Transnistrian region, of its obligations under Article 1 of Protocol No. 1 to the ECHR when vehicles,⁹⁶ a truck and goods⁹⁷ were confiscated by individuals claiming to be customs officials of the self-proclaimed "Moldovan Republic of Transnistria." Similarly, the ECHR found a violation of Article 1 of Protocol No. 1 in the case concerning the eviction of a lawyer from the office where he practiced, as well as the seizure of movable possessions from the office⁹⁸; in the case concerning the confiscation by the Moldovan customs of banknotes from the self-proclaimed "Moldovan Republic of Transnistria" (RMT), the claimant, a member of numismatic organisations, reported the banknotes and intended to send them to an American company for numismatic purposes⁹⁹. Illegal confiscation was also established by the ECHR in a case against the Republic of Moldova in the context of a "raider attack" against the applicant company, which involved the alleged illegal seizure of its goods with the assistance of presumably corrupt courts and law enforcement agencies¹⁰⁰.

93 *Dolneanu v. Moldova*, Application no. 17211/03, Judgment 12 February 2018.

94 *Balan v. Moldova (No. 1)*, Application no. 19247/03, Judgment 29 January 2008; *AsDAC v. Moldova*, Application no. 47384/07, Judgment 8 March 2021.

95 *IPTEH SA and Others v. Moldova*, Application no. 35367/08, Judgment, 07 April 2010; *Baroul Partener-A v. Moldova*, Application no. 39815/07, Judgment 16 October 2009.

96 *Turturica and Casian v. Moldova and Russia*, Application nos. 28648/06, 18832/07, Judgment 30 January 2017.

97 *Pădureț v. Moldova and Russia*, Application no. 26626/11, Judgment 13 November 2017.

98 *Sobieski – Camerzan v. Moldova*, Application no. 3792/05, Judgment 13 February 2018.

99 *Ziaunys v. Moldova*, Application no. 42416/06, Judgment 28 November 2016.

100 *Theo National Construct S.R.L. v. Moldova*, Application no. 72783/11, Judgment 11 January 2023.

7.6. *Expropriation Without Fair Compensation*

In the case law of the European Court of Human Rights, we can identify a single case against the Republic of Moldova concerning the expropriation of an individual's possessions. The Court emphasises in this context the importance of respecting individuals' property rights, ensuring compliance with legal guarantees, and providing appropriate compensation. In the case of *Mocanu and Others v. Moldova*¹⁰¹, in November 2004, the Government of Moldova decided to continue the construction of a railway through the city of Sângera, citing improvements in traffic and increased transit flow. In this context, the first claimant lost 0.41 hectares of land, the second 1.53 hectares, and the third 1.12 hectares. Compensation was determined, and the government transferred the land to the state-owned company "Calea Ferată a Moldovei" in December 2004. Construction began in January 2005. The claimants filed a lawsuit in May 2005, alleging illegal expropriation of their land without fair compensation. The courts rejected their claims, stating that the expropriation served a public interest.

The Court emphasises that any interference with property rights must be lawful. The practice of de facto expropriation allows authorities to occupy and irreversibly alter the use of possessions, effectively transferring it to public ownership. National law does not permit expropriation without fair compensation, which must be awarded through a court decision in cases of disagreement. However, the state expropriated the claimants without providing adequate compensation. Considering these factors, the court found that the interference was not compatible with the principle of legality and violated the claimants' property rights. Therefore, there was a violation of Article 1 of Protocol No. 1 to the Convention.

7.7. *ECHR Findings on Property Rights Violations Arising From Armed Conflict*

In relation to the case law of the European Court of Human Rights regarding Article 1 of Protocol No. 1 in the context of the armed conflict that occurred in 1992 in the Republic of Moldova, the case of *Ilaşcu and Others v. Moldova and Russia*, the decision of July 8, 2004, is particularly noteworthy. The applicants were convicted by a court in the left bank region of the Nistru, which lacked jurisdiction under Article 6 of the ECHR. They did not receive a fair trial, and as a result of the judicial proceedings, among other consequences, they were deprived of their possessions.

The Government of the Russian Federation stated that the claims of the applicants cannot be attributed to Russia and that, in any case, they are unfounded. The governments of Romania and the Republic of Moldova did not express any opinion on this issue.

Even if we assume that the ECHR had *ratione temporis* jurisdiction to examine these claims, the court at the time found that the facts presented to support the respective claims were insufficient. Therefore, since this claim was not substantiated, the court concluded that there was no violation of Article 1 of Protocol No. 1 to the ECHR.¹⁰²

101 *Mocanu and Others v. Moldova*, Application no. 8141/07, Judgment 26 September 2018.

102 Dorul and Loghinescu, 2021, pp. 165–167.

It is important to note in this chapter that the existence of the separatist regime continues to amplify the discrepancies within the unified legal framework of the Republic of Moldova, hindering the provision of legal assistance to citizens from the left bank of the Dniester River. This situation jeopardises international judicial cooperation in this area. There is a pressing need to intensify efforts to address the issue of providing legal assistance to citizens of the Republic of Moldova living in the left bank areas (Transnistria), while ensuring the protection of fundamental rights and freedoms enshrined in international and European legal instruments to which the Republic of Moldova is a party to.¹⁰³

7.8. De Lege Ferenda Proposals in the Context of Systemic Issues Regarding the Republic of Moldova's Compliance With Article 1 of Protocol No. 1 to the European Convention on Human Rights

The various cases brought before the European Court of Human Rights have highlighted a number of challenges within the normative and institutional system of the Republic of Moldova. These cases reveal multidimensional issues related to the right to respect for the property of individuals or legal entities, which can be violated in numerous ways. To address these concerns and promote a stronger framework for the protection of human rights, several recommendations are pertinent for the Republic of Moldova: amending legislation to revise limitation periods; reviewing procedures for the revision of court decisions to ensure that legal provisions adequately protect property rights and the right to a fair trial; consistent and appropriate application of existing legislation; strengthening the legal and governmental system; joining and continuously reaffirming the state's commitment to international human rights standards, particularly those included in the European Convention on Human Rights.

In particular, the Moldovan authorities are recommended to take the following measures in the spirit of the European Convention on Human Rights:

It should be recognised that the inability of an individual to obtain enforcement of a court decision rendered in their favour constitutes an interference with the right to respect for possessions and prevents the individual from exercising control over property rights that have already been legally recognised.

When assessing whether administrative authorities have acted diligently in enforcing a court ruling awarding property or monetary compensation to an individual, the mere lack of funds and/or alternative housing space should not be accepted as a plausible or legitimate justification for restricting the person's rights under Article 1 of Protocol No. 1 to the Convention.

Continued non-enforcement of a final court judgement, lacking reasonable and convincing arguments, constitutes an impermissible interference with the right to property protection.

It must be taken into account that reopening judicial proceedings and quashing a final judgement does not undermine the enforceability of that judgement and does

103 Cernomoreț, 2019, pp. 230–245.

not exempt authorities from responsibility for non-enforcement during the period in which the judgement was valid.

When reviewing a final judgement, it should be considered that a debt established by a court decision may qualify as “possessions” within the meaning of Article 1 of Protocol No. 1. Moreover, quashing such a final judgement without the right to appeal constitutes an interference with the beneficiary’s right to the protection of property.

In cases of withdrawal, invalidation, or suspension of a license of a legal entity, competent authorities must invoke very serious reasons serving the general interest, especially when such sanction has a deterrent effect resulting in the interruption or cessation of the entire commercial activity of the company. Withdrawal of a license for minor or insignificant violations will never be consistent with Article 1 of Protocol No. 1.

Complaints arising from the annulment of privatisation procedures must be carefully analysed in terms of the grounds that led to the annulment. The absence of serious reasons to declare a public tender or privatisation procedure null and void – especially when the acquiring company has properly fulfilled its obligations – undermines legal certainty and protection of property rights.¹⁰⁴

By implementing these measures, the Republic of Moldova can promote an environment that respects, supports, and protects the rights and dignity of its citizens, strengthens the rule of law, and contributes to the establishment of a just and prosperous society.

8. Conclusions

In the years following the end of World War II, the international community witnessed impressive developments in the realm of property protection. At that time, the bipolar world, characterised by socialist states with planned economies and capitalist states centred on market economies, established the first regional mechanism for the protection of human rights – the European Convention on Human Rights. Thus, the bodies of the Convention (the Court and the Commission) were compelled to apply the provisions of Article 1 of Protocol No. 1 to cases involving states with entirely opposing normative approaches. This has been a true challenge for the Court, but the points raised in this paper demonstrate that the European judicial body has managed over more than seven decades to coherently address the content of fundamental rights, consistently referring to the purposes and objectives stated in the Convention.

The terms used in Article 1 of Protocol 1 to the ECHR provide a strong shield for a wide range of interventions in the field of property protection. This includes both real estate and personal property, as well as tangible and intangible assets.

Summarising the positions of theorists, definitions found in international acts, national legislations, and the practice of the Strasbourg jurisdiction, we can deduce

104 Poalelungi et al., p. 356.

that the right to respect for property, in the sense of Article 1 of Protocol No. 1 to the ECHR, can be defined as an economic, subjective, real, and perpetual right belonging to individuals and legal entities. It has an absolute nature in horizontal relationships and is a relative right in vertical relationships, provided that it is exercised in accordance with the law and the general principles of international law.

The meaning of the term “possessions,” as argued by the practice of the European Court of Human Rights, indicates a broad and autonomous field of application. We believe that the term “possessions” used in the first sentence of Article 1 of Protocol No. 1 is broader than “property.”

The protection of property, in the sense of the European Convention on Human Rights, entails guarantees against arbitrary or disproportionate forms of interference, such as deprivation or limitation of rights.

Deprivation of a person’s possessions can only occur in the presence of a public necessity. If such circumstances arise, the state is obliged to provide a fair compensation.

The term “deprivation” in the sense of Article 1 of Protocol No. 1 to the ECHR should be understood as the “removal” or “dispossession” of the rights holder from the object and attributes of property rights.

In terms of the obligations that fall on states under Article 1 of Protocol No. 1 to the ECHR, the European Court of Human Rights takes a similar approach to that applied in the examination of other substantive rights. In cases concerning the protection of property, the court addresses both positive and negative obligations without explicitly distinguishing between them.

States have a wide margin of appreciation in determining the extent of public interest as understood in the context of Article 1 of Protocol No. 1. Thus, national authorities can decide both on the purpose and the means to achieve that purpose in cases of deprivation of possessions for public utility. The European Court of Human Rights will consistently assess compliance with the “golden rule,” which is the principle of proportionality concerning state actions that constitute an interference under Article 1 of Protocol No. 1.

In this paper were analysed *in concreto* specific cases against the Republic of Moldova concerning Article 1 of Protocol No. 1 of the ECHR, particularly arising from issues such as the non-execution of court decisions, abusive revision of court rulings, improper handling of appeals, license withdrawal, delayed payment of financial deposits, protection of intellectual property, confiscation, expropriation, and investment recovery. By examining the claims of the applicants regarding property issues, the European Court of Human Rights has sometimes identified systemic problems. This has led to the initiation of political mechanisms to monitor how the Republic of Moldova adheres to the provisions of the Convention and the Court’s rulings. Unfortunately, the failure of national authorities to respect the right to property, within the framework of the European Convention on Human Rights, affects the state’s image and has serious consequences on the evolution of the situation within society.

Protection of property rights is a concern both at times of peace and during armed conflicts. The protection of possessions in the context of armed conflicts is governed by *lex specialis* - international humanitarian law.

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Right to Education

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‘Non scholae, sed vitae discimus.’¹
(We learn not for school, but for life.)
Seneca

ABSTRACT

As one of the fundamental rights and freedoms, the right to education belongs to the second generation of human rights. It is crucial not only for the development of personality, but also for societal progress. Even in the twenty-first century, judicial protection remains necessary, as its implementation cannot be taken for granted. The first section of this paper considers the definition of the right to education as it has gradually evolved on the European continent. We highlight its key characteristics and distinctive features and specify its position within major international documents on the protection of human rights. The second section addresses the case law of the European Court of Human Rights in relation to the right to education under the Convention for the Protection of Human Rights and Fundamental Freedoms. Cases of its violation, either freestanding or in interaction with other fundamental human rights, are analysed casuistically.

KEYWORDS

Right to education, Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights, case law

1. Introduction

The importance of education has been evident both today and historically. Education has always signified a process of acquiring knowledge, skills, values or abilities, although the methods and means of this process have naturally changed as the society has developed. Simultaneously, the accessibility of education has also undergone transformation. Generally, societal development has been closely linked to the

| 1 Rebro, 1995, p. 205. |

| Alena Krunková (2026) ‘Right to Education’ in Paczolay, P. (ed.) *The European Convention on Human Rights A Central and Eastern European Perspective*. Miskolc–Budapest: Central European Academic Publishing, pp. 573–594. https://doi.org/10.71009/2026.pp.tecohr_18 |

overall level of education. However, the universalisation of education was neither simple nor swift.² The emergence and development of modern states and philosophical movements of the eighteenth century may be considered as foreshadowing the concept of the right to education, as ideas of freedom, equality, and individual rights began to take shape. The importance of education for society was recognised long before it was considered part of fundamental rights.³ For the right to education to emerge, it first had to be included in the emerging catalogue of fundamental rights and freedoms. From the historical development point of view, it did not form part of the first generation of fundamental rights and freedoms, which comprised only human and political rights.

A genuine interconnection between the issue of education and fundamental rights arose only after the Second World War, with the emergence of the second generation of human rights. The right to education thus falls within economic, social and cultural rights.

To understand the right to education fully, it is helpful to characterise this group of rights. Social, economic, and cultural rights gained prominence after the profound societal and state changes brought about by the World War II. Within the system of fundamental rights and freedoms, they have long constituted the most controversial group regarding legal anchoring, conceptual definition, and practical implementation.

Their initial legal formulation appeared in international pacts and agreements through which these rights found real expression. These include the Universal Declaration of Human Rights (1948), the European Social Charter (1961), the International Covenant on Economic, Social and Cultural Rights (1966), and the Convention on the Rights of the Child (1989). All these documents bind the contracting states as obliged entities to incorporate specific rights into their law (typically at the state constitution), because a right begins effectively only once the conditions for its implementation and protection are established. The European Convention for the Protection

2 Education as an important value has been discussed in the historical context since ancient times, of course adequately to those times. In ancient Greece and Rome, education was not considered a universal right, but rather a privilege for certain strata of the society, especially the aristocracy and the upper classes. In this period, education focused mainly on development of thinking and philosophy, available to only a small portion of the population. In the Middle Ages, most educational institutions were under the patronage of the church, and again, that did not mean universal accessibility. Education was primarily intended for priests, educated men and the nobility.

3 Education was mainly considered by philosophers in their works, e.g., John Locke and Jean-Jacques Rousseau, in their philosophical works from the 17th and 18th centuries, respectively, advocated the ideas of equality and universality of education. In his work 'Emil or on Education' (1762), J. J. Rousseau emphasized the importance of education as a tool for development and formation of civil society. Before them, Martin Luther, the founder of the Protestant Reformation, propagated the idea that every person should be able to read and understand Sacred Scripture. This is how the need for basic education for all began to take shape.

of Human Rights and Fundamental Freedoms (1950) did not originally include this category of rights.⁴

Economic, social, and cultural rights also require direct state involvement for their implementation (e.g., material assistance in the event of illness, loss of employment, or the construction of schools systems necessary for successful implementation of the right to education). They provide the material basis for the implementation of other human rights and freedoms, especially personal and political rights.⁵ While personal and political rights are individualistic in structure and their fulfilment is a matter of status, the implementation of social, economic and cultural rights is a continuous process, heavily dependent on a state's economic capacity. As a result, they are subject to frequent legislative adjustments that alter their practical realisation, such as minimum wage levels, health insurance conditions, child allowance amount, and state assistance in education, without altering their essential character.

2. Right to Education

The right to education is classified as a cultural right within economic, social, and cultural rights. An important characteristic of this group of rights is that their implementation makes them a means of developing the human personality and thus contributes to the progress of society (e.g., the right to education, freedom of artistic and creative expression, freedom to conduct business, etc.).

The right to education is also considered as a key factor in the development of society, as its application affects economic growth, innovation, cultural exchange, and social cohesion. The scope of this right is continually expanding, and its specification relates to many spheres of an individual's life. In terms of content, it includes, at a basic level, the right to access to education and, simultaneously, the right to receive education. More broadly, it encompasses several ancillary rights, such as the right to quality education, innovative education, free primary education, specialised education for persons with specific needs, and access to qualified teaching staff.

The basic features of the right to education may be summarised as follows:

Generality – the bearer of the right to education is every person. Accordingly, any discrimination in this respect is prohibited, as the right to education is intended for all. Discrimination involves any differentiation, exclusion, limitation, or preference which, on grounds of race, colour, sex, language, religion, political, or other beliefs, national or social origin, economic conditions or birth, has the purpose or effect of nullifying or impairing equality of treatment in education. No person or group may

⁴ See also: Fenton-Glynn, 2021, p. 47; Schiedermaier, Schwarz and Steiger, 2022; Thelma, 2024.

⁵ These rights help to ensure the material and spiritual development of the individual, some of which may also be necessary for the physical existence of a person (e.g., the right to health protection, the right to adequate material security, the right to assistance in material need, etc.).

be deprived of access to any type or level of education, nor limited to lower-level education.⁶

Universality – universality ensures that all individuals have the right to access education on equal terms and with equal opportunities. This understanding also reflects a global dimension (e.g., recognition of educational documents), manifested both in equal opportunities and in equal chances at education worldwide, including for those living in remote or marginalised areas.

Personalisation – this aspect reflects that the right to education is an individual human right that providing access to education and educational opportunities. Its bearers are natural persons, differentiated by specific characteristics (age, children, adults, secondary education, etc.). This right can be exercised individually or collectively.

Mutuality – the right to education is crucial for personal development and societal progress and is inextricably linked to other human rights and freedoms. In many cases, its implementation requires the simultaneous exercise of other rights (e.g., the right to university education in another state requires the right to enter and reside in that state).

Standard of education – sets the obligation of the state to create conditions for compulsory primary education that ensure a minimum level of education for all.

Accessibility – stipulates the state's duty to create conditions for free primary education at a certain age, enabling its effective implementation (e.g., distribution of the network of state schools with regard to geographical and demographic factors, adequate numbers of school classes corresponding to population needs).

Specificity in universality – the right to education is also realised through special conditions for people with specific needs, physical disabilities, or those belonging to marginalised groups. This includes adapting the education system to ensure accessibility for all.

State guarantee – the state must secure sufficient funds to implement the right to education (e.g., establishing systems of primary, secondary, and higher education, ensuring qualified teaching staff, and providing support mechanisms such as student dormitories, leisure centres, and sports clubs).

Respect for individual freedom – this manifests in two ways: the freedom of individual to choose whether to pursue further education (after completing compulsory minimum education), and the freedom to choose an educational institution.

Cooperation with parents in children's education – this guarantees the free will of parents as guardians of minors. Parents have a priority right to choose the type of education for their children. When exercising functions in upbringing and teaching, the state must respect the right of parents to ensure education consistent with their religious and philosophical convictions. This characteristic demonstrates the overlap between the right to education and freedoms of thought, conscience and religion.

6 See also: Duffy, 2024, pp. 653–675; Gaviria, 2022, pp. 382–406.

In practice, this overlap has caused considerable friction, reflected in proceedings before the ECHR, discussed in the next section.⁷

Stability – the implementation of the right to education should be consistent in nature, the educational process ought to constitute an established system providing continuity. Its quality must be sufficiently high to prepare individuals for life in society, participation in the labour market and personal development. Education must comply with basic norms and quality standards.

Dynamism – educational systems must remain flexible and responsive to changing individuals and societal needs. This includes innovation, adaptation to new technologies and the adoption of new teaching methods.

3. Right to Education in International Documents

The international dimension of the right to education increases its credibility and allows for a higher degree of protection. Although the European Convention for the Protection of Human Rights and Freedoms did not originally contain this right, it was gradually recognised, strengthened, and protected throughout the twentieth century.

The Universal Declaration of Human Rights, adopted on 10 December 1948 within the United Nations (UN), was the first international document to enshrine the right to education. Its legal regulation found in Article 26 is as follows:

‘Everyone shall have the right to education. Education must be free, at least at the primary and basic levels. Primary education must be compulsory. Technical and vocational education must be universally accessible, and higher education must be equally accessible to all on the basis of ability.

Education shall be directed towards the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial and religious groups, as well as the activities of the United Nations for the preservation of peace.

Parents have a prior right to choose the type of education for their children.’

Within the framework of the Council of Europe and its Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “Convention”), the right to education was incorporated through Additional Protocol No. 1, adopted on 20 March 1952, in Article 2, placing it among the fundamental rights protected by the ECHR:

7 See also: Fancourt, 2024, p. 40.; Duffy, 2024, pp. 653–675.; Preet, 2021.

4. Right to Education

‘No one shall be denied the right to education. In exercising any functions in the field of upbringing and teaching, the State shall respect the right of parents to ensure education in conformity with their own religious and philosophical convictions.’

The Council of Europe subsequently incorporated it into the European Social Charter, among economic, social, and cultural rights. Under this regulation, the right to education has two aspects. First is the social aspect, where the emphasis is on state activity to ensure accessibility and attainability (i.e., the availability of the right). Second is its protective aspect, comprising the entitlement to exercise this right. Since it is subject to the amendment of Article 2 of Additional Protocol No. 1 to the Convention, it also includes the prohibition for the state to interfere in the exercise of this right that would effectively deny its exercise.

Subsequently, the International Covenant on Economic, Social and Cultural Rights (1966) further elaborates the right to education in Article 13.⁸

‘1. The States, which are Parties to the present Covenant, recognise the right of everyone to education. They agree that education shall be directed towards the full development of the human personality, the sense of its dignity, and the strengthening of respect for human rights and fundamental freedoms. They agree that education shall enable all persons to participate effectively in a free society, to promote mutual understanding, tolerance and friendship among all peoples and racial, ethnic and religious groups, contribute to the activities of the United Nations in the preservation of peace.

2. The States, which are Parties to the present Covenant, recognise that, with a view to achieving full execution of this right:

- a) primary education shall be compulsory and freely accessible to all;
- b) secondary education in its various forms, including technical and vocational secondary education, shall be generally made possible and accessible to all by all every appropriate means, and in particular by the progressive introduction of free education;
- c) higher education shall be equally accessible to everyone, according to their abilities, by all appropriate means, and in particular by the gradual introduction of free education;
- d) the primary education of persons who have not obtained or completed primary education shall, as far as possible, be encouraged or intensified;

8 Fenton-Glynn, 2021; Theory and Practice of the European Convention on Human Rights, 2024.

e) development of the school system shall be actively pursued at all levels; an adequate scholarship system shall be introduced, and the material conditions of teachers shall be constantly improved.

3. The States, which are Parties to the present Covenant, undertake to respect the freedom of parents or guardians to choose schools other than those established by public authorities, which correspond to the minimum level of education established or approved by the State, and to ensure the religious and moral education of their children in accordance with their own convictions.

4. Nothing in this Article shall be construed as interfering with the freedom of individuals and organisations to establish and direct educational institutions, subject to the observance of the principles set forth in paragraph 1 of this Article, and the requirement that the education provided in such institutions shall conform to a minimum level established by the State.’

At the European Union level, the right to education is regulated by the Charter of Fundamental Rights of the European Union in Article 14 as follows:

‘1. Everyone has the right to education and to have access to vocational and continuous training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational institutions is subject to respect for democratic principles, and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical, and pedagogical convictions shall be respected in accordance with the national laws governing the exercise of such freedoms and rights.’

These documents may be considered elementary in the field of international protection of human rights. In addition to them, other international conventions address specific aspects of the right to education, such as the UNESCO Convention against Discrimination in Education (1960). At the same time, the protection of the right to education is also partially ensured by conventions adopted by the UN General Assembly that primarily protect other rights—for instance, the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention on the Rights of the Child (1989); and the Convention on the Rights of Persons with Disabilities (2006). These documents form the framework of international law relating to education and constitute essential standards for its protection and development.

Compared with the above-mentioned universal and regional human rights instruments, the International Covenant on Economic, Social and Cultural Rights of 1966 devotes the greatest attention to the right of education.⁹

9 See also: Fenton-Glynn, 2021; Schiedermaier, Schwarz and Steiger, 2022; Isenström, 2024.

Children's education has a special status within the right to education, particularly in relation to the Convention on the Rights of the Child (1989), which enshrines the civil, political, economic and cultural rights of children. Under this convention, education is intended to develop the child's personality, talent, mental, and physical abilities, prepare the child for an active life in society, promote respect for parents, cultural identity, language, ethical, moral values, and, shape their personality in terms of respect for human rights, fundamental freedoms, and principles enshrined in the UN Charter. The Convention guarantees free and compulsory primary education for all children and encourages the development of diverse forms of secondary education. It also proposes preventive measures to support regular school attendance and counselling activities that make educational information available in the field of education and training. In relation to higher education, it declares its implementation for all according to their abilities.¹⁰ Human rights education should be 'child-centred; child-friendly, and empowering the child'. The Convention implies that the education will be available to children where States provide adequate infrastructure, including capacity, regional representation, qualified staff, facilities, and educational materials.¹¹

5. Analysis of ECHR Case Law in Relation to the Right to Education

At the beginning, it is necessary to note that the jurisprudence of the European Court of Human Rights (ECHR) demonstrates the close connection and interaction between the right to education with other rights protected by the Convention. Therefore, further interpretation shall be proceeded with in this spirit.

'Art. 2 – Right to education

No one shall be denied the right to education. In exercising any functions in the field of upbringing and teaching, the State shall respect the right of parents to ensure such upbringing and education as reflection of their religious and philosophical convictions.'

Although the relevant provision of the Convention is not very extensive, its content reveals numerous contexts previously identified as characteristic of the right to education. This is confirmed by the extensive case law of the ECHR. Article 2 of Additional Protocol No. 1 cannot be interpreted restrictively, as this would be inconsistent with its object and purpose.¹²

10 Art. 28 of the Convention on the Rights of the Child.

11 Horná and Petöcz, 2015, p. 46.

12 Ruling in cases *Leyla Şahin v. Türkiye*, Application no. 44774/98, Judgment 10 November 2005, *Timishev v. Russia*, Application nos. 55762/00 and 55974/00, Judgment 13 December 2005, *Çam v. Türkiye*, Application no. 51500/08, Judgment 23 February 2016, *Velyo Veleev v. Bulgaria*, Application no. 16032/07, Judgment 27 May 2014.

ECHR jurisprudence confirms that the right to education applies to primary schools,¹³ secondary education,¹⁴ as well as to higher and vocational education,¹⁵ including specialised courses. The right in Article 2 is guaranteed not only to children, but also to adults or anyone who wishes to exercise this right.¹⁶ Its scope covers all courses, and therefore extends to religious teaching, ethics, and sex education.¹⁷ The provision applies both to the content and to the method of teaching.

Article 2 guarantees an individual right to education and, simultaneously, the right of parents to have their children educated in accordance with their religious and philosophical beliefs. However, the Article must be interpreted in accordance with other rules of international law forming part of the Convention framework.¹⁸

The right to education also includes the right of parents to have education provided with respect for their religious and philosophical beliefs. In this context, the term “respect” conveys more than merely “taking into account” or “taking into consideration”. As a result, parents cannot refuse a child’s right to education based on their beliefs.¹⁹ The ECHR interprets “parents” broadly, extending beyond fathers and mothers to include, grandparents.²⁰ A child in education cannot claim to be a victim of the exercise of parental rights under the second sentence of Article 2 of Additional Protocol 1 to the Convention.²¹

A third right is derived from the combination of these rights, namely the right to establish non-state schools.²² In the case of *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden* (06 March 1987, no. 11533/85), the ECHR expressly stated that the right to establish schools outside the public framework is protected by Article 2 of Additional Protocol No. 1 to the Convention, stating that ‘Article 2 of Protocol No. 1 guarantees: the right to establish and run a private school’. This implies the

13 Ruling in the case of *Sulak v. Türkiye*, Application no. 24515/94, Judgment 17 January 1996.

14 Ruling in the case of *Cyprus v. Türkiye*, Application no. 25781/94, Judgment 10 May 2001.

15 Ruling in the case of *Leyla Şahin v. Türkiye*, Application no. 44774/98, Judgment 10 November 2005, *Mürsel Eren v. Türkiye*, Application no. 60856/00, Judgment 7 February 2006. Access to higher education institutions that exist at a given time forms an integral part of the right to education as per Article 2 of Additional Protocol No. 1 to the Convention. See also *İrfan Temel and others v. Türkiye*, Application no. 36458/02, Judgment 3 March 2009.

16 Ruling in the case of *Velyo Velez v. Bulgaria*, Application, no. 16032/07, Judgment 27 May 2014.

17 Ruling in the case of *Jimenez Alonso and Jimenez Merino v. Spain*, Application no. 51188/99, Judgment 25 May 2000, *Dojan and Others v. Germany*, Application nos. 319/08, 2455/08, 7908/10, 8152/10 and 8155/10, Judgment 13 September 2011, *Appel-Irrgang and others v. Germany*, Application no. 45216/07, Judgment 6 October 2009.

18 Ruling in the case of *Catan and others v. Moldova and Russia*, Application nos. 43370/04, 8252/05 and 18454/06, Judgment 19 October 2012.

19 Ruling in the case of *Konrad and others v. Germany*, Application no. 35504/03, Judgment 11 September 2006.

20 Ruling in the case of *Lee v. United Kingdom*, Application no. 25289/94, Judgment 18 January 2001.

21 Ruling in the case of *Eriksson v. Sweden*, Application no. 11373/85, Judgment 22 June 1989.

22 Kmec et al., 2012, p. 1302.

right to opt for private instead of public education. However, this right is not absolute and may be subject to state restrictions to ensure a high-quality education system.²³

In this context, reference may be made to the ECHR's decision concerning the state's positive obligations relating to the financing of educational institutions in *Private Primary School Cesta k úspěchu v Praze, s. r. o. and the civic association Škola dětem v. Česká republika* (*School to Children v. the Czech Republic*, 22 November 2011, no. 8314/10). The ECHR emphasised that Article 2 of Additional Protocol No. 1 obliges Contracting States to guarantee to all individuals within their jurisdiction the right to access existing school facilities, as well as enabling individuals to enjoy the privileges of completed studies by officially recognising the education obtained. However, it does not guarantee the right to education requiring the Contracting States to provide or finance the teaching of a certain form or level of instruction. The first sentence of Article 2 gives the States an exclusive right to decide whether to financially support private schools. Accordingly, persons under the jurisdiction of a Contracting State cannot require the State to establish any educational institution.²⁴ However, if the State decides to finance non-state schools, it cannot do so in a discriminatory manner as per Article 14 of the Convention, in conjunction with Article 2 of Additional Protocol No. 1 to the Convention. Similarly, the State cannot disadvantage private universities by setting the same criteria for determining the student numbers as those used for public universities.

The implementation of the education system is the responsibility of States, subject to respecting compulsory primary education, which ensures the initial integration of the individual into the society. In this context, the ECHR also addressed the issue of *home-schooling*, which concerns both the child's basic right to education and the rights of parents to raise and educate their children, in accordance with their convictions. For example, in Germany, home schooling is prohibited. In *Wunderlich v. Germany* (24 June 2019, no.18925/15), the ECHR found no violation of Article 8 (right to respect for private and family life). The case involved a German family where the parents of four children rejected the state school system and its compulsory attendance policy. They decided to educate the children at home, having made the decision as early as with the eldest daughter, by not enrolling her in school. Parents received several fines, subject to criminal proceedings for violating the school attendance obligations of their minor children. Despite this, they continued not to enrol their children, opting instead to pay the fines. Eventually, the state (Germany) removed the children away from home for three weeks, after the parents refused compliance.

In this case, the ECHR mainly examined whether the enforcement of compulsory schooling, aimed at ensuring children's integration into society, constituted a relevant reason justifying the partial denial of parental rights. The ECHR leaned toward a

23 See also: Trellová, 2021, p. 611; Ohlig and Timm, 2024.

24 Judgment of the ECHR in the *Case concerning certain aspects of the Law on the use of languages in education versus Belgium*, Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment 23 July 1968.

conclusion that the authorities could reasonably assume that the children were isolated, lacked external social contact, and that this posed a threat to their physical integrity. It further concluded that the temporary removal of the children did not exceed what was necessary and was carried out in their best interests. The ECHR stated that there were “relevant and sufficient” reasons to justify the limited restriction of parental rights.²⁵ The ECHR therefore approached the matter with a certain degree of reserve, continuing to respect the free discretion of the State to allow or refuse home-schooling, and to determine at which levels of education home schooling may be permitted.

The right to education is not absolute, and may be limited within established national limits. As regard to its limitation, it follows from the ECHR case-law, the fact that a person cannot continue university studies during a period of lawful detention following conviction does not amount to a deprivation of the right to education.²⁶ Similarly, in the case of a complainant who was unable to complete the final year of secondary school owing to the commencement of a prison sentence, the ECHR concluded that ‘there was no violation of his right to education under the circumstances of the case’.²⁷

The ECHR further determined that the rights contained in Article 2 of Additional Protocol No. 1 also includes the State’s obligation to regulate how education is implemented.²⁸ In the event of a difference in treatment in the regulation of education, provisions in the Article 14 of the Convention shall be considered. The right to education guarantees equal access to existing educational institutions for everyone and rather than a right to receive education of one’s choice. Differential treatment is not discriminatory when it pursues a legitimate objective and is proportionate. In this context, the ECHR considered the use of languages in education in Belgium, concerning the impossibility for French-speaking children living in a Dutch-speaking area to attend classes taught in Dutch. However, Dutch-speaking children living in an area with a preferred French language could attend classes with Dutch language of instruction. The measure in question was not imposed in the interest of the schools for administrative or financial reasons but was based only on considerations relating to language. The ECHR thus found a violation of Art. 2 of Additional Protocol No. 1 in conjunction with Art. 14, as the difference in treatment lacked sufficient justification.²⁹

25 *Wunderlich v. Germany*, Application no. 18925/15, Judgment 24 June 2019, see also *Konrad and Others v. Germany*, Application no. 35504/03, Judgment 11 September 2006, *Dojan and Others v. Germany*, Application nos. 319/08, 2455/08, 7908/10, 8152/10 and 8155/10, Judgment 13 September 2011, *Leuffen v. Germany*, Application no. 1844/92, Judgment 9 July 1992.

26 Ruling in the case of *Arslan v. Türkiye*, Application no. 31320/02, Judgment 1 June 2006.

27 Ruling in the case of *Epistatu v. Romania*, Application no. 29343/10, Judgment 24 September 2013.

28 *Campbell and Cosans v. the United Kingdom*, Application nos. 7511/76; 7743/76, Judgment 25 February 1982.

29 ECHR ruling against *Belgium*, Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment 23 July 1968.

In terms of access to education and opportunities for learning, the State's educational policy and implementation are eminently important.³⁰ The ECHR respects the degree of discretion available to each State, even in sensitive cases such as education in minority languages, provided that the State itself also respects the creation of comparable conditions for minorities' education in relation to the majority population. An illustrative example is the case of *Ádám and others versus Romania*, which concerned alleged discrimination against pupils belonging to national minorities in final secondary school-leaving examination. The complainants, ethnic Hungarians, studied in their native language at a secondary school in Romania. They failed the final school-leaving examination, as they did not obtain the passing grades in Romanian language and literature (Mr. Petres, Bakos, Forika, Maxem and Mrs. Ádám) or Hungarian language and literature (Mr. Ambrus). They complained discrimination based on the organisation and timetable of the examination. In addition to the national baccalaureate, they had to pass two (oral and written) examinations on the day after the national baccalaureate. The final school-leaving examination in Romanian language and literature was very difficult for them, they pointed out, and because of this, Hungarian pupils had less time to prepare as compared to Romanian pupils. They had no rest day between examinations, which increased their burden and reduced chances of success at final examinations. The complainants claimed that, as a result, they failed to graduate, referring in particular to Article 2 of Additional Protocol No. 1 to the Convention.

The ECHR noted that complaint concerned pupils belonging to national minorities who had obtained secondary education in their mother tongue and were significantly influenced by the content and the timetable of the baccalaureate exam. The ECHR confirmed that planning of school curricula falls, in principle, within the competence of the Contracting States. It further noted an international consensus between the Contracting States recognising the special needs of minorities and the obligation to protect their security, identity, and lifestyle, not only in their own interest but also for the preservation of cultural diversity. The ECHR concluded that the students had voluntarily decided to study in another language, and take advantage of the opportunities offered by Romania. In this context, the ECHR noted that the law recognises the right, but does not impose an obligation on pupils belonging to a national minority to study in their mother tongue. Moreover, it emphasised that the fact that timetable for final secondary school-leaving examination is set annually by the Ministry of Education at the beginning of each school year and does not differ significantly in individual years, the pupils had sufficient time for both academic and mental preparation for the examinations. The ECHR concluded that Hungarian students were not treated

30 In the case of *Altınay v. Türkiye*, Application no. 37222/04, Judgment 9 July 2013, where the ECHR examined changes in the system of access to the university, it found a violation of Article 14 of the Convention, read in conjunction with Article 2 of Additional Protocol No. 1 to the Convention, even though these changes were aimed at radically improving the quality of education. One of the reasons was the unpredictability of the application of the new system or the implementation of the new system, which was not proportionate to the objective pursued.

differently from their Romanian classmates and that there was no breach of Article 2 of Additional Protocol No. 1 to the Convention.³¹

Recently, in the decision-making activities of the ECHR, the link between the right to education and its implementation for children with special needs has frequently been highlighted. This case law underlines the need to ensure inclusive and equitable education for such children. It reinforces States' commitments to children with disabilities and emphasises the need to ensure adequate support and adaptation of the learning environment. In doing so, it strengthens the principles of equality and non-discrimination in education and underscores the importance of an individualised approach to each child's needs.

For example, in *G.L. v. Italy*, the ECHR addressed inability of the Italian authorities to provide special educational support for a child with non-verbal autism during the first two years of elementary school. G.L. was entitled to special assistance under Italian law but did not receive it; her parents were thus forced to secure private assistance at their own expense. This lack of support negatively affected her ability to access education at the same level as her non-disabled peers. The Court found that the lack of funds did not justify the State's failure to provide education equal to that of other children. This practice resulted in discrimination on the basis of disability, in violation of Article 14 of the Convention (prohibition of discrimination) read in conjunction with Article 2 of Protocol No. 1 (right to education). Despite legislation requiring the inclusion of children with disabilities in mainstream schools, G.L.'s school environment had not been adapted to her special needs. No dedicated assistant was made available to support school educational and social inclusion. The ECHR pointed that the Italian authorities had failed to assess the real needs of G.L. and take measures to secure the same educational conditions as those enjoyed by other children. The decision of the Italian courts, which concurred with the procedure of the school authorities without further examining alternative solutions, was considered insufficient.³²

T.H. v. Bulgaria similarly concerned the right to education of a child with behavioural disorders and developmental problems. The complaint, lodged by the child's parents, alleged that the Bulgarian authorities had failed to implement appropriate measures and support for their son's education. The child encountered several challenges within the school system, including a lack of adaptation to the educational process that responded to his special needs, which led to a disruption of his schooling and negatively impacted his personal development. The complainants argued that schools in Bulgaria did not provide the individual adaptations and support necessary for T.H. to achieve education at the level of his peers. Problems included inadequate staffing, reluctance to adapt curricula, and the absence of professionals capable of addressing challenges associated with his condition. According to the complainants,

31 Ruling in the case of *Ádám and others v. Romania*, Application no. 81114/17 and 5 others, Judgment 13 October 2020.

32 Ruling in the case of *G.L. v. Italy*, Application no. 59751/15, Judgment 10 December 2020.

these failures breached their child's right to education under Article 2 of Protocol No. 1 to the Convention, read in conjunction with Article 14. The ECHR found that T.H. 's right to education had been violated. It emphasised that the lack of adequate support and adaptation in the school environment led to the child's exclusion from full-fledged education. The Court held that the right to education includes not only access to school, but also the availability of education tailored to the individual needs. The court therefore stated that the State must create conditions ensuring equal access to quality education for all children, including those with disabilities or other special needs.³³

In *Elmazova and others v. North Macedonia*, the ECHR examined allegations of segregation of Roma pupils in two schools – Bitola and Štipe – where Roma pupils were placed in classes attended predominantly by Roma, while Macedonian pupils were assigned to separate classes or transferred elsewhere. The Court found that this practice was discriminatory and infringed the complainants' rights under Article 14 and Article 2 of Protocol No. 1. It ordered North Macedonia to adopt measures to end the segregation, which lacked objective justification and produced unequal treatment. The Court stressed that Roma children require special protection because of their disadvantaged social position. While it found no discriminatory intent on the part of the State, it held that the results of state policies and practices amounted to discrimination. This case pointed out that segregation continues in a "circle of marginalisation" and prevents Roma children from integrating and having equal access to education, having a negative impact on their future education and job opportunities. The Constitutional Court of North Macedonia had found no concrete evidence of segregation and relied on the general ethnic composition of the area, asserting that such composition did not itself constitute discrimination. However, the ECHR emphasised that discrimination may arise from de facto situations, and that the absence of discriminatory intent cannot justify segregation. The Court found that the differences in ethnic composition of the schools were not objectively justified and that the State had failed to ensure adequate protection for Roma pupils. Accordingly, there had been a breach of Article 14 in conjunction with Article 2 of Protocol No. 1. The ruling stresses that the States have a duty to protect vulnerable groups, such as Roma, from discrimination and ensure that they have equal access to the same opportunities.³⁴

In connection with discrimination, the ECHR also ruled in the case of *Moraru v. Romania*, which concerned allegations of discrimination and violation of the right to education under Article 14 of the Convention, read in conjunction with Article 2 of Protocol No. 1. It involved the refusal of the admission to complainant, Elena Moraru, on the basis of height and weight to study military medicine. The Court held that differential treatment based on physical characteristics was discriminatory, as it had

33 Ruling in the case of *T.H. v. Bulgaria*, Application no. 46519/20, Judgment 11 April 2023.

34 Ruling in the case of *Elmazova and others v. North Macedonia*, Application nos. 11811/20 and 13550/20), Judgment 13 March 2023. see also *Szolcsán v. Hungary*, Application no. 24408/16, Judgment 30 March 2023.

not been adequately justified by the state authorities, which constituted a violation of her rights. It concluded that the criteria regarding body size were neither sufficiently justified in relation to the training nor necessary for future practice in the field of military medicine. The Court also pointed that similar criteria did not apply to civilian medical studies, indicating disproportionate differential treatment. The ECHR acknowledged that the States have a certain degree of discretion in setting the criteria for admission to specific academic programmes, especially when they relate to safety or efficiency concerns. However, in this case, the height and weight criteria were not adequately justified and, therefore, constituted a discriminatory interference with the complainant's right to education. In this case, the ECHR ruling emphasised that the criteria for admission to study must be legal, appropriate, and relevant to the objectives they pursue. The States shall not impose conditions which, without sufficient justification, would lead to discrimination on the basis of physical characteristics, especially when these characteristics are irrelevant to the academic programme or the profession.³⁵

The ECHR has also examined several cases involving the right to education in minority languages. In *Djeri and others v. Latvia*, the Court considered a complaint concerning reforms that increased the use of Latvian language in education and limited the use of minority languages such as Russian. However, the ECHR found no violation of the right to education, holding that the government's measures were appropriate and necessary to ensure the unity of the education system, prepare pupils for primary education, and secure equal access to schooling and participation in society. The Court found that the reforms were legitimate in strengthening the Latvian language after periods of Soviet domination and held that Latvia did not exceed its margin for discretion. At the same time, it allowed the pupils of the Russian minority to learn their language and maintain their cultural identity.³⁶

In *Djibouti and others versus Latvia*, the ECHR addressed a complaint about 2018 changes in the Latvian school system, which increased mandatory language requirements for teaching in Latvian, including private schools. Previously, private schools had autonomy to decide the extent to which other languages, including Russian, were used as the medium of instruction. After the 2018 amendment, private schools were required to teach at least 50 per cent of classes in Latvian in lower grades, 80 per cent in middle grades and 100 per cent in all final grades of secondary schools in Latvian. The complainants argued that these changes violate their right to education and cultural rights, particularly regarding the possibility of education in their native language. The ECHR ruled that these changes were in line with Latvia's constitutional principles and that the State had the right to promote national language to ensure the unity of the education system and facilitate public participation. The Court acknowledged

35 Ruling in the case of *Moraru v. Romania*, Application no. 46519/20, Judgment 08 February 2023.

36 Ruling in the case of *Djeri and others v. Latvia*, Application nos. 50942/20 and 2022/21, Judgment 18 July 2024.

that the measures were proportionate; and the rights of minorities to preserve their cultural identity were sufficiently protected. Accordingly, it held that there had been no violation of the right to education under Article 2 of Protocol No. 1 to the Convention, read in conjunction with Article 14. It recognised that the State has the right to promote its national language and that these measures do not interfere with the rights of minorities to the extent that they constitute discrimination or a violation of the right to education. It leaned toward the argument of the Latvian authorities that the promotion of national language is a legitimate objective that does not endanger the fundamental rights of minorities.³⁷

In connection with the language issue, we refer to the ongoing proceedings in *Ukraine v. Russia* concerning allegedly undesirable “administrative practice,” including the suppression of the Ukrainian language in schools, and the persecution of Ukrainian-speaking children in schools in the occupied territories of Crimea. Ukraine objected to restrictions on the use of Ukrainian in the educational process, including school closures and reductions in Ukrainian-taught subjects. In this case, the ECHR has not yet produced a final ruling.³⁸

A recent case also illustrates the interaction between the right to education and teachers’ right to strike. In *Humpert and Others v. Germany*, the ECHR addressed the justification of disciplinary measures imposed on teachers who participated in a strike during working hours. The contested disciplinary measures served to ensure a proper functioning of the school system, thereby safeguarding the right to education. The ECHR ruled that these measures had a legal basis, as German law prohibits strikes by public employees. The Court found that these measures were in accordance with the law and did not constitute a disproportionate restriction. At the same time, the Court examined whether the German ban on strikes by civil servants, including teachers, violates their rights under Article 11 of the Convention (freedom of assembly and association). In Germany, a constitutional ban on strikes for civil servants applies under Article 33 § 5 of the Basic Law, aimed at maintaining a stable administration and ensuring the proper functioning of state institutions. The ECHR acknowledged that the prohibition constitutes a serious restriction of Article 11 rights, but held that this restriction does not directly amount to violation. The Court emphasised that strike is an important element of trade union activity, but not the only means by which unions should pursue their interests.³⁹ At the same time, the ruling implicitly accords heightened protection to the implementation of the right to education, especially in relation to those responsible for delivering it.

37 Ruling in the case of *Djibouti and others v. Latvia*, Application no. 225/20, Judgment 19 February 2024.

38 Ruling in the case of *Ukraine v. Russia*, Application nos. 20958/14 and 38334/18, Judgment 25 June 2024.

39 Ruling in the case of *Humpert and others v. Germany*, Application nos. 59433/18, 59477/18, 59481/18 and 59494/18, Judgment 14 December 2023.

6. Final Summary

The right to education is recognised as a second-generation human right, as its universal and general acceptance emerged only after the Second World War, alongside the development of economic, social, and cultural rights. This historical evolution reflected a growing awareness that education is not merely a privilege, but a fundamental prerequisite for human dignity, equality, and the realisation of other rights. Ensuring access to education became an essential step towards building democratic, just, and prosperous societies.

The significance of implementing and protecting the right to education is therefore considerable. Education plays a crucial role not only in shaping the personality, intellect, and moral values of individuals, but also in promoting economic growth, technological innovation, cultural exchange, and social cohesion of communities. A society that guarantees education for all fosters inclusion, tolerance, and active citizenship, thereby strengthening its stability and development.

The right to education possesses several key characteristics that define its nature and scope. Among these are its generality and universality, meaning that the right belongs to every person without distinction. It is also personalised and mutual, reflecting both the individual's entitlement to education and the state's corresponding obligation to provide it. Accessibility ensures that education is available and attainable for all, while respect for individual freedom guarantees that education remains a space for free thought and personal development. The right also includes the requirement of a certain standard of quality and is backed by the state's responsibility to secure and maintain that standard.

In substance, the right to education covers all forms and levels of education – from early childhood and primary education to higher and lifelong learning – emphasising the continuous and developmental nature of learning in the modern world.

International protection of this right is enshrined in key global and regional legal instruments, including the Universal Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the European Union. The original text of the Convention did not include the right to education; it was incorporated later through the First Additional Protocol in Article 2. This addition placed the right to education under the jurisdiction of the European Court of Human Rights (ECHR), significantly strengthening its enforceability in Europe.

Through its jurisprudence, the ECHR has consistently recognised the right to education as a fundamental individual right applicable to both children and adults. In cases concerning children, the Court also upholds parents' rights to ensure that their children's education and upbringing are in accordance with their religious and philosophical beliefs. This balance between the child's right to education and parental freedoms reflects the Court's nuanced understanding of the role of education in shaping values and identities in pluralistic societies.

The ECHR frequently examines the right to education in connection with other human rights and fundamental freedoms. Many of its rulings have addressed the education of national minorities – particularly the right to receive education in one’s native language – or the prevention of discrimination and segregation, especially in cases concerning Roma children. In recent years, the Court has increasingly dealt with cases involving children with specific educational needs, emphasising the importance of inclusive education and the obligation of states to adapt their educational systems to the diverse needs of all learners.

Through its evolving jurisprudence, the European Court of Human Rights continually refines the interpretation of the right to education and balances it with other rights and freedoms. In doing so, it helps define the practical boundaries of this right while reinforcing its fundamental importance for individuals and societies alike. Ultimately, the right to education stands as a key pillar of modern democratic order—an instrument of empowerment that enables every person to participate fully in cultural, social, and economic life.

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Right to Free Elections

Attila HORVÁTH

ABSTRACT

This study examines the evolution of the European Court of Human Rights' (ECtHR) jurisprudence on the right to free elections under Article 3 of Protocol No. 1, focusing on how the Court has shaped, expanded, and systematised the concept of "universal suffrage" in response to changing political, social, and technological conditions. Although the Convention initially provided only a minimalist and institutional formulation of the right – centred on the obligation to hold free elections – ECtHR case law has transformed this provision into a substantive individual right that imposes increasingly detailed requirements on States. The chapter traces the development of this shift, showing how the Court's interpretation has gradually broadened from the early, deferential margin of appreciation toward a more robust review of electoral restrictions, franchise limitations, and procedural safeguards. After a brief overview of the development of the right to vote, the study provides a comprehensive analysis of Article 3 of Protocol No. 1, examining each element of the provision individually. Through an analysis of more than 70 judgments, the study highlights the Court's emerging concern with structural risks to electoral integrity, including conditions under which the right to vote may be subject to limitations. Particular attention is given to the Court's methods of judicial reasoning, which increasingly integrate comparative practices, Council of Europe standards, recommendations of the Venice Commission and empirical assessments of electoral impact. The chapter also offers a cursory overview of the international status of voting rights. The study argues that the ECtHR's evolving jurisprudence has become a central component of Europe's electoral heritage, contributing not only to the protection of individual political rights but also to setting normative benchmarks for democratic legitimacy. It concludes that while the Court's expanding role strengthens electoral safeguards, it also raises questions about judicial authority, uniformity of standards, and the scope of State discretion in designing electoral systems.

KEYWORDS

right to free elections, voting rights, universal suffrage, equal suffrage, secret ballot

1. Introduction

'Voting is a civic sacrament' – the significance of elections could hardly be expressed more aptly than Theodore M. Hesburgh (1917–2015), an American Catholic priest and academic social activist. Similar to sacraments, which represent the most significant

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rites within Christian denominations, elections are at the heart of democracy.¹ The commitment to democratic values constituted a critical factor in the establishment of the Council of Europe: as the Preamble of the Statute of the Council of Europe emphasises, ‘the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy’ [emphasis added]. Even the Preamble of the Convention recalls the principle of democracy, claiming that ‘fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy [...]’ [emphasis added]. About half a century later, the Venice Commission confirmed that ‘[a]longside human rights and the rule of law, democracy is one of the three pillars of the European constitutional heritage, as well as of the Council of Europe’.² Further, it also stipulates that ‘[d]emocracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status. These principles represent a specific aspect of the European constitutional heritage that can legitimately be termed the “European electoral heritage”’.³

In the above context, it may be unexpected to learn that the text of the 1950 Convention did not refer to free elections or the right to vote. The reason is relatively straightforward: Representatives of countries that drafted the Convention were unable to reach a consensus on how elections and the right to vote should be reflected in the Convention.⁴ As Lardy and Bates point out, two opposing positions emerged during the course of negotiations: while some states claimed that the issue of free election ‘went outside the traditional domain of human rights’, others equated the proposed right to free elections with the familiar freedoms of opinion, speech, assembly, and association.⁵ However, further negotiations resulted in an agreement on the wording of free elections provision by the end of 1951. The right to free elections, alongside the protection of property and the right to education, was enshrined in the First Protocol, signed in March 1952 and entered into force in May 1954.

2. A Brief History of Voting Rights

Although the practice of electing officials is rooted in antiquity, the institution of parliament with elected representatives was consolidated in England at the end of the 17th century, and parliamentary elections were held in Europe during the 18th and 19th centuries, as well as in the United States and some Latin American countries.

1 Cf. Orr, 2023.

2 Venice Commission, 2002, p. 17.

3 Venice Commission, 2002, p. 17.

4 For further insights into the drafting process of P1-3, see Schabas, 2015, pp. 1012–1018.

5 Lardy and Bates, 2009, p. 712.

However, these elections should be considered as “pre-democratic” due to the limited franchise.⁶

Even during the second half of the 19th century, suffrage was considered a privilege for the few (quite often, very few). First, every state had restrictive conditions in place, meaning that suffrage was conditional on various criteria. The impact of such criteria is vividly illustrated by the fact that the 1832 Suffrage Reform Act of England, a legislative milestone in its own right, increased the number of citizens with voting rights by more than half, but gave only 7% of the population the right to vote (approximately 650,000).⁷

The right to vote is commonly restricted based on the following criteria: wealth or income; the French Charter of 1814 explicitly made the right to vote and the right to candidacy dependent on the amount of direct taxes paid by male citizens (300 and 1,000 francs, respectively).⁸ Education: As per Act XXVI of 1925, suffrage in Hungary was conditional, with some being successful completion of the first four classes of elementary public school or a certificate of equivalent education.⁹ Gender: For centuries, suffrage was the exclusive prerogative of men. Although some states (e.g. New Zealand) granted women the right to vote as early as the end of the 19th century, in most countries, women’s suffrage was not introduced until after World War I.¹⁰ Origin or race: in the United States of America, the voting rights of black people were restricted until 1965).¹¹

At the outset, the principle of equal suffrage was not universally accepted. For example, in Belgium, the Voting Rights Reform of 1893 introduced such a system, granting suffrage to all men who reached the age of 25, but also granted one or two additional votes to constituents fulfilling certain criteria regarding wealth, income, or education.¹² Secret ballots are indispensable elements of democratic electoral systems. However, until the end of the 19th century, most countries had open ballot systems, and many did not opt for secret ballots until the first half of the 20th century.¹³

The restrictions imposed on voting rights eased either gradually or abruptly over time. It was only during the first half of the 20th century that universal, equal, free suffrage became common worldwide, with a large time lag between continents and regions.¹⁴ Various international human rights instruments (see Section 4) have played a significant role in the spread and consolidation of democratic suffrage. They

6 Posada-Carbó, 1996.

7 Phillips and Wetherell, 1995, pp. 413–414.

8 Crook, 2021, pp. 28–29.

9 Hollósi, 2016, pp. 57–58.

10 For the history of woman suffrage, see e.g. DuBois, 1998.

11 Warren, 1965.

12 Mahaim, 1900, p. 75.

13 See e.g. Teorell, Ziblatt and Lehoucq, 2017.

14 For an European overview, see Caramani, 2000, pp. 47–65.

stipulated, *inter alia*, the right of every citizen to participate in public affairs, vote, and be elected.

Naturally, elections are a prerequisite for the realisation of democratic suffrage. However, it is erroneous to assume that holding elections is a sufficient criterion for determining whether a country can be considered democratic. The notion that periodic elections are a sufficient condition for democracy is supported by the fact that, even during the 20th century, several authoritarian regimes – and some still exist today – did not abandon the practice of holding elections on a regular basis.¹⁵ Notably, only a few countries [e.g. Saudi Arabia] do not hold any form of parliamentary election. Regarding the relationship between elections and democracy, let us quote Pildes's words: 'We can envision elections without democracy (indeed, we have plenty of experience of exactly that), but it is difficult to envision a modern democracy without meaningful elections'.¹⁶

3. Right to Free Elections – A Contextual Analysis

3.1. Wording of Article 3 Protocol No. 1.

In contrast to the number of human rights enshrined in the Convention, only a short provision has been devoted to the right to free election. Article 3 of Protocol No. 1. (hereafter, P1–3) is as follows: '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'.

Even in the first reading, the wording about the right to free elections differs from the wording of the rights and freedoms mentioned in Section I of the Convention. Meanwhile, all other rights in Section I (and in the Protocols) refer to *individual persons* ('everyone has the right to...', 'no one shall...'), P1–3 'neither expressly confer a subjective "right" nor prohibit or abolish anything, but it is formulated as an obligation of the Member States' (i. e. 'The High Contracting Parties undertake...').¹⁷ Therefore, it is not surprising that the Commission initially adopted a dismissive stance on complaints based on P1–3. For example, in *X. v. Germany* (1960), it was concluded that Article 3 does not guarantee an individual's right to vote.

It was *Mathieu-Mohin and Clerfayt v. Belgium* (1987), where the Court was asked to determine complaints under P1–3 for the first time; therefore, it deemed it necessary to indicate the meaning it ascribed to that article in the context of the instant case. With regard to the specific wording of P1–3, the Court pointed out that '[i]t has sometimes been inferred from this that the P1–3 does not give rise to individual rights and freedoms "directly secured to anyone" within the jurisdiction of these Parties

15 For non-competitive elections, see Jessen and Richter, 2011.

16 Pildes, 2012, p. 529.

17 Grabenwarter, 2013, p. 400.

[references omitted], but solely to obligations between States'.¹⁸ However, the Court made it clear that such a restrictive interpretation did not stand up for scrutiny. The key statement for the interpretation of P1-3 is as follows.

'Accordingly, and those appearing before the Court agreed on this point, the inter-state colouring of the wording of Article 3 (P1-3) does not reflect any difference of substance from the other substantive clauses in the Convention and Protocols. The reason for it would seem to lie rather in the desire to give greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to "hold" democratic elections.'¹⁹

As Lardy and Bates note, unlike case law on positive obligations, with P1-3 the Court has derived an individual right from a text which explicitly refers only to a positive obligation on the part of states to provide a collective good.²⁰

The wording of P1-3 has another specific feature which distinguishes it from Articles 8 to 11. In the second paragraph, the latter articles explicitly address the circumstances under which the fundamental right may be subject to limitations or restrictions, referring to, for example, the interests of national security, public safety, and the prevention of disorder or crime. P1-3, however, did not include any such restrictions. It does not follow from this that the right to free election is absolute. The Court resolved this contradiction by invoking the so-called implied limitations principle, which was first developed in *Mathieu-Mohin and Clerfayt*, and subsequently elucidated in greater detail in *Ždanoka v. Latvia* (2006). In the Court's view, as P1-3 recognises the right to free elections without setting the limitations in express terms, let alone defining them, there is room for implied limitations.²¹

'Given that Article 3 of Protocol No. 1 is not limited by a specific list of "legitimate aims" such as those enumerated in Articles 8 to 11 of the Convention, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case. [...] In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality and

18 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 48.

19 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 50.

20 Harris et al., 2009, p. 712.

21 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 52.

whether the restriction has interfered with the free expression of the opinions of the people.’²²

In the following sections, we analyse P1–3, with a focus on a detailed examination of each element of the provision.

3.2. ‘Reasonable Intervals’

According to the wording of the Convention, legislative elections shall be held at “reasonable intervals”. Regarding the interpretation of “reasonable time”, the Court has not pronounced itself on this issue. In *Timke v. Germany* (1995), the Commission found that

‘the question whether elections are held at reasonable intervals must be determined by reference to the purpose of parliamentary elections. That purpose is to ensure that fundamental changes in prevailing public opinion are reflected in the opinions of the representatives of the people. Parliament must in principle be in a position to develop and execute its legislative intentions – including longer term legislative plans. Too short an interval between elections may impede political planning for the implementation of the will of the electorate; too long an interval can lead to the petrification of political groupings in Parliament which may no longer bear any resemblance to the prevailing will of the electorate. In the light of these considerations, it cannot be said that a five-year interval between elections does not ensure the free expression of the opinion of the people in the choice of the legislature’.

Meanwhile, the Commission considered that a five-year interval was acceptable, and the Court subsequently offered no further clues. Grabenwarter claims that ‘there is a large margin of appreciation in choosing the length of an election period’. In his view, election periods of four or five years are reasonable in any case, but a period of six years may be reasonable and adequate. In addition, it cannot be said that periods of two or three years would, to a lesser extent, secure the free expression of people’s will.²³

The Venice Commission made some further guidelines regarding the frequency of elections:

‘Elections must be held at regular intervals; a legislative assembly’s term of office must not exceed five years.’²⁴

22 *Ždanoka v. Latvia*, Application no. 58278/00, Judgment 16 March 2006, para. 115.

23 Grabenwarter, 2013, p. 402.

24 Venice Commission, 2002, p. 13.

General elections are usually held at four- or five-year intervals, while longer periods are possible for presidential elections, although the maximum should be seven years.²⁵

A cursory examination of parliaments (or lower houses of the bicameral parliaments) of the 46 States Parties reveals that in just over two-thirds of states, parliamentary elections occur every four years, while in the remaining states (e.g. Austria, France, Italy), parliamentary term lasts five years.²⁶

3.3. 'Secret Ballot'

In P1-3 provisions, 'secret ballot' seems most straightforward. As the Venice Commission notes,

'[s]ecrecy of the ballot is one aspect of voter freedom, its purpose being to shield voters from pressures they might face if others learned how they had voted. Secrecy must apply to the entire procedure, particularly to the casting and counting of votes'.²⁷

From the above discussion, it follows that voters must vote individually. Every form of control by one voter over the vote of another (e.g. 'family voting') must also be prohibited.²⁸

The Parliamentary Assembly of the Council of Europe provides further guidelines for secret balloting, emphasising that it is taken for granted as a basic principle and is a vital part of all democratic processes.²⁹ The Resolution adopted on the subject lays down that

'Ensuring the secrecy of voting therefore remains a key aspect of free and fair elections. It protects voters against any threats likely to impinge on their choices and safeguards their freedom of thought and their political and other beliefs. The secret ballot plays an integral part in legitimising the democratic process. It ensures that citizens are able to express themselves freely, that elected representatives are truly representative and that legislative and executive bodies are legitimate, thereby contributing to public trust in institutions'.³⁰

Secret balloting indicates that nobody may have access to ballots once cast to discover how anyone has voted. During the electoral process and inside the polling station,

25 Venice Commission, 2002, p. 32.

26 However, senators (members of the upper house) in France and in the Czech Republic have six-year terms.

27 Venice Commission, 2002, p. 17.

28 Venice Commission, 2002, p. 17.

29 Parliamentary Assembly, 2007a, Section 1.

30 Parliamentary Assembly, 2007a, Section 3.

secrecy of the ballot implies not only the right but also an obligation for voters to keep their votes secret.³¹

The issue of secrecy in the voting process has only been addressed by the Court on a few occasions in its judgments. In *Bakirdzi and E.C. v. Hungary* (2022), the Court ruled that Hungary's national minority list voting system was not available to applicants without compromising the right to secrecy. (According to the current Hungarian statutory scheme, voters may request that their status of belonging to a national minority be entered into a central electoral register. By doing so, a request for registration as a national minority voter shall contain a reference to the national minority [i.e. the voter must indicate to which national minority he or she belongs] and a statement by the voter in which the voter professes to belong to the national minority in question.) The secrecy of vote was not violated in the act of voting itself, rather indirectly: as soon as a minority voter registers, it becomes apparent which list he or she intends to vote for (e.g. Ms. Bakirdzi belongs to the Greek national minority, therefore, when entering the polling station, she is given the ballot paper of the Greek 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 candidates in 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.³²

In *Toplak and Mrak v. Slovenia*, the Court reiterated that the assistance of a voting assistant, provided that the free will of the voter with a disability is respected, is in compliance with international standards in the field, as the voting assistant is obliged to respect the secrecy of the voting procedure under, *inter alia*, the Penal Code.³³

The question of secret balloting was raised in a special dimension in the case of *Magyar Kétfarkú Kutypárt v. Hungary* (2020). A few weeks before the 2016 Hungarian migrant quota referendum, the Magyar Kétfarkú Kutypárt (Hungarian Two-tailed Dog Party, a joke party) made available a mobile application called 'Cast an invalid ballot' which enabled users to upload and share anonymously photographs of their (invalid) ballot. The Court agreed with the judgment of the Supreme Court of Hungary that 'the secrecy of the ballot had not been infringed, as the mobile application had not allowed access to the personal data of the users and had thus been incapable of linking a cast ballot to a voter'.³⁴

31 Parliamentary Assembly, 2007a, Section 4.

32 *Bakirdzi and E.C. v. Hungary*, Application nos. 49636/14, 65678/14, Judgment 3 April 2023, para. 70.

33 *Bakirdzi and E.C. v. Hungary*, Application nos. 49636/14, 65678/14, Judgment 3 April 2023, para. 125.

34 *Bakirdzi and E.C. v. Hungary*, Application nos. 49636/14, 65678/14, Judgment 3 April 2023, para. 113.

3.4. 'Free Expression of the Opinion of the People' I: The Right to Vote

Although the text of P1-3 does not make this clear at first glance, this provision implies the “right to vote” (the “active” aspect) and the “right to stand for election” (the “passive” aspect).³⁵ In accordance with this dichotomy, these two rights are discussed separately below. As demonstrated in the following sections, Contracting States benefit from a wide margin of appreciation regarding the conditions governing the right to vote and the right to stand for election.

According to the Venice Commission, the five principles underlying Europe's electoral heritage are: universal, equal, free, secret, and direct suffrage.³⁶ A cursory comparison of this statement with P1-3, however, reveals that the Convention makes explicit reference to only two (“free” and “secret”) of the five principles.

3.4.1. Universal suffrage and its restrictions

Unlike several human rights instruments concerning the right to vote, P1-3 does not include the term “universal”. Nevertheless, the Commission found in one of its early decisions that the undertaking of Contracting Parties to hold free elections implies the recognition of universal suffrage (*X. v. Germany* [1967]). Pursuant to the Guideline of the Venice Commission, ‘[u]niversal suffrage means in principle that all human beings have the right to vote and to stand for election’.³⁷ At first glance, this seems to be a straightforward definition; however, universal suffrage is a contested concept, and it is still a matter of debate as to how inclusive suffrage ought to be.³⁸ In *X. v. Germany* (1967), even the Commission itself warned, that ‘it does not follow that P1-3 accords the right unreservedly to every single individual to take part in elections; whereas, indeed, it is generally recognised that certain limited groups of individuals may be disqualified from voting’. However, disfranchisement was treated with caution in *Hirst v. the United Kingdom (no. 2.)* (2005) the Court ruled in principle that

‘[a]ny departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 [reference omitted]’.³⁹

35 See e.g. *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 51.

36 Venice Commission, 2002, p. 7.

37 Venice Commission, 2002, p. 7.

38 See e.g. Beckman, 2008.

39 *Hirst v. the United Kingdom (no. 2.)*, Application no. 74025/01, Judgment 6 October 2005, para. 62.

The Venice Commission has identified three conditions under which the right to vote may be subject to limitations: age, nationality, and residence.⁴⁰ In addition, the deprivation of suffrage rights may be based on mental incapacity or a criminal conviction for a serious offence.⁴¹

3.4.1.1. Age

Minimum age requirements are the most common restriction imposed on voting rights: there is no country where everybody can vote regardless of his/her age. Although it appears evident that the right to vote should be contingent upon a minimum age, there are also opposing views, claiming that this restriction should be rejected because its ‘competence argument’ is unreasonably controversial.⁴² The Venice Commission regards minimum age as a kind of requirement, holding that ‘the right to vote and to be elected must be subject to a minimum age’ [emphasis added].⁴³ Although it may be reasonable to require a certain level of maturity and competency from voters, it is challenging to specify an appropriate age. The Venice Commission only affirms that the right to vote must be acquired, at the latest, at the age of majority.⁴⁴ However, as Peto states, the question of the correct minimum voting age has re-entered the public political debate in Europe during the last few years, and increasingly, more states have lowered the voting age to 16 or 17 years.⁴⁵ Furthermore, the Parliamentary Assembly of the Council of Europe addressed this issue, calling on member states to, *inter alia*, investigate the possibility of lowering the voting age to 16 years.⁴⁶

As for the right to stand for election, the Venice Commission’s position on this matter is as follows:

‘[it] should preferably be acquired at the same age as the right to vote and, in any case, not later than the age of 25 years, except where there are specific qualifying ages for certain offices (e.g. member of the upper house of parliament, head of state)’.⁴⁷

The question of voting age appeared only tangentially in the Strasbourg case-law: in *Hirst v. the United Kingdom*, the Court laid down that ‘the imposition of a minimum age

40 It is consistent with the Commission’s finding, stipulated in *X. v. the United Kingdom* (1976a): ‘among the conditions commonly imposed in Convention countries on the possession or exercise of a right to vote in Parliamentary elections, are citizenship, residence and age’.

41 Venice Commission, 2002, pp. 7–8.

42 Cook, 2013.

43 Venice Commission, 2002, pp. 7–8.

44 Venice Commission, 2002, pp. 7–8.

45 Peto, 2018, pp. 277–278.

46 Parliamentary Assembly, 2011, Section 7.

47 Venice Commission, 2002, pp. 7–8.

may be envisaged with a view to ensuring the maturity of those participating in the electoral process'.⁴⁸

3.4.1.2. Citizenship

The right to vote and the right to stand for election have long been regarded as a core right of citizenship. Conversely, voting rights are a privilege extended only to the citizens of a given state. However, in the age of globalisation, democratic governments worldwide deny millions of adults the right to vote. As Beckman highlights, '[w]ith the exception of children, the largest group excluded from participation in the democratic process are the "resident aliens"'. In this group, we found guest workers, refugees, asylums, and people immigrating for less dramatic reasons.⁴⁹ Although the strong link between citizenship and the right to vote seems to have weakened over the past decades, the liberalisation of political rights of noncitizens is a fairly slow process.⁵⁰

The Venice Commission makes it clear regarding the universal suffrage that 'a nationality requirement may apply',⁵¹ and finds it 'advisable for foreigners to be allowed to vote in local elections after a certain period of residence'.⁵² The exemption from local citizenship requirement has already appeared in the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level, stipulating that:

'Each Party undertakes, subject to the provisions of Article 9, paragraph 1 [in time of war or other public emergency threatening the life of the nation, the this right may be subjected to further restrictions – the Author], to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections.'⁵³

The Treaty establishing the European Community made an even stronger commitment to grant the right to vote and stand for municipal elections in their EU member state of residence:

'Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal

48 *Hirst v. the United Kingdom (no. 2.)*, Application no. 74025/01, Judgment 6 October 2005, para. 62.

49 Beckman, 2006, p. 153.

50 Earnest, 2015.

51 Venice Commission, 2002, pp. 7–8.

52 Venice Commission, 2002, p. 8.

53 Convention on the Participation of Foreigners in Public Life at Local Level (ETS 144), Art. 6(1).

elections in the Member State in which he resides, under the same conditions as nationals of that State.⁵⁴

The same article also grants the same group of persons the right to participate in European Parliament elections.⁵⁵

Returning to P1-3, the Strasbourg case-law does not offer any example of the interpretation of voting rights and citizenship. It has been found in passing that '[i]n respect of the right to vote a condition of citizenship is not contrary to this provision' (*Luksch v. Italy* [1997]), but as Schokkenbroek notes, it may hardly be expected that the Court will force a breakthrough on this point.⁵⁶

3.4.1.3. Residence

The previous section addressed the subject of voting rights for aliens (non-citizens) residing in a particular country. This section examines if permanent expatriates in a given state are entitled to voting. To elucidate the problem, let us quote López-Guerra: 'given that permanent expatriates are no longer subject to the laws and binding decisions of their homeland, why should they have the right to decide who will govern those who do live within the country?'⁵⁷

From the early 1980s, the Parliamentary Assembly of the Council of Europe adopted a number of resolutions and recommendations regarding the voting rights of citizens living abroad,⁵⁸ each of them clearly encouraged the member states to abolish residency requirements and enfranchise their expatriate citizens. The Venice Commission took a cautious stance in its 2002 Guidelines: on the one hand, 'a residence requirement may be imposed',⁵⁹ on the other hand, 'the right to vote and to be elected may be accorded to citizens residing abroad'.⁶⁰ However, the Venice Commission subsequently advanced the argument in favour of extending the right to vote while concluding that the principles of European electoral heritage did not, at this stage, require the introduction of a right to vote for non-residents.⁶¹

External voting is a widely adopted norm, and over the last three decades, the majority of the world's states have extended their voting rights to non-resident citizens.⁶² The enfranchisement of citizens abroad entails a number of problems,⁶³ some of which are reflected in the Strasbourg case-law.

The relevant decisions of the Commission and the Court are consistent in that the condition of residence is not contrary to P1-3. The applicant in case *X. v. the United*

54 Treaty establishing the European Community, Art.19(1).

55 Treaty establishing the European Community, Art. 19(2).

56 Schokkenbroek, 2006, p. 921.

57 López-Guerra, 2005, p. 216.

58 See e.g. Parliamentary Assembly 1982, 1999, 2004, 2005, 2007b, 2012.

59 Venice Commission, 2002, p. 8.

60 Venice Commission, 2002, p. 8.

61 Venice Commission, 2011, p. 15.

62 Wellman, Allen and Nyblade, 2023.

63 See e.g. Lafleur, 2015.

Kingdom (1976a) was a United Kingdom (UK) citizen residing in Paris since 1971, and she complained that British subjects residing abroad could not participate in national parliamentary elections. In its decision, the Commission found that such a restriction can be justified for several reasons: first, the assumption that a non-resident citizen is less directly or continuously interested in and has less day-to-day knowledge of its problems; second, the impracticability for Parliamentary candidates of presenting the different electoral issues to citizens abroad to secure a free expression of opinion; third, there is a need to prevent electoral fraud, the danger of which increases in uncontrolled postal votes; finally, the link between the right of representation in the Parliamentary vote and the obligation to pay taxes, not always imposed on those in voluntary and continuous residence abroad.

Based on the above, the Commission concluded that the residence requirement in the electoral law of the UK cannot be regarded as unreasonable or arbitrary, and so contrary to P1-3, so as to interfere with the rights of the applicant. Regarding the alleged breach of the anti-discrimination provision of the Convention (Article 14), the Commission considered that the distinction between resident and non-resident citizens pursued a legitimate aim and was not a disproportionate means of achieving it. The Commission added to the *X. v UK* (1979) case that the fact that members of the UK diplomatic service or Armed Forces stationed outside the UK continue to enjoy the right to vote in parliamentary elections still does not constitute a violation of Article 14, as these persons are not living abroad voluntarily but have been sent to a country other than their own by their government in the performance of services to be rendered to their country.

The four-point reasoning set out in *X. v. the United Kingdom* (1976a) has been applied by the Commission and the Court in several subsequent cases (e.g. *Luksch v. Germany* [1997], *Hilbe v. Liechtenstein* [1999], *Doyle v. the United Kingdom* [2007], *Shindler v. the United Kingdom* [2013]). In the latter decisions, the Commission/Court also noted that it may be possible that the applicant has not severed ties with his country of origin and that some of the reasons given in *X. v. the United Kingdom* (1976a) are inapplicable to the current case. However, the law cannot consider every individual case but must lay down a general rule.⁶⁴

Although the Court noted in *Shindler v. the United Kingdom* that ‘there is a growing awareness at European level of the problems posed by migration in terms of political participation in the countries of origin and residence’,⁶⁵ the Court’s position on voting rights for expatriate citizens remained unchanged:

‘[...] none of the material forms a basis for concluding that, as the law currently stands, States are under an obligation to grant non-residents unrestricted access to the franchise. [...] A key issue which still has to be addressed within

⁶⁴ See e.g. *Luksch v. Germany*.

⁶⁵ *Shindler v. the United Kingdom*, Application no. 19840/09, Judgment 9 September 2013, para. 114.

this discussion is whether the focus should be on promoting participation in the State of origin, in the State of residence or in both. Further issues concern the modalities of the exercise by non-residents of the right to vote, which give rise to practical and security considerations.⁶⁶

The *Sitaropoulos and Giakoumopoulos v. Greece* (2012) differs slightly from the previous cases, as Greek citizens' applicants were already registered on the electoral roll and their right to vote was explicitly recognised in the domestic (Greek) law. Hence, they were not complaining about a restriction on their right to vote as such but about the failure to adopt the arrangements needed to give effect to that right.⁶⁷ Applicants living in France would have to travel to Greece to exercise their right to vote, and the financial outlay required for travel would have been significant. In addition, their professional and family lives would be disrupted because they would be obliged to leave their work and families for a few days.⁶⁸ However, the Court was not convinced that this would have been disproportionate to the point of impairing the essence of voting rights in question.⁶⁹ The Court ruled that, in general terms, P1-3 does not provide for the implementation, by Contracting States, of measures to allow expatriates to exercise their right to vote from their place of residence.⁷⁰

3.4.1.4. Voting rights of persons with mental disabilities

In addition to the requirements of age, citizenship, and residency, individuals may be deprived of their right to vote or be elected. According to the Venice Commission, deprivation must be based on mental incapacity or a criminal conviction for a serious offence.⁷¹ It is needless to say the deprivation seriously undermines the idea of universal suffrage, therefore the exclusion from the right to vote is only possible under strict, cumulative conditions: it must be provided for by law; the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them; withdrawal of political rights or finding of mental incapacity may only be imposed by the express decision of a court of law.⁷²

66 *Shindler v. the United Kingdom*, Application no. 19840/09, Judgment 9 September 2013, para. 114.

67 *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment 15 March 2012, para. 51.

68 *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment 15 March 2012, para. 52.

69 *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment 15 March 2012, para. 80.

70 *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment 15 March 2012, para. 71.

71 Venice Commission, 2002, p. 8.

72 Venice Commission, 2002, p. 8.

Although the Parliamentary Assembly of the Council of Europe expresses concern about an unjustified link between legal capacity and the right to vote⁷³ and urges the delinking of them,⁷⁴ mental disability is a prevalent cause of disenfranchisement across the globe. According to Bhugra and his colleagues, over one-third of the countries worldwide (36%) deny all persons with any mental health problems a right to vote without any qualifier.⁷⁵ However, from a human-rights perspective, the exclusion of people with disabilities from the right to vote can hardly be justified.⁷⁶

The case of *Alajos Kiss v. Hungary* (2010) was crucial to the restriction of voting rights for the mentally disabled. After being diagnosed with manic depression, the applicant was placed under partial guardianship, which automatically deprived him of his rights under the Hungarian legal framework. He argued that the judicial decision was not been preceded by any scrutiny, thus establishing a connection between his mental ailments and his capacity to vote. In his view, his condition impeded his capacity to orient himself towards political matters.⁷⁷ In examining the legitimate aim, the Court was persuaded by the arguments proposed by the Hungarian Government, which asserted that the statutory scheme wishes to ensure that ‘only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs’.⁷⁸ Regarding proportionality, the Court noted that Hungarian laws do not distinguish between those under total and those under partial guardianship.⁷⁹ Although States may enjoy a wide margin of appreciation when specifying the conditions of active and passive suffrage in their domestic laws, an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, does not fall within an acceptable margin of appreciation.⁸⁰ The Court, therefore, concluded that ‘an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote’ [emphasis added].⁸¹ Accordingly, P1–3 was violated.

However, in an analogous case, *Strøbye and Rosenlind v. Denmark* (2021), the Court did not conclude a breach of P1–3. Applicants were deprived of their legal capacity, which entailed forfeiture of their right to vote. From the perspective of applicants, their case was identical to that of *Alajos Kiss v. Hungary*.⁸² The Court, however, did not share this view, as under the Danish legal framework, only a small group of persons

73 Parliamentary Assembly, 2017, Section 1.

74 Parliamentary Assembly, 2017, Section 7.2.1.

75 Bhugra et al., 2016.

76 See e.g. Barclay, 2013; Ryan, Henderson and Bonython, 2016.

77 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 30.

78 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 38.

79 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 39.

80 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 42.

81 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 44.

82 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 82.

was disenfranchised, namely, those who were both subject to guardianship and had been deprived of their legal capacity.⁸³ The Court gave great weight to the fact that

‘The Danish rules setting out the conditions for depriving a person of his or her legal capacity were very strict and closely related to the issue of whether the person in question was able to foresee the consequences of his or her decisions and to make conscious and judicious decisions’.⁸⁴

The Court also ruled that the relevant Danish legislation significantly differed from the legislation examined in *Alajos Kiss*, where all persons, whether under full or partial guardianship, were subject to an automatic blanket restriction in respect of suffrage.⁸⁵

In *Anatoliy Marinov v. Bulgaria* (2022), on the other hand, the Court found a violation of P1–3 similar to the reasoning elucidated in the *Alajos Kiss* case. The judgment confirmed that

‘the indiscriminate removal of the voting rights of the applicant – *without an individualised judicial review* and solely on the basis of the fact that his mental disability necessitated that he be placed under partial guardianship – cannot be considered to be proportionate to the legitimate aim for restricting the right to vote [emphasis added]’.⁸⁶

3.4.1.5. Voting rights of prisoners

Is it justified to disenfranchise people who have committed serious crimes? As might be anticipated, opinions are disparate on this matter: some argue in favour of the deprivation of the right to vote,⁸⁷ others are against the disenfranchisement of prisoners, claiming that ‘commitment with democratic participation, respect for political equality and the democratic dignity of our fellow citizens speak in favour of the inclusion, rather than exclusion, of those who are imprisoned into the electoral franchise’.⁸⁸ It is also the case that European countries have different legal regimes: most of them have either no restrictions on prisoners’ voting or apply some restrictions linked to the length of the sentence and/or the kind of offence a person is convicted of; while some states do not allow prisoners to vote.⁸⁹

83 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 86.

84 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 87.

85 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 113. Some argue, however, that the judgment in *Strøbye and Rosenlind v. Denmark*, Applications nos. 25802/18, 27338/18, Judgment 6 September 2021 departs from and undermines the Court’s disability voting rights precedents, particularly *Alajos Kiss*; Fiala-Butora, Smith and Stein, 2021.

86 *Anatoliy Marinov v. Bulgaria*, Application no. 26081/17, Judgment 15 May 2022, para. 57.

87 See e.g. Ramsay, 2013.

88 Marshall, 2018, p. 16.

89 For comparative reports, see Horne and White, 2015; Prpic, 2023.

The case-law of the Convention organs accepted various restrictions on certain convicted persons. In the *X. v. the Netherlands* (1974), the applicant complained that he was deprived for life of the right to vote because of a conviction for uncitizen-like behaviour. However, the Commission found that depriving convicted disloyal citizens of certain political rights, including the right to vote, may be justified and, therefore, does not breach the Convention. A similar conclusion was reached in *H. v. the Netherlands* (1983).

‘The national legislator, in exercise of his margin of appreciation, may restrict the right to vote of convicted persons, even when it involves the conviction of an unconditional, conscientious objector to military service, who refused to comply with the formalities enabling him to acquire objector status.’

In the “groundbreaking” judgment *Hirst v. the United Kingdom (no. 2)* (2005), the Court established a new precedent regarding the right to vote for convicted prisoners.⁹⁰ The applicant, a prisoner sentenced to a discretionary life sentence for manslaughter, alleged that as a convicted prisoner in detention, had been subject to a blanket ban on voting in elections. The Government argued that

‘the disqualification in this case pursued the intertwined legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country.’⁹¹

The Court admitted that, in the present case, for the first time that the Court had the occasion to consider a *general and automatic disenfranchisement* of convicted prisoners, as this issue has not been previously examined.⁹² On the one hand, the judgment laid down that there was no place under the Convention system for automatic disenfranchisement based purely on what might offend public opinion.⁹³ However, on the other hand, this statement

‘does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the

90 For an analysis of the significance of the judgment, see Powers, 2006.

91 *Hirst v. the United Kingdom (no. 2)*, Application no. 74025/01, Judgment 6 October 2005, para. 50.

92 *Hirst v. the United Kingdom (no. 2)*, Application no. 74025/01, Judgment 6 October 2005, para. 68.

93 *Hirst v. the United Kingdom (no. 2)*, Application no. 74025/01, Judgment 6 October 2005, para. 70.

Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, *does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations* [references omitted, emphasis added].⁹⁴

According to the Government, disenfranchisement pursues the legitimate aim of preventing crime by sanctioning the conduct of convicted prisoners and enhancing civic responsibility and respect for the rule of law. The Court found no reason to exclude these aims as untenable or incompatible per se with the right guaranteed under P1-3.

Concerning the question of proportionality, the Court adopted a more rigorous stance:

'The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a *general, automatic, and indiscriminate restriction* on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1 [emphasis added]'.⁹⁵

Thus, the Court concluded that P1-3 had been violated.

Notably, five judges delivered a joint dissenting opinion. They found that a general restriction on prisoners' right to vote should, in principle, be judged in the same way that other restrictions precluded the right to vote.⁹⁶ As the dissenting opinion emphasises, the European legislation shows that there is little consensus about whether or not prisoners should have the right to vote.⁹⁷

In applying the criteria described in the *Hirst* case to the *v. Austria* (2010) case, the court adopted the following approach. The applicant was convicted of murder, sentenced to life imprisonment, and disenfranchised. Regarding the conditions for disenfranchisement set out in domestic law, the Court found that the provisions in question were more detailed than those applicable in *Hirst* case. The Court noted that the deprivation of voting rights, in contrast to the statutory scheme of the UK, does not apply automatically to all prisoners irrespective of the length of their sentence,

94 *Hirst v. the United Kingdom* (no. 2), Application no. 74025/01, Judgment 6 October 2005, para. 71.

95 *Hirst v. the United Kingdom* (no. 2), Application no. 74025/01, Judgment 6 October 2005, para. 82.

96 Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens, para. 4.

97 Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens, para. 6.

nature or gravity of their offence, but restricts disenfranchisement to a more narrowly defined group of persons, as it is applicable only in the case of a prison sentence exceeding one year and only to convictions for offences committed with intent.⁹⁸ However, Austria's legal framework has not yet "passed" the *Hirst* test, as the Court also examined how the decision on disenfranchisement was taken. At this point, the Court highlighted the following:

'Under the *Hirst* test [...] it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions [reference omitted]'.⁹⁹

Subsequently, the Court held that this 'discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned' did not exist under the provisions of law which had led to the applicant's disenfranchisement. The Court therefore concluded that P1-3 had been breached.

The applicant of the *Scoppola v. Italy* (no. 3.) (2012) case was sentenced to 30 years of imprisonment and a lifetime ban from public office, which, pursuant to the Italian legal system, entails the forfeiture of the right to vote. Applying the proportionality test, the Court found that disenfranchisement is applied to individuals convicted of a series of specific offences for which express provisions are made by law (e.g. offences against the interests of the State administration) or to people sentenced to certain terms of imprisonment specified by law.¹⁰⁰ Furthermore, the Court also considered that

'the legal provisions in Italy defining the circumstances in which individuals may be deprived of the right to vote show the legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender'.¹⁰¹

At this point, the Court undertook a comparison between the present case and the *Hirst v. the United Kingdom* (no. 2), concluding that

'in the circumstances the Court cannot conclude that the Italian system has the general, automatic, and indiscriminate character that led it, in the *Hirst* (no. 2) case, to find a violation of Article 3 of Protocol No. 1. In Italy there

98 *Frodl v. Austria*, Application no. 20201/04, Judgment 4 October 2010, para. 33.

99 *Frodl v. Austria*, Application no. 20201/04, Judgment 4 October 2010, para. 34.

100 *Scoppola v. Italy* (no. 3.), Application no. 126/05, Judgment 22 May 2012, para. 105.

101 *Scoppola v. Italy* (no. 3.), Application no. 126/05, Judgment 22 May 2012, para. 106.

is no disenfranchisement in connection with minor offences or those which, although more serious in principle, do not attract sentences of three years’

imprisonment or more, regard being had to the circumstances in which they were committed and to the offender’s personal situation.¹⁰²

Furthermore, the Court ruled in favour of the Italian legislative framework stating that under Italian law, it is possible for a convicted person who has been permanently deprived of the right to vote to recover that right.¹⁰³ In light of the above, and in contrast to the *Hirst* case, the Court ruled that the margin of appreciation afforded to the respondent government related to the restriction of the right to vote had not been contravened.

The purpose of this chapter is not to provide a comprehensive review of all the analogous cases. It is noteworthy that since the *Hirst* case, the Court has ruled that several other states’ restrictions on prisoners’ enfranchisement violate P1-3 because of the existence of a general, automatic, and thus indiscriminate restriction on prisoners’ universal suffrage.¹⁰⁴

Summarising its previous practice, the Court in *Kalda v. Estonia* (No. 2) (2022) held that

‘With a view to securing the rights guaranteed by Article 3 of Protocol No. 1, the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners’ voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied.’¹⁰⁵

3.4.2. Equal Suffrage

P1-3 does not explicitly guarantee the universality of suffrage, but it also does not guarantee equality. Nevertheless, the Guidelines of the Venice Commission discuss in detail equal suffrage which entails, *inter alia*, equal voting rights and equal voting power. As for the former, each voter has, in principle, one vote; where the electoral system provides voters with more than one vote (e.g. in Germany or Hungary), each voter has the same number of votes.¹⁰⁶ Equal voting power, as the other side of equal suffrage, is related to the “weight” of the votes. It goes without saying if the number of residents in constituency “A” is 50,000 and 100,000 in constituency “B”, then the votes of the citizens in the latter constituency are worth less than the votes of those in constituency “A”.

The Court clarified that the phrase ‘conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’ implies essentially the

102 *Scoppola v. Italy* (no. 3.), Application no. 126/05, Judgment 22 May 2012, para. 108.

103 *Scoppola v. Italy* (no. 3.), Application no. 126/05, Judgment 22 May 2012, para. 109.

104 For a more detailed overview, see Celiksoy, 2020.

105 *Kalda v. Estonia* (No. 2), Application no. 14581/20, Judgment 22 May 2023, para. 41.

106 Venice Commission, 2002, p. 9.

principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election. However, equal suffrage does not entail that all votes must necessarily have equal weight with regard to the outcome of the election or that all candidates must have equal chances of victory.¹⁰⁷

In *Oran v. Turkey* (2014), the applicant complained that Turkish citizens who had lived abroad for more than six months could only vote for the lists drawn up by the political parties but not for independent candidates (as the applicant himself). The Court found that ‘the right to vote cannot be construed as laying down a general guarantee that every voter should be able to find on the ballot paper the candidate or the party he had intended to vote for’.¹⁰⁸ The majority of judges (4:3) held that the restriction in question met the legislature’s legitimate concern to ensure the political stability of the country and of the government which would be responsible for leading it after the elections. Consequently, considering the respondent State’s broad margin of appreciation in this field, the Court considered that the treatment complained of by the applicant in his capacity as an unaffiliated independent candidate was based on an objective and reasonable justification.¹⁰⁹ By contrast, dissenting opinions concluded that the Turkish legal framework restricted applicants’ chances of winning votes, infringing on the principle of equal suffrage.¹¹⁰

The issue of equal suffrage arises in the specific context of the Hungarian legal framework that has been in force since the 2014 parliamentary election. In a mixed electoral system, voters who have a residence in Hungary have two votes: they vote for one candidate in the single-member constituency and for one party list; meanwhile, voters without a Hungarian residence have only one vote, which is cast for one party list. The rationale underlying this differentiation is straightforward: the 106 single-member constituencies, in the absence of a domicile address, the 106 single-member constituencies cannot accommodate the inclusion of voters from beyond the border. However, this raises the question: does it not violate the principle of equality of suffrage that some Hungarian citizens only have one vote, not two? As no one has yet taken the matter to the Court, it is not possible to provide a definitive response. However, having regard for the position of the Court in *Oran v. Turkey*, it is in conformity with the Convention that Hungarian citizens may have either two or only one vote, depending on their residency.¹¹¹

107 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 54., cf. *Yumak and Sadak v. Turkey*, Application no. 10226/03, Judgment 8 July 2008, para. 112.

108 *Oran v. Turkey*, Application nos. 28881/07 and 37920/07, Judgment 8 September 2014, para. 57.

109 *Oran v. Turkey*, Application nos. 28881/07 and 37920/07, Judgment 8 September 2014, para. 66.

110 Partly Dissenting, Partly Concurring Opinion of Judges Sajó, Keller, and Lemmens, para. 6.

111 Bodnár, 2016, pp. 428–429.

3.5. 'Free Expression of the Opinion of the People' II: The Right to Stand for Election

3.5.1. Preliminary Remarks

Concerning the right to stand as an election candidate and the passive aspect of suffrage, one may make two preliminary remarks: First, the same general conditions and principles (including the prohibition of discrimination) apply to restricting the right to vote. Second, States benefit from a broader latitude in setting the conditions for standing for election; therefore, the proportionality test is more limited. In *Melnichenko v. Ukraine* (2004), the Court accepted that 'stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility'.¹¹² The Court made its position clearer a few years later in *Etxeberria and Others v. Spain* (2009).

'[...] The right to stand for election in the legislature could be subject to stricter requirements than the right to vote. Indeed, whereas the criterion relating to the "active" aspect of Article 3 of Protocol No. 1 usually entailed a broader assessment of the proportionality of legal provisions depriving a person or group of persons of the right to vote, the Court's approach to the "passive" aspect of that provision was essentially confined to verifying the absence of arbitrariness in the domestic procedures leading to an individual's being deprived of the right to stand for election.'¹¹³

The Court's cautious stance can be explained by the fact that it acknowledges and respects the right of Member States to establish their own institutional system, especially the national parliament. As Lardy and Bates note, '[t]he Court does not want to be seen to meddle in this domain without good reason'.¹¹⁴ In addition, it is not negligible that unlike Articles 8, 9, 10 and 11 of the Convention, P1-3 does not itself describe a list of aims, which can be considered legitimate for the purposes of restrictions of the right under that Article.¹¹⁵

Nor does the Venice Commission equate the level of protection of the right to vote and the right to stand as a candidate: 'conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them'.¹¹⁶ The Commission justifies this distinction on the grounds that, in the case of passive suffrage rights, the holding of a public office is at stake, and it may be legitimate to debar persons whose activities in such an office would violate a greater public interest.¹¹⁷

¹¹² *Melnichenko v. Ukraine*, Application no. 17707/02, Judgment 30 March 2005, para. 57.

¹¹³ *Etxeberria and Others v. Spain*, Application nos. 35579/03, 35613/03, 35626/03, 35634/03, Judgment 6 November 2009, para. 50.

¹¹⁴ Lardy and Bates, 2009, p. 719.

¹¹⁵ See e.g. *Kara-Murza v. Russia*, Application no. 2513/14, Judgment 4 January 2023, para. 42.

¹¹⁶ Venice Commission, 2002, p. 8.

¹¹⁷ Venice Commission, 2002, p. 20.

3.5.2. *Right to Stand for Election vs. Democratic Order*

Over the past few decades, the Court has had to decide whether a wide variety of restrictions on standing in elections are compatible with Article 3. Strasbourg case law abounds in cases in which the purpose of the restrictions was to maintain democratic order; many of these judgments involve the new democracies of Eastern Europe.¹¹⁸ The applicant of *Ždanoka v. Latvia* (2004) was a member of the Communist Party of Latvia, which was declared unconstitutional and dissolved in 1991 as it backed a coup d'état against the newly independent Latvia. In 1994 and 1995, the Latvian Parliament adopted two laws on municipal and parliamentary elections, respectively, which stated that people who had actively participated in the CPL's activities after 13 January 1991, the date of the first coup d'état supported by the party, could not stand for election. Based on these laws, the applicant was automatically disqualified from standing for elections and lost her seat in the Riga City Council. The Court gave great weight to the fact that the applicant had never been convicted of a criminal offence on account of her activities and concluded that the *permanent* disqualification from standing for election to the Latvian Parliament is not proportionate to the legitimate aims which it pursued and curtails the applicant's electoral rights to such an extent as to impair their essence and that its necessity in a democratic society has not been established.¹¹⁹ However, the Grand Chamber overturned the Chamber's judgment (*Ždanoka v. Latvia* [2006]), holding that 'impugned restriction pursued aims compatible with the principle of the rule of law and the general objectives of the Convention, namely the protection of the State's independence, democratic order and national security'.¹²⁰ Regarding the proportionality of exclusion, the Court attached great importance to the historical and political contexts:

While such a measure may scarcely be considered acceptable in the context of one political system, for example, in a country with an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historical-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime.¹²¹

The Court also attached weight to the fact that the Latvian parliament periodically reviewed relevant laws.¹²² Thus, the Court concluded that there was no violation of P1-3.

In *Ādamsons v. Latvia* (2008), the Court took a notably different view. The applicant was prevented from standing for parliamentary elections in 2002, as the law on legislative elections forbids former KGB employees to stand for elections. The Court considered that the measure at issue pursued aims compatible with the principle of

118 Lardy and Bates, 2009, p. 719.

119 *Ždanoka v. Latvia*, Application no. 58278/00, Judgment 16 March 2006, para. 99.

120 *Ždanoka v. Latvia*, Application no. 58278/00, Judgment 16 March 2006, para. 118.

121 *Ždanoka v. Latvia*, Application no. 58278/00, Judgment 16 March 2006, para. 133.

122 *Ždanoka v. Latvia*, Application no. 58278/00, Judgment 16 March 2006, para. 134.

the rule of law and the general objectives of the Convention, namely, the protection of the State's independence, its democratic order, its institutional system, and its national security.¹²³ Concerning the proportionality of the restriction, the Court ruled that the present case was fundamentally different from the *Ždanoka* case. Meanwhile, in the latter case, the law-maker had clearly and precisely defined the category of ineligible persons ('persons who had actively participated in the CPL's activities after 13 January 1991' – see above), the law applied in the *Adamsons* case referred to former KGB "agents" in general, a concept that was, as such, too broad in the Courts's view. In contrast to *Ždanoka*, in the present case, it is no longer sufficient to simply find that the person concerned belonged to the group in question: '[s]ince that group is defined in too general a manner, a restriction on the electoral rights of its members must follow an individualised approach enabling account to be taken of their actual conduct [references omitted]'. In the Court's view, the need for such individualisation becomes increasingly important with the passage of time, in as much as the time at which the impugned conduct is alleged to have taken place becomes more remote.¹²⁴

The Court concluded that when the authorities deprived the applicant of his right to stand for election, exceeded an acceptable margin of appreciation, however wide, and that the interference complained of is incompatible with the requirements of P1–3.¹²⁵

The above-mentioned *Etxeberria and Others v. Spain* centred on the cancellation of the candidacy of electoral groups to regional elections on the grounds that they were continuing activities of political parties that had been declared illegal owing to their links with a terrorist organisation. The Court agreed with the Spanish Government's assertion that the restriction at issue pursued aims compatible with the principles of the rule of law and the general objectives of the Convention, particularly the protection of the democratic order.¹²⁶ Accordingly, the restriction complained of had been proportionate to the legitimate aim pursued and, in the absence of any element of arbitrariness, had not infringed on the free expression of people's opinions.¹²⁷

The applicant of *Paksas v. Lithuania* (2011), a former President of Lithuania, was removed from office by the Parliament following impeachment proceedings for committing a gross violation of the Constitution. The Court found the lifetime prohibition for Paksas to be elected to the Parliament and to any other office for which it was necessary to take an oath in accordance with the Constitution was disproportionate and in violation of P1–3. The Court also referred to *Ždanoka v. Latvia* judgment, emphasising that in the present case, in contrast to *Ždanoka*, 'not only is the restriction in issue

123 *Adamsons v. Latvia*, Application no. 3669/03, Judgment 1 December 2008, para. 120.

124 *Adamsons v. Latvia*, Application no. 3669/03, Judgment 1 December 2008, para. 125.

125 *Adamsons v. Latvia*, Application no. 3669/03, Judgment 1 December 2008, para. 132.

126 *Etxeberria and Others v. Spain*, Application nos. 35579/03, 35613/03, 35626/03, 35634/03, Judgment 6 November 2009, para. 52.

127 *Etxeberria and Others v. Spain*, Application nos. 35579/03, 35613/03, 35626/03, 35634/03, Judgment 6 November 2009, para. 56.

not subject to any time-limit, but the rule on which it is based is set in constitutional stone'.¹²⁸

The applicant party was a Moldovan political party in *Political Party 'Patria' and Others v. the Republic of Moldova* (2020), which was removed from the list of participants three days before parliamentary elections owing to the alleged use of undeclared foreign funds. The Court accepted the Government's argument that the conditions set out in the Moldovan Electoral Code pursued the legitimate aim of observing the rule of law and the protection of democracy's proper functioning which implied the assurance of equal and fair conditions for all candidates in the electoral campaign and the protection of free expression of people's opinion during elections.¹²⁹ However, the Court ruled that interference with applicants' electoral rights fell short of the standards required under P1-3. The disqualification was arbitrary on account of the lack of sufficient procedural safeguards.

3.5.3. Further Legitimate Aims

Aside from the defence of the democratic order, the Court recognised further legitimate aims capable of justifying restrictions on the exercise of the right to stand for election. In *Podkolzina v. Latvia* (2002), the Court held that the obligation to have sufficient knowledge of the official language may pursue a legitimate aim, as the interest of each State in ensuring that its own institutional system functions normally is incontestably legitimate.¹³⁰ (However, the process by which the applicant's language skills were evaluated constituted an infringement of the Convention's procedural requirements of fairness and legal certainty.) In *Krasnov and Skuratov v. Russia* (2007), the Court also found that requiring a candidate for election to the national parliament to submit truthful information on his or her employment and party affiliation is a legitimate aim for the purpose of P1-3, as this provision enables voters to make an informed choice regarding the candidate's professional and political background.¹³¹

In *Melnychenko v. Ukraine* (2004), the Court did not object to the five-year continuous residency requirement for potential parliamentary candidates, on the grounds that this requirement may be deemed appropriate for enabling such persons to acquire sufficient knowledge of the issues associated with the national parliament's tasks.¹³²

In *Gitonas and Others v. Greece* (1997), the Court had to decide whether certain individuals holding public office could be precluded from standing for election and being elected in any constituency where they had performed their duties for more than three months in the three years preceding elections. According to this judgment, the disqualification of applicants was neither arbitrary nor disproportionate and

128 *Paksas v. Lithuania*, Application no. 34932/04, Judgment 6 January 2011, para. 110.

129 *Political Party 'Patria' and Others v. the Republic of Moldova*, Applications nos. 5113/15 and 14 others, Judgment 4 November 2020, para. 34.

130 *Podkolzina v. Latvia*, Application no. 46726/99, Judgment 9 July 2002, para. 34.

131 *Krasnov and Skuratov v. Russia*, Application nos. 17864/04 and 21396/04, Judgment 31 March 2008, para. 44.

132 *Melnychenko v. Ukraine*, Application no. 17707/02, Judgment 30 March 2005, para. 57.

‘serves a dual purpose that is essential for the proper functioning and upholding of democratic regimes, namely ensuring that candidates of different political persuasions enjoy equal means of influence (since holders of public office may on occasion have an unfair advantage over other candidates) and protecting the electorate from pressure from such officials who, because of their position, are called upon to take many – and sometimes important – decisions and enjoy substantial prestige in the eyes of the ordinary citizen, whose choice of candidate might be influenced’.¹³³

The applicants in *Ahmed and Others v. the United Kingdom* (1998), serving as local government officers, claimed that their right to participate in certain forms of political activity (*inter alia*, to stand for local election) had been curtailed unlawfully. The Court again invoked political impartiality as a legitimate aim and emphasised that restrictions operate for as long as applicants occupy politically restricted posts; furthermore, any of the applicants wishing to contest an elected office is at liberty to resign from his post.¹³⁴ Consequently, without taking a stand on whether local authority elections are covered by P1–3, the Court concluded that there was no breach of that provision in this case.

In other cases, the Court found that the restrictions imposed on the right to stand for election were disproportionate. The precedent of the *Tănase v. Moldova* (2010) case was a law which imposed a ban on persons with dual or multiple citizenship from becoming MPs. The Government relies upon several aims to justify the prohibition introduced by the impugned law, namely, ensuring loyalty, defending the independence and existence of the State, and guaranteeing the security of the State.¹³⁵ The Court held that such a restriction, considering the special position of Moldova, which had a potentially high proportion of dual nationals and had only recently become independent, could have been justified after its independence in 1991.¹³⁶ However, the Court recalled that the ban was enforced in 2008 and not 1991, 17 years after Moldova had gained independence, and about five years later, laws were relaxed to allow dual citizenship. In these circumstances, the Court considered ‘the argument that the measure was necessary to protect Moldova’s laws, institutions and national security to be far less persuasive’.¹³⁷ The Court concluded that the restrictions in question curtailed the rights guaranteed by P1–3 to the extent of impairing their essence and depriving them of their effectiveness.¹³⁸

133 *Gitonas and Others v. Greece*, Application nos. 18747/91; 19376/92, 19379/92, Judgment 1 July 1997, para. 40.

134 *Ahmed and Others v. the United Kingdom*, Application no. 22954/93, Report of the Commission 29 May 1997, para. 75.

135 *Tănase v. Moldova*, Application no. 7/08, Judgment 27 April 2010, para. 164.

136 *Tănase v. Moldova*, Application no. 7/08, Judgment 27 April 2010, para. 173.

137 *Tănase v. Moldova*, Application no. 7/08, Judgment 27 April 2010, para. 174.

138 *Tănase v. Moldova*, Application no. 7/08, Judgment 27 April 2010, para. 179.

The background of *Kara-Murza v. Russia* (2022) was similar. Russia annulled its dual national registration as a candidate for legislative elections in 2006. The Court observed that the Russian Government did not propose any historical or political considerations explaining the necessity of the impugned restrictive measure; for example, it was not shown that there was an external threat to Russia's independence or its democracy,¹³⁹ and found the breach of P1-3.

In *Lykourazos v. Greece* (2006), the applicant was elected MP in 2000, but the Greek Special Supreme Court forfeited his seat as he was a practising lawyer. The decision of the Greek Court was based on the provision of the Constitution that reads as follows: '[t]he duties of a member of parliament are also incompatible with the exercise of any profession' [emphasis added]. However, this provision was enacted only after the 2000 parliamentary election; hence, the applicant was elected in 2000 in complete accordance with the law. The Court held that

'the Special Supreme Court had caused him to forfeit his seat and had deprived his constituents of the candidate whom they had chosen freely and democratically to represent them for four years in Parliament, in breach of the principle of legitimate expectation'.

Therefore, this situation is a breach of the substance of the rights guaranteed by P1-3.¹⁴⁰

3.5.4. Electoral Systems Contested

The Court also had to rule in several cases wherein the right to stand for election was not directly affected, but rather through the regulation governing the conduct of elections and the electoral system itself. The Commission's and Court's case-law suggests that there is no "optimal" electoral system, thus, the Contracting States have a wide margin of appreciation, given that their legislation on the matter varies from place to place and from time to time. In *Mathieu-Mohin and Clerfayt v. Belgium*, the Court recognised that

'[e] lectoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other: on the one hand, to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will'.¹⁴¹

The Court also stressed the importance of the context:

139 *Kara-Murza v. Russia*, Application no. 2513/14, Judgment 4 January 2023, para. 47.

140 *Lykourazos v. Greece*, Application no. 33554/03, Judgment 15 September 2016, para. 57.

141 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 54.

‘For the purposes of Article 3 of Protocol No. 1 (P1-3), any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the “free expression of the opinion of the people in the choice of the legislature”’.¹⁴²

In *Tête v. France* (1987), the Commission recalled that P1-3 ‘does not create any obligation to introduce a particular electoral system such as proportional representation or majority voting’. Even the highly disproportional first-part-the-post system of the UK is compatible with the Convention (*Liberal Party, R. and P. v. the United Kingdom* [1980]); furthermore, neither majority bonus systems nor a closed list system contravene the terms of P1-3 (*Saccomanno and Others v. Italy* [2012]).

On several occasions, the Court was summoned to decide whether it is in conformity with the Convention for a Member State to impose a condition of electoral deposit of a specified number of supporting signatures as a prerequisite for standing as a candidate in elections. As for the submission of candidatures, the aforementioned prerequisites are explicitly permitted by the Venice Commission: on the one hand, ‘the presentation of individual candidates or lists of candidates may be made conditional on the collection of a minimum number of signatures’¹⁴³; on the other hand, ‘if a deposit is required, it must be refundable should the candidate or party exceed a certain score; the sum and the score requested should not be excessive’.¹⁴⁴

In *Sukhovetsky v. Ukraine* (2006), the Court concluded that the obligation of paying electoral deposit ‘pursued the legitimate aim of guaranteeing the right to effective, streamlined representation by enhancing the responsibility of those standing for election and confining elections to serious candidates, whilst avoiding the unreasonable outlay of public funds’.¹⁴⁵ Although the applicant claimed that this measure was disproportionate to the aims pursued (given his low income, he was unable to meet the cost of the deposit), the Court held that ‘the deposit required of the applicant cannot be considered to have been excessive or such as to constitute an insurmountable administrative or financial barrier for a determined candidate wishing to enter the electoral race’.¹⁴⁶

The applicant of *Mihaela Mihai Neagu v. Romania* (2014) was unable to collect 100,000 supporting signatures to contest the 2009 European Parliamentary elections; therefore, her candidature was rejected. The Court acknowledged that the requirement to collect a large number of signatures may deprive independent candidates of the possibility of representing part of the electorate, nevertheless ‘the purpose of the

142 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 54.

143 Venice Commission, 2002, p. 9.

144 Venice Commission, 2002, p. 9.

145 *Sukhovetsky v. Ukraine*, Application no. 13716/02, Judgment 28 June 2006, para. 62.

146 *Sukhovetsky v. Ukraine*, Application no. 13716/02, Judgment 28 June 2006, para. 73.

measure complained of was to carry out a reasonable selection among the candidates in order to ensure their representativeness in the European Parliament and to rule out any abusive candidacies'.¹⁴⁷ In addition, the threshold of 100,000 signatures (0.55% of all citizens registered on the electoral rolls) is consistent with the Venice Commission's guidelines (a maximum of 1%).

The electoral threshold, applied in several Member States, was also challenged before the Court. In *Partija 'Jaunie Demokrāti' and Partija 'Mūsu Zeme' v. Latvia* (2007), the Court considered that the 5% threshold laid down by the Latvian law cannot be held to be contrary to the requirements of that provision, in so far as it favours sufficiently representative schools of thought and makes it possible to avoid excessive fragmentation of Parliament. The Court reiterated its statement made in *Mathieu-Mohin and Clerfayt*, namely, from P1-3 '[i]t does not follow, however, 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"'.¹⁴⁸

In *Partei Die Friesen v. Germany* (2016), the question arose as to whether a party representing a minority should be exempted from the electoral threshold. The applicant party asserted that it represented the Frisian people; however, the number of Frisians was so low in Lower Saxony that the party could not meet the 5% threshold requirement in parliamentary elections (it attained merely 0.3% of the overall votes); therefore, its right to participate in elections without being discriminated against had been violated. Although the Court accepted the applicant party's argument that the minimum threshold had a chilling effect on potential voters who may not have wanted to "waste" their votes on a political party unable to pass the threshold,¹⁴⁹ the Court also revoked that the 'Convention did not compel the Contracting Parties to provide for positive discrimination in favour of minorities'.¹⁵⁰ The Court also noted that the Framework Convention for the Protection of National Minorities did not oblige Member States to exempt national minority parties from electoral thresholds.¹⁵¹ *Strack and Richter v. Germany* (2016) also centred on the 5% threshold; however, this time, the case had been referred to the Court by two voters, who claimed that the 5% threshold, applied in the 2009 European Parliament election, resulted in seven parties not being considered for seats, even though they would have won one or two seats had the threshold not existed. According to the applicants, 10.8% of the votes were thus "wasted". Although the German Federal Constitutional Court ruled that the threshold was unconstitutional and thus void, the Court concluded that Germany

147 *Mihaila Mihai Neagu v. Romania*, Application no. 66345/09, Judgment 6 March 2014, para. 34.

148 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 54.

149 *Partei Die Friesen v. Germany*, Application no. 65480/10, Judgment 28 April 2016, para. 34.

150 *Partei Die Friesen v. Germany*, Application no. 65480/10, Judgment 28 April 2016, para. 42. It has been ruled for the first time in *Magnago and Südtiroler Volkspartei v. Italy*, Application no. 25035/94, Judgment 15 April 1996.

151 *Partei Die Friesen v. Germany*, Application no. 65480/10, Judgment 28 April 2016, para. 43.

had not overstepped the wide margin of appreciation, which the Convention affords Contracting States in these matters.

Based on the above, what is the highest tolerable threshold? In *Yumak and Sadak v. Turkey* (2008), the Court took an ambivalent view. Although it considered a 10% electoral threshold (applied in Turkey) as excessive, it was not persuaded that

‘when assessed in the light of the specific political context of the elections in question, and attended as it is by correctives and other guarantees which have limited its effects in practice, the threshold has had the effect of impairing in their essence the rights secured to the applicants by Article 3 of Protocol No. 1’.¹⁵²

Accordingly, the Court found no infringement of P1–3, although it concurred with the organs of the Council of Europe, which stressed the exceptionally high level of the threshold and recommended that it be lowered.

3.6. ‘Choice of the Legislature’

Elections can occur at various levels of government. In addition to parliamentary elections, local (municipal), regional, European parliamentary, and presidential elections have been held. However, it should be stressed that the Convention concerns only the ‘choice of the legislature’. Accordingly, the Court laid down that P1–3 applies only to the election of the “legislature”, or at least of one of its chambers if it has two or more (*c-Mohin and Clerfayt v. Belgium*). Furthermore, in the same case, the court elucidated that ‘the word “legislature” does not necessarily mean only the national parliament, however, it has to be interpreted in the light of the constitutional structure of the State in question’.¹⁵³ In conclusion, it can be stated that, according to the case-law of the Court, the legislature is not confined to the national parliament; the word “legislature” has to be interpreted in the light of the constitutional structure of the State in question.

As for the local (municipal) elections, the Court has consistently maintained that these elections do not fall within the scope of P1–3 In *X. v. the United Kingdom* (1976b), the Commission found in relation of the status of local authorities in Northern Ireland

‘that insofar these local authorities have a legislative function it is confined to the making of by-laws applicable within their areas and these powers are rigidly limited by statute and they have no powers to make rules other than in accordance with the powers conferred by Parliament’.

152 *Yumak and Sadak v. Turkey*, Application no. 10226/03, Judgment 8 July 2008, para. 147.

153 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 53.

Consequently, the Commission does not consider that these authorities are covered by the term “legislative”, as it is employed in P1-3. In *Booth-Clibborn and others v. the United Kingdom* (1985), the Commission was of a similar opinion: despite the significant scope of their functions, the metropolitan county councils cannot properly be said to form part of the “legislature” of the UK; therefore, the cancellation of elections to those bodies cannot raise an issue under P1-3. The Court applied similar reasoning in the *Salleras Llinares v. Spain* (2000) when it noted that the Spanish Constitution confers the exercise of legislative power on the parliament (*Cortes Generales*); thus, municipal councils clearly do not exercise legislative power and do not, therefore, form part of the “legislature” within the meaning of P1-3.

The Court’s practice is volatile at the regional level, depending on the powers and competencies of the body affected by the complaint. Neither the regional councils in France nor the regional assemblies in Poland could be considered “legislatures” within the meaning of P1-3. (*Malarde v. France* [2000g and *Mółka v. Poland* [2006], respectively). As regards the previous one, the Court held that ‘in France, the legislative function was exercised by Parliament and the powers of the regional councils were limited to regulating, through deliberations, the economic, social, health, cultural and scientific affairs of the region’. In *Mółka v. Poland*, the Court followed a similar approach. Following an examination of Poland’s constitutional system, the Court concluded that Poland’s regional assemblies (similar to municipal and district councils) are the repositories of power of an administrative nature concerning the organisation and provision of local services. Consequently, these bodies do not possess any inherent primary rule-making power and do not form part of the legislature of the Republic of Poland. Accordingly, P1-3 is not applicable to elections to these organs.

In *Mathieu-Mohin and Clerfayt v. Belgium*, the Court took a different view. According to the judgment,

‘the 1980 reform vested the Flemish Council with competence and powers wide enough to make it, alongside the French Community Council and the Walloon Regional Council, a constituent part of the Belgian “legislature” in addition to the House of Representatives and the Senate’.

The legislative assembly of the Autonomous Community of the Canary Islands was similarly assessed by the Court of Justice: in accordance with the structure of the Spanish State’s Autonomous Communities (*Comunidades autónomas*), their legislative assemblies participate in the exercise of legislative power and are, therefore, part of the “legislature” within the meaning of P1-3 (*Federación nacionalista Canaria v. Spain* [2001]). In *Repetto Visentini v. Italy* (2021), following an examination of the Italian Constitution and the Regional Statute of the Trentino-Alto Adige region, the Court concluded that both the regional council and the provincial councils of Trento and Bolzano could be considered to be constituent parts of the “legislature”. It followed that P1-3 was applicable in the present case. In a subsequent case, also concerning Italy, the court advanced a similar line of argument a few months later

(*Miniscalco v. Italy* [2021]). It is clear from this that in accordance with the federal structure of the German State, the diets of the German Länder, are “legislature” within the meaning of P1–3 (*Timke v. Germany*).

The wording of P1–3 may lead one to conclude that presidential elections are clearly beyond the scope of the article as this provision concerns ‘the choice of the legislature’ and not the appointment of a Head of State, such as the Federal President of Austria (*Habsburg-Lothringen v. Austria* [1991]). In a recent study, Şahin indicates that the Court declares applications regarding presidential elections incompatible *ratione materiae*, without going into details, especially in cases where the President is equipped with ceremonial powers (e.g. *Habsburg-Lothringen v. Austria*, *Baskauskaite v. Lithuania* [1998], *Anchugov and Gladkov v. Russia* [2013]). However, in applications made against countries where the President has broader powers than usual, the Court examines in detail whether these powers could be construed as falling within the scope of legislative power.¹⁵⁴ The Court was the first to make this point in *Boškoski v. the former Yugoslav Republic of Macedonia* (2004), claiming that the Court does not exclude the possibility of applying P1–3 to presidential elections. It was undoubtedly a major turning point when the Court ruled that P1–3

‘enshrines a characteristic of an “effective political democracy”, for the ensuring of which regard must not solely be had to the strictly legislative powers which a body has, *but also to that body’s role in the overall legislative process* [emphasis added]. Should it be established that the office of the Head of the State had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a “legislature” within the meaning of Article 3 of Protocol No 1.’

(However, in the present case the Court found no indication that the powers of the Head of the State are such as to make it part of the “legislature” of the respondent State.)

In the *Boškoski* decision, the Court delineated the powers that a president must possess for Article 3 to be applicable to the election of the president: power to initiate and adopt legislation; absolute veto power; unlimited discretion to dissolve the national parliament; unlimited discretion to appoint or dismiss the government or its members.

In Şahin’s view, ‘It is impossible to apply these criteria cumulatively. In a country with at least minimum democracy, all these powers cannot be given to the President’.¹⁵⁵ In addition, Schokkenbroek claimed that the reasoning underlying the *Boškoski* case was unconvincing.¹⁵⁶

154 Şahin, 2023, pp. 756–757.

155 Şahin, 2023, p. 757.

156 Schokkenbroek, 2006, p. 930.

It cannot be said that the court consistently applied the criteria defined in the *Boškoski* judgment in its subsequent decisions. In some cases, the role of the President was not assessed (*Brito Da Silva Guerra and Sousa Magno v. Portugal* [2008]; *Paksas v. Lithuania*; *Anchugov and Gladkov v. Russia*), whereas in others, the powers of the Head of State were examined in greater detail (*Georgian Labour Party v. Georgia* [2008]; *Krivobokov v. Ukraine* [2013]). However, P1–3 has never been applied to any presidential elections so far.

In addition, the Court was tasked with determining whether the European Parliament falls to be considered as the “legislature” or part of it. The question was first addressed in *Matthews v. the United Kingdom* (1999), in which the court had to answer whether the European Parliament, at the relevant time, had the characteristics of a “legislature” in Gibraltar. Bearing in mind that since the Maastricht Treaty, the European Parliament’s powers are no longer expressed to be “advisory and supervisory”, thus moved towards being a body with a decisive role to play in the legislative process of the European Community, and having regard to the fact that the European Parliament also has functions in relation to the appointment and removal of the European Commission, the Court found that the European Parliament is sufficiently involved in the specific legislative processes leading to the passage of legislation under Articles 189b and 189c of the EC Treaty, and insufficiently involved in the general democratic supervision of the activities of the European Community, to constitute part of the “legislature” of Gibraltar for the purposes of P1–3. A similar approach was followed in *Occhetto v. Italy* (2013).

Although P1–3 centres on elections, the issue of referendum is worth a closer examination. The Commission first held in *X. v. the United Kingdom* (1975) that the obligations of the High Contracting Parties under P1–3 were limited to elections concerning the choice of the legislature. In contrast, the British Referendum on European Economic Community membership was not an election concerning the choice of legislature; therefore, it did not fall within the scope of P1–3. The Commission and the Court maintained this stance for decades (see e.g. *Bader v. Austria* [1996]; *Nurminen and Others v. Finland* [1997]; *Castelli and Others v. Italy* [1998]; *Ž. v. Latvia* [2006]; *Moohan and Gillon v. the United Kingdom* [2017]). In *Cumhuriyet Halk Partisi v. Turkey* [2017], the Court provided a more detailed explanation as to why referendums are not covered by P1–3 (as either a constitutional referendum or an independence referendum):

‘It cannot be inferred from the ordinary meaning of the term “elections” in Article 3 of Protocol No. 1 that a “referendum” would fall within the scope of that provision. Firstly, referendums, unlike elections, are not held “at reasonable intervals” owing to the fact that in most, if not all, cases they represent a system of ascertaining the opinion of the people on a matter that is not a recurrent subject, such as the Constitutional Referendum in the present case, which is limited to a particular time and a particular subject. Secondly, and importantly, referendums are not usually organised as a means of electing

citizens to certain posts, in other words as an election giving the electorate the possibility to choose the legislature.’

Based on the above, the Court appears to have completely excluded referendums from the scope of P1–3. However, this is not entirely the case: as noted in the *Moohan and Gillon v. the United Kingdom*,

‘the Court has not excluded the possibility that a democratic process described as a “referendum” by a Contracting State could potentially fall within the ambit of Article 3 of Protocol No. 1. However, in order to do so the process would need to take place “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”’.

It is therefore unclear what distinguishes a referendum that meets the aforementioned criteria from an election to legislature. Nevertheless, the Court has thus far not considered Article 3 as applicable to any case related to referendums.¹⁵⁷

4. International Status of Voting Rights: A cursory overlook

The right to vote and stand for election is a well-established norm of international law. Several conventions, declarations, and other soft law instruments address the issues of voting rights and free elections, although the exact wording differs from text to text.

Article 21(3) of the Universal Declaration of Human Rights (UDHR, 1948) stipulates the following:

The will of the people shall be the basis of the authority of government; this will/shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

In contrast to the UDHR, the International Covenant on Civil and Political Rights (ICCPR, 1966) emphasises the individual’s rights. Article 35 puts:

‘Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [i. e. race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status – the Author] and without unreasonable restrictions:
[...]

157 On the relationship between referendums and P1–3, see Fasel, 2023. The author claims that law-initiated referendums and citizen-initiated referendums that concern the form of the legislature should also fall under its scope.

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; [...]

The Document of the Copenhagen Meeting of the Conference on the Human Dimension (or the Copenhagen Declaration) is a text agreed upon by the Conference on Security and Co-operation in Europe in June 1990. At the time, during the years of democratisation in East-Central Europe, the document was hoped to be a ‘European constitution on human rights’, and it was ‘undoubtedly a major step forward on the road to common European standards in the field of human rights and humanitarian issues’.¹⁵⁸ Section 7 of the document goes into much more detail than the previous human rights instruments on the right to vote and guarantee fair elections. The 35 signatory states, including countries of the former socialist bloc, have declared, *inter alia*, the following:

‘To ensure that the will of the people serves as the basis of the authority of government, the participating States will: hold free elections at reasonable intervals, as established by law; permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote; guarantee universal and equal suffrage to adult citizens; ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public; respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination; respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations [...]; ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere [...].’

In contrast to the UDHR, the ICCPR, or the ECHR, the Copenhagen Declaration not only contains provisions on the right to vote itself but also sets requirements for the legal and political environment of elections (e.g. political campaigning and unimpeded access to the media).

The *Charter of Fundamental Rights of the European Union* (2000) stands out from previous documents as it enshrines certain political, social, and economic rights for European Union (EU) citizens and residents under EU law. Unlike previous declarations and conventions, the Charter only addresses the European Parliament elections and municipal elections:

158 Bloed, 1991, p. 42.

‘Article 39 – Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40 – Right to vote and to stand as a candidate for municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.’

As Rosas notes, ‘the Charter is to be seen as a constitutional rather than international instrument, proclaimed as it was by the Union and for Union purposes’.¹⁵⁹ This explains why the Charter does not cover national parliamentary elections: while EU regulations pertain to participation in the European Parliament and local elections,¹⁶⁰ national parliamentary elections are not subject to the EU law.

In addition to the above documents, several other non-binding recommendations serve as benchmarks for regulating the right to vote. These include General Comment No. 25 (The right to participate in public affairs, voting rights and the right of equal access to public service) issued by the Office of the United Nations High Commissioner for Human Rights in 1996 and the Code of Good Practice in Electoral Matters drafted by the Venice Commission (2002).

Concerning regional human rights instruments, these three documents are worth a cursory look. Article 13 of the African Charter on Human and Peoples’ Rights (1981) stipulates that ‘every citizen should have the right to participate freely in the government of his country, either directly or through freely chosen representatives, in accordance with the provisions of the law’.

However, it makes no explicit reference either to free elections or to voting rights. According to Article 23 of the American Convention on Human Rights (1969),

‘Every citizen shall enjoy the following rights and opportunities: [...] b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters’.

Finally, Article 24(3) of the Arab Charter on Human Rights (first version: 1994; updated version: 2004) reads as follows: ‘Every citizen has the right to stand for election or choose his representatives in free and impartial elections, in conditions of equality among all citizens that guarantee the free expression of his will’.

159 Rosas, 2021, p. 1757.

160 See e.g. Treaty on the Functioning of the European Union, Art. 20(2)(b).

A brief comparison of the ECHR with the other documents mentioned above reveals that the ECHR is similar to the UDHR and the Copenhagen Declaration in that it places less emphasis on individual rights and more on obligations for States Parties.

5. Summary

As described above, P1-3 has been drafted in a “parsimonious” manner, thus the provision on the right to free elections, from a certain aspect, says less than the relevant provisions of the ICCPR or even of the UDHR. For example, the right to vote and the right to stand for election are not set out explicitly (unlike the ICCPR), and neither the universality nor the equality of suffrage are enshrined in P1-3 (unlike the UDHR). The “difficult birth” of Article 3 and its “minimalist approach” can be explained by the fact that there was a significant divergence of opinion among the Contracting States regarding the content and scope of the provision.

Not independent of this, the Commission initially adopted a dismissive stance regarding complaints based on P1-3, claiming that an individual’s right to vote is not guaranteed by the provision in question. In this respect, *Mathieu-Mohin and Clerfayt v. Belgium* (1987) was a breakthrough case, as in its judgment the Court explicitly approved the shift that had evolved in the previous decades:

‘From the idea of an “institutional” right to the holding of free elections, the Commission has moved to the concept of “universal suffrage” and then, as a consequence, to the concept of subjective rights of participation – the “right to vote” and the “right to stand for election to the legislature” [references omitted].¹⁶¹

Harris and his colleagues concluded in 2009 that ‘Strasbourg jurisprudence is much richer than it was just a few years ago’.¹⁶² Indeed, in recent decades, a number of landmark judgments have had a significant impact on a relatively wide range of citizens and have compelled Member States to amend their legal frameworks (e.g. *Hirst v. UK* [No 2], *Zdanoka v. Latvia* or *Alajos Kiss v. Hungary*).

Nevertheless, there is no doubt that the court will have to interpret and apply P1-3 very frequently. The rate of judgments affecting the right to free elections hovers around 1%, which means, as Bodnár states, ‘Strasbourg is still not the typical forum for voters and political parties when seeking remedies for violations of their right to free elections’.¹⁶³ Notably, during the period between 1959 and 2020, the Court

¹⁶¹ *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 51.

¹⁶² Harris et al., 2009, p. 711.

¹⁶³ Bodnár, 2017, p. 53.

identified a total of 31,418 instances of noncompliance with the provisions set forth in the Convention. Of these instances, only 102 cases pertained to P1-3, which corresponds to approximately 0.3% of the total number of identified violations.¹⁶⁴

If we want to assess the case-law of the Court, it should be noted at the outset that the court's interpretation differed depending on whether the "active" or "passive" aspect of the right to vote was at stake in the case.¹⁶⁵ With some simplification, we can conclude that the Court takes the most activist approach in cases relating to the right to vote ("active" aspect). This was mainly reflected in the fact that the case-law has continued to develop the requirement of universal suffrage, which is, as the Court's Guide on P1-3 notes, 'now the benchmark principle'.¹⁶⁶ The Court has sought to broaden the scope of the universality of the right to vote, in particular, to facilitate the right to vote for disabled people (often under guardianship) and prisoners. Of course, it is not that these two groups of people cannot be excluded from the right to vote but that a blanket ban is not in conformity with the Convention.

Regarding the right to stand for election ("passive" aspect), the Court has been yet more reserved, giving the Contracting States a broader margin of appreciation. The Court approved that the right to stand for election to the legislature could be subject to stricter requirements than the right to vote. Accordingly, as ruled in *Ādamsons v. Latvia*, the Court is 'even more cautious' in its assessment of restrictions imposed on the right to vote: the assessment is 'essentially limited to verifying the absence of arbitrariness in the domestic procedures leading to the deprivation of an individual of the right to stand for election'.¹⁶⁷ In summary, the Court seeks to respect the marked diversity of state laws governing candidature and the qualifications of representatives, given the politically more sensitive nature of passive electoral rights.¹⁶⁸ For these reasons, the Contracting States enjoy even wider leeway regarding regulations governing the conduct of elections and the electoral system itself. Whether the subject of the complaint is the mechanism of the electoral system, the electoral threshold, the electoral deposit, or supporting signatures, the Court has been yet more reserved.

As the chapter has shown, the court must protect the rights of individuals vis-à-vis states without interfering in the electoral law of the states to such an extent that it could be interpreted as a violation of sovereignty. Although some scholars criticise the way the Court interprets and applies P1-3,¹⁶⁹ others conclude that 'there is still a huge potential hidden behind the brief wording of P1-3',¹⁷⁰ and urge a more activist

164 For statistics from 1959 to 2020, see European Court of Human Rights, 2021. Notably, the former communist states of Central and Eastern Europe are slightly overrepresented among the Court's violation judgments regarding P1-3. Azerbaijan is most often in breach of P1-3 (25 judgments), followed by, rather surprisingly, Italy (17).

165 Bodnár, 2017, p. 57.

166 European Court of Human Rights, 2024, p. 6.

167 *Ādamsons v. Latvia*, Application no. 3669/03, Judgment 1 December 2008, para. 111.

168 Harris et al., 2009, p. 715.

169 See e.g. Zysset, 2019.

170 Golubok, 2009, p. 390.

approach concerning free elections,¹⁷¹ the Court has undeniably played a pivotal role in defending the right to free elections and, as a consequence, safeguarding Europe's electoral heritage over the past decades.

171 Bodnár, 2017.

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Freedom of Movement

Tetiana DRAKOKHRUST

ABSTRACT

Freedom of movement is a fundamental right enshrined in Article 2 of Protocol No. 4 of the European Convention on Human Rights (ECHR). This right guarantees individual the liberty to move within the borders of a state, to leave any country, and to return to their country of origin. However, the right to freedom of movement is not absolute and can be subject to restrictions. These restrictions must be prescribed by law, necessary in a democratic society, and pursued for legitimate aims such as national security, public safety, public order, prevention of crime, or protection of health, morals, or the rights of others. The European Court of Human Rights (ECtHR) plays a crucial role in interpreting and enforcing this right, balancing individual freedoms with state interests. The Court has developed a substantial body of case law that delineates the scope and limitations of freedom of movement, considering factors such as proportionality and necessity of the restrictions imposed by states. The Court's jurisprudence also highlights the importance of the right in the context of migration, residency rights, and the treatment of non-citizens, emphasizing the protection of individuals against arbitrary or discriminatory restrictions. The chapter provides an overview of the legal framework, key principles, and significant case law under the ECHR concerning freedom of movement, offering insights into how this right is protected and limited within the European human rights system.

KEYWORDS

Freedom of movement, European Convention on Human Rights, Article 2 Protocol 4, European Court of Human Rights, restrictions

1. Introduction

Social life unfolds in both time and space. Without space and the ability to move within it, human activity is impossible. The understanding of freedom touches upon various aspects of human existence. Some expressions of freedom are so self-evident to individuals that their significance become apparent only when such expressions are restricted. One of these self-evident rights and freedoms, which are perceived as inherently belonging to humans, is the right to free movement. Opportunities across the world are unevenly distributed and this unevenness is the primary impetus for people to move. People seek better places to utilise their abilities and live with

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greater security and well-being. Therefore, free movement is an expression of human freedom and has immense potential for human development. However, movement (migration) is not always a manifestation of individual choice – people often relocate owing to severe compulsion.

The right to free movement may initially seem less significant than other personal (civil) or political rights. However, it is one of the most important rights, the violation of which in many countries leads to numerous problems and suffering. According to the Universal Declaration of Human Rights, all individuals have the right to recognition of their dignity and certain inalienable rights, which are ‘the foundation of freedom, justice, and peace in the world’. Article 13 of the Universal Declaration of Human Rights states that ‘Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including their own, and to return to their country’.

The right to free movement within national or international borders can significantly affect other fundamental human rights as outlined in the Universal Declaration of Human Rights and other treaties. Without this freedom, an individual may be subjected to political repression or even deprived of life, prevented from practising their chosen religion, enjoying the right to marriage and family life, or obtaining a job or education, which could ultimately improve their quality of life.

The realisation of one principle may limit another, thus necessitating a reasonable balance. The study of international legal frameworks that regulate and implement the right to freedom of movement will allow for a better understanding of the direction in which the domestic legislative practice of certain European countries should move on the path to international integration. After all, the right to freedom of movement is not absolute and is accompanied by certain restrictions necessary to ensure the rights, freedoms, and interests of others as well as the interests of the state and society.

2. A Short Historical Overview on the Development of the Right of Movement

The right to freedom of movement is a fundamental natural right of individuals; however, its recognition and the unfolding of its content in legal reality represent a rather complex historical process. Each historical era is characterised by its own unique social order and understanding of law. Freedom of movement is a significant civilizational achievement of humanity, but to truly grasp the essence and value of this right, it is essential to focus on the periods of its formation and development, the specific restrictions it faced in different historical epochs, and its establishment in normative documents. This approach allows for a more profound understanding of the right and highlights its key essential characteristics.

In the context of Ancient Roman law, freedom of movement was not a distinct subject of legal regulation or study. However, the elements of this right can be traced

to the specifics of the legal status of individuals and the establishment of its boundaries. This is evident in the two key criteria for distinguishing people in Rome: the free (citizens, Latins) and the enslaved ('Gaius in the 1st book of *Institutes*: The main division that pertains to the law of persons is that all men are either free or slaves') as well as the status of citizens and peregrines.

The Latins (native inhabitants of older Roman provinces) were free people but differed from Roman citizens by a series of restrictions in the political and familial spheres. The freedom of movement for these two categories of individuals was almost equal; however, the situation differed when it came to choosing a permanent place of residence:

'At the same time, under certain circumstances, a Roman could change their citizenship to that of a Latin, for example, to acquire a plot of land in newly annexed Roman provinces, if the state provided these lands to Latins on favorable terms, thereby encouraging the development of new territories'.

Thus, a Roman citizen could choose to reside in one of the provinces (with the Roman authorities often encouraging this for colonisation and development of new provinces), but in doing so, the person would lose their status as a citizen and acquire the status of a Latin, along with the loss of certain political rights. However, under certain conditions, a person could attain the status of a Roman citizen and gain the right to permanent residence within Rome (although there were restrictions to prevent overpopulation in Rome and depopulation in the provinces). Therefore, we can conclude that the right to freedom of movement in ancient Rome could either expand or restrict other important rights, particularly political rights. Consequently, residency, or a permanent location as an element of freedom of movement for a free person, had significant status implications.

Special attention should be paid to famous historical legal document of medieval England – the Magna Carta. While in ancient Rome, the emphasis on freedom of movement was more about the right to choose a place of residence, the Magna Carta was the first document to clearly articulate the right to free movement. Specifically, Articles 41 and 42 of the Charter are particularly noteworthy. Even at that time, the foundations for the institution of restricting freedom of movement were laid. The document (a) distinguished restrictions on movement for certain categories of people; (b) outlined the purposes of such restrictions in the interest of the common good of the state and in the interest of the security and defence of the country; and (c) established the temporary nature of their application.¹

Special attention should be paid to the important constitutional normative act of a country founded on the principles of immigration and freedom of movement, namely, the Declaration of Independence of the United States of America. In addition to proclaiming independence from the English crown, the Declaration also justified this act

1 Hryshchenko, 2022, p. 88–89.

by pointing out the unlawful actions of the king: 'He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands'.²

While the Magna Carta observed a kind of "granting" or "recognition" of the right to free movement, the Declaration clearly formulates this freedom as self-evident, inherent to human nature, unquestionable, and something that should be defended against monarchical restrictions. This crucial doctrinal position crowned the development of natural law views on freedom of movement. This right is a vital foundation of democracy, distinguishing it from monarchical despotism.³

An important contribution to affirming the natural origin of the right to freedom of movement was made by the French Declaration of the Rights of Man and of the Citizen of 1789:

'The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression... Law is the expression of the general will... All citizens, being equal in its eyes, are equally eligible to all public dignities, positions, and employments, according to their capacities, and without distinction except that of their virtues and talents'.⁴

Most researchers agree that the freedom of movement found its expression with the introduction of elements of the passport system in European countries. The passport system originated in Germany in the 15th century to distinguish traders and craftsmen from bandits and beggars who roamed the country.⁵ Once again, we observe the tendency that freedom of movement was a privilege for commerce. However, considering that all categories of the population objectively travelled across the territory, it can be asserted that all free people had the ability to move freely. However, another issue arose – the legality of movement and residence in a certain area. The modern understanding of freedom of movement also points to legal grounds. Evidently, in Germany as well as in other countries, the problem of identifying moving subjects arose because everyone had different statuses and did not always have legal grounds for such movement, particularly criminals. The introduction of the passport system allowed distinguishing those segments of the population for whom freedom of movement was a privilege. By the 17th century, various types of passports had emerged, such as military passports (for the registration and control of soldiers), plague passports, and passports for Jews among others. Therefore, the passport system was primarily intended to identify individuals, their places of residence, and social status.

2 Declaration of independence of the United States of America, 4 July 1776.

3 Hryshchenko, 2022, p. 90.

4 Declaration of the Rights of Man and Citizen of 1789.

5 Savranchuk, 2010, p. 102.

In one way or another, all these factors influenced the right to movement and the extent of its absolutisation.⁶

In the mid-19th century, the passport system faced criticism and was abolished in several European countries (Germany at the Dresden Conference, Austria, Denmark, Spain, and Italy). This stance was driven by the fact that the concepts of legalism and strong state control, with which the passport system in the sphere of freedom of movement was associated, became less relevant owing to changes in the social order of Europe at the time and the increasing democratisation of society. The principle of transborder movement progressively spread across the European continent, and foreigners were increasingly viewed as subjects requiring strict control.

The passport as a phenomenon and corresponding regime played a significant role in the development and establishment of the right to freedom of movement. On one hand, it was a tool of control, as it facilitated the identification of individuals and imposed certain restrictions based on their social status, territorial origin, and ethnicity. On the other hand, freedom of movement became formalised, becoming a state right, and thus received certain guarantees of its protection.⁷

Since then, freedom of movement, having first transformed into an independent personal right, has been enshrined in the national legislation and subsequently, as a universally recognised personal right in international acts, primarily in Protocol No. 4 of the European Convention on Human Rights (ECHR).

3. Contextual Analysis of the Right of Movement in Accordance with the Convention

The right to freedom of movement is a fundamental human right enshrined in the international human rights law. Under the ECHR, this right is primarily protected by Article 2 of Protocol No. 4, which was added to the Convention in 1963. This provision guarantees individuals the right to liberty of movement and freedom to choose their residence within the territory of a state as well as the right to leave any country, including their own, and to return to their country.

Text of Article 2 of Protocol No. 4:

‘Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Everyone shall be free to leave any country, including his own.

No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public

6 Savranchuk, 2010, p. 103.

7 Sofinska, 2020, p. 343.

order, the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others.

The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.⁸

The right to freedom of movement under the ECHR is not absolute. While it provides robust protections, this right can be restricted under certain circumstances. The conditions under which the restrictions are permissible are articulated within the text of Article 2 itself. Restrictions are as follows: a) In accordance with law: Any restriction must have a basis in national law, which should be precise, accessible, and foreseeable in its application. b) Necessary in a democratic society: This implies a proportionality test, where the restriction must correspond to a pressing social need, be proportionate to the legitimate aim pursued, and necessary in a democratic society. c) In the interests of specific public concerns: These include national security, public safety, maintenance of public order, prevention of crime, protection of health or morals, or protection of the rights and freedoms of others. d) In the context of our research, it is essential to distinguish between restrictions on freedom of movement based on the conditions under which they are implemented. e) General restrictions on human rights under normal conditions. f) Derogation from rights, understood as their restriction during a state of emergency.

This raises the following question: What are the specific features of restrictions on the right to freedom of movement under these conditions as established by international human rights instruments?

General restrictions allow for a balance between individual interests and societal needs. The ECHR provides instances in which exceptions to certain rights are explicitly defined, meaning that such actions (or circumstances) are not considered violations of rights. For example, Article 4(3) of the Convention outlines types of work and service that are not considered ‘forced or compulsory labor’. Another approach is when a part of an article sets legitimate aims for restricting a specific right. This approach is utilised in the section concerning the right to freedom of movement, particularly in Article 2(3) of Protocol No. 4 of the Convention.⁹

Furthermore, the Convention delineates the general principles of restrictions on rights and freedom across different articles. For instance, Article 17 prohibits the destruction and excessive limitation of rights and freedoms provided by the Convention. In the case-law of the European Court of Human Rights (ECtHR) concerning the protection under this article, the Court recognised that the general purpose of Article 17 is to prevent the promotion of ideas that are contrary to the text and spirit of the Convention. This is significant because the abuse of rights and freedoms is incompatible with democracy and human rights.

8 Council of Europe, 1963.

9 Council of Europe, 2025.

Understanding these principles helps clarify the framework within which freedom of movement can be restricted and ensures that such restrictions are implemented in a way that respects both individual rights and the broader needs of society¹⁰.

Next, for each right protected by the Convention, the legitimate aims for permissible restrictions are specifically defined and somewhat expanded compared with, for example, the Universal Declaration of Human Rights. Article 2 of Protocol No. 4 to the Convention supplements the list of legitimate aims for restricting the right to freedom of movement with the societal need for such restrictions, specifically ‘the protection of national security’ and ‘the prevention of crime’. These restrictions are exhaustive; that is when establishing the restrictions on the right to freedom of movement, national legislations should not exceed these limits. However, in practice, achieving this can be challenging.

The Convention also defines the criteria for the admissibility of restrictions on human rights and freedoms. The ECtHR has developed a well-defined argumentation regarding the content of these criteria. This primarily concerns the legality of the restriction. It should be noted that although the Convention uses different expressions related to the legality of restrictions, such as ‘prescribed by law’ (Article 9(2), Article 10(2), Article 11(2)), ‘in accordance with the law’ (Article 8(2)), and ‘provided by law’ (Article 2(3) of Protocol No. 4); the ECtHR has treated these as synonymous and equivalent in meaning.

Moreover, in the case of *Sunday Times v. United Kingdom* (26 April 1979, Arts. 47 and 49), the ECtHR established general principles regarding the phrase “prescribed by law”. The first principle is that the restriction must have a basis in national law, meaning that the existence of grounds for applying such a restriction in the state’s legislation is necessary.

The second principle stipulates that ‘the law must be adequately accessible,’ meaning that citizens must have the opportunity, appropriate to the circumstances, to understand which legal norms will apply in a given case. Therefore, proper publication of such acts is required.

The third principle asserts that ‘a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct,’ meaning that individuals must be able to foresee the consequences of their actions.¹¹

Recognising the impossibility of achieving absolute precision in the formulation of laws as the pursuit of such precision could lead to excessive rigidity by state authorities and acknowledging that many laws contain terms that are inherently vague, the ECtHR sees the interpretation and application of laws as the task of legal practice. Therefore, the level of precision required by national legislation largely depends on the content of the law, its quality and scope, and the status of its recipients. However,

10 Decision as to the admissibility of *Witzsch v. Germany*, 20 April 1999.

11 Case of the *Sunday Times v. the United Kingdom*, 26 April 1979.

the interpretation and application of national legislation primarily fall under the jurisdiction of national authorities.¹²

The first criterion is that the national legislation must be consistent with the rule of law. This means that there must be a certain level of protection in national law against arbitrary interference by state authorities in the rights guaranteed by the Convention. This requirement involves clearly establishing the boundaries and manner of exercising discretionary powers by authorities, although the ECtHR does not require the inclusion of detailed procedures and conditions for their observance under substantive law.¹³

The second criterion for the admissibility of restrictions is the legitimacy of their aim, meaning that the restriction must pursue a lawful (legitimate) aim, such as the protection of specific interests. The list of such protected interests (aims), as mentioned above is detailed in each article of the Convention. According to Article 2(3) of Protocol No. 4 of the Convention, such interests when restricting freedom of movement include national or public security, maintaining public order, preventing crime, protecting health or morals, and protecting the rights and freedoms of others.

The third criterion for the legitimacy of a restriction is its necessity in a democratic society. The ECtHR has paid significant attention to this criterion in its jurisprudence. The ECtHR primarily interprets the concept of a “democratic society” through the notions of “pluralism,” “tolerance,” and “broad-mindedness”.

Moreover, the ECtHR has developed specific principles for interpreting the phrase “necessary in a democratic society”. First, the adjective “necessary” is not synonymous with “indispensable”, nor does it have the flexibility of expressions such as “permissible”, “ordinary”, “reasonable”, or “desirable”. Second, the ECtHR recognises that states have a certain margin of discretion (freedom of Judgement), as it is their responsibility to ensure human rights and freedoms.

However, the state’s margin of discretion is not unlimited, as the ECtHR reserves the right to make a final decision on whether the applied restriction is compatible with the Convention. Thus, the state’s internal margin of discretion goes hand in hand with European oversight.¹⁴

Notably, when making final decisions on complex issues, the ECtHR often considers the law and practice of other Council of Europe member states, and sometimes even worldwide. The ECtHR grants a wide margin of discretion to the respondent state if there is no consensus among states on the issue at hand. Conversely, if there is a broad European or international consensus on the matter, the margin of discretion of the respondent state is significantly narrowed.¹⁵

Third, the phrase “necessary in a democratic society” implies that the interference must correspond to a “pressing social need” and be “proportionate to the legitimate

12 Case of *Vogt v. Germany* *ibid*, 2 September 1995 Art. 48.

13 Case of *Silver and Others v. the United Kingdom*, 25 March 1983 Art. 88.

14 Case of *Handyside v. the United Kingdom*, 7 December 1976 Arts. 48–49.

15 Case of *X, Y and Z v. the United Kingdom*, 22 April 1997 Art 39.

im". Proportionality of interference is understood as the State's (or its judicial authorities') responsibility to ensure a fair balance between the individual's rights and the interests of society as a whole. Failure to maintain such a fair balance would be considered disproportionate interference with the individual's rights and, therefore, would not be "necessary in a democratic society".¹⁶ It is crucial that the ECtHR examines whether the grounds justifying the restriction are relevant and sufficient. In other words, the ECtHR assesses whether national courts appropriately exercised their discretion to balance the conflicting interests of the applicant and society and whether they provided relevant and sufficient explanations for the necessity of such interference.

Fourth, the provisions of the Convention articles that allow for exceptions to guaranteed rights must be interpreted narrowly.¹⁷ It is also critically important that the states apply the "necessary in a democratic society" standards to each specific legitimate aim of imposing restrictions, as enumerated in the relevant article of the Convention. It is not permissible to invoke a general necessity to justify restrictions. Therefore, a restriction is "necessary in a democratic society" when the situation cannot be resolved otherwise without such restrictions.

When discussing the limitation of rights under special circumstances, it is important to note that the Declaration does not include relevant provisions. The stipulation regarding derogation from obligations during an emergency was established by the Convention (Article 15).

According to Article 15 of the Convention, an "emergency" is defined as war or another public danger that threatens the life of the nation. The ECtHR does not provide a specific interpretation of the term "war" because, on one hand, any significant manifestations of violence or disturbances on the brink of war fall under the understanding of the second term in this article, "public danger that threatens the life of the nation". On the other hand, with the establishment of the Geneva Conventions in international law, the term "armed conflict" is used. The phrase "other public danger that threatens the life of the nation" was interpreted by the ECtHR in the case of *Lawless v. Ireland* (1 July 1961, Art. 28) as 'an exceptional crisis or emergency affecting the entire population and constituting a threat to the organized life of the community of which the state is composed'.¹⁸

It is crucial that derogation from obligations has conditions, limits, and procedures established by international acts. This leads to the conclusion that even in a state of emergency, states do not exercise full discretion. According to the Convention (Article 15), the main conditions for the legitimacy of derogation from obligations are as follows:

In times of war or other public emergencies threatening the lives of the nation, it is important that the emergency must actually exist or be imminent (the requirement

16 Case of *Handyside v. the United Kingdom*, 7 December 1976 Arts. 48–50.

17 Case of *Klass and Others v. Germany*, 6 September 1978 Art. 42.

18 Case of *Lawless v. Ireland*, 1 July 1961.

of imminence does not imply that the state waits for a catastrophe to occur and does not take measures to combat it). Additionally, the usual measures or restrictions permitted by the Convention must be clearly insufficient.

The measures taken in response must not exceed what is strictly required by the exigencies of the situation. In determining whether a state has exceeded these limits, the ECtHR considers the nature of the rights affected by the derogation, the circumstances that led to the emergency, and its duration.

The measures must not conflict with the state's other obligations under international law. The ECtHR independently examines whether there is any inconsistency between the derogation from obligations and the state's other obligations under international law.¹⁹

The Convention includes safeguards regarding rights that cannot be restricted under any circumstances.²⁰ However, an analysis of this article reveals that some of the listed rights are not absolute and can therefore be restricted. A similar approach is applied in Article 15, paragraph 2 of the Convention, although the list of articles is reduced to four: Articles 2 (except in cases of death resulting from lawful acts of war), 3, 4 (paragraph 1), and 7. As seen from the text of Article 2, the prohibition on derogation regarding it is also relative. Therefore, currently, only four rights are considered non-derogable: the prohibition of torture (Article 3), prohibition of slavery²¹, prohibition of punishment without law²², and right not to be tried or punished twice.²³ The limitation of other rights is permissible, provided that there is a "reasonable justification" for such limitations.

When exercising the right to derogate from its obligations, a state must follow certain procedures:

‘Inform other states, the UN Secretary-General, and the Secretary-General of the Council of Europe regarding the provisions from which it has derogated and the reasons for such a decision.

Notify when such measures have ceased to apply. The purpose of such notification is to make the derogation from obligations public. Without such official and public notification of derogation from obligations, the measures taken by the state will not fall under Article 15 of the Convention.’²⁴

Thus, the conditions for the legitimacy of restrictions were supplemented by the Convention, with the necessity of social need for restriction and the proportionality of the means of restriction with their legitimate aims. The legitimate aims of restricting the right to freedom of movement include the protection of national security,

19 Guidance on Article 15 of the ECHR.

20 Art. 4 para. 2 of the Convention.

21 Ibid., Art. 4 para. 1.

22 Ibid., Art. 7 para. 1.

23 Art. 4 para. 1 of Protocol No. 7.

24 Prodyvus, 2023, p. 367.

public order, public health or morals, the rights and freedoms of others, and the prevention of crime. The Convention also defines the criteria for the permissibility of restrictions, including the legality of the restriction, necessity of the restriction in a democratic society, and legitimacy of the aim of the restriction.

4. Comparison with Other Universal and Regional Human Rights Instruments Containing the Right of Movement

The right to freedom of movement is a critical aspect of personal liberty that is essential for meeting an individual's needs. Deprivation of this fundamental right often leads to loss or restriction of other human rights and freedoms. Therefore, freedom of movement is an integral part of the international human rights protection mechanism. Provisions regarding the right to freedom of movement are enshrined in various universal and regional human rights instruments, including the following:

Universal Declaration of Human Rights (1948):

Article 13 states the following:

‘Everyone has the right to freedom of movement and residence within the borders of each state.

Everyone has the right to leave any country, including their own, and to return to their country’.²⁵

International Covenant on Civil and Political Rights (1966):

Article 12 stipulates the following:

‘Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Everyone shall be free to leave any country, including his own.

The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.

No one shall be arbitrarily deprived of the right to enter his own country’.²⁶

Convention on the Elimination of All Forms of Discrimination Against Women (1979).

Article 15(4) states the following:

25 Universal Declaration of Human Rights of 1948.

26 International Covenant on Civil and Political Rights of 1966.

‘States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile’.²⁷

International Convention on the Elimination of All Forms of Racial Discrimination (1965).

Article 5(d)(i) requires the following.

‘States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: the right to freedom of movement and residence within the border of the State’.²⁸

Convention on the Rights of Persons with Disabilities (2006).

Article 18 states the following:

‘States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence, and to a nationality, on an equal basis with others’.²⁹

American Convention on Human Rights (1969).

Article 22 states the following:

‘Every person lawfully in the territory of a State Party has the right to move about in it and to reside in it subject to the provisions of the law.

Every person has the right to leave any country freely, including his own.

The exercise of the rights mentioned above may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

The exercise of the rights enumerated in paragraph 1 may also be restricted by law in specific areas to protect public interest.

The collective expulsion of aliens is prohibited.’³⁰

Each of these instruments reflects a commitment to protecting the right to freedom of movement while also acknowledging that this right may be subject to lawful

27 CCPR General Comment No 27: Article 12 (Freedom of Movement).

28 Protocol No. 4 of the Convention on the Protection of Human Rights and Fundamental Freedoms, which guarantees certain rights and freedoms not provided for in the Convention and in the First Protocol to it, dated 16 September 1963.

29 American Convention on Human Rights of 1969.

30 African (Banjul) Charter on Human and People’s Rights of 1981.

restrictions, provided such restrictions are necessary, proportionate, and serve legitimate purposes such as national security, public order, public health, and the rights of others. The recognition and protection of freedom of movement is consistent across various universal and regional human rights documents, underscoring its importance as a fundamental human right.

Thus, it can be concluded that the freedom of movement traditionally consists of three elements: entry, exit, and internal movement. The subjective component includes the extension of the principles of equality and non-discrimination in the context of freedom of movement, as this issue also exists. The question of the freedom of movement of foreigners is particularly complex, as it often involves the choice of residence and stay, which requires the states to be able to provide for this and places an additional burden on their economies. Another issue is the movement of family members, as well as the difference between the freedom of movement of economically active and inactive citizens. The right to freedom of movement also encompasses the issue of mass migration, including cases of forced and voluntary repatriation.

It is worth noting that in the EU, the concept of free movement is often considered in a broader sense and extends beyond people.

For example, the Treaty establishing the European Community specifies the characteristics of the internal market, which include ‘the abolition of barriers to the free movement of people, goods, services, and capital between Member States’. The internal market encompasses a space without internal borders where, according to this Treaty, the free movement of people, goods, services, and capital is ensured. Every Union citizen has the right to move and reside freely within the territories of Member States, subject to the restrictions and conditions set out in the Treaty. Thus, once again, we see that the modern understanding of freedom of movement is interpreted as a multidimensional phenomenon not only in terms of geography or subject matter but also in relation to other accompanying, yet equally important, phenomena and processes. This is because the European Community initiated its integration processes as an economic union, and thus, the economic aspect of freedom of movement needed to be reflected. The highest degree of expansion of freedom of movement is the declaration and establishment of the absence of borders for the movement of people, goods, services, and capital, allowing for the full realisation of liberal principles regarding this right. C. Tulba rightly points out:

‘In EU law, the term ‘movement’ encompasses not only the physical crossing of borders by entities and objects of legal relations (people, goods, money) but also rights related to residence and the exercise of various forms of economic activity in other states’.

Indeed, for European legislation, movement refers to the flow of both tangible and intangible elements, particularly concerning economic activity, which does not require additional expenses from states but rather enriches them.

An important issue in the realisation of the right to freedom of movement, highlighted by the UN Human Rights Committee, is bureaucratic procedures:

‘...a source of concern is the numerous legal and bureaucratic barriers that excessively affect the full realization of individuals’ rights to freely leave the country, including their own, and to settle in another. Regarding the right to move within the country, the Committee criticized provisions requiring individuals to obtain permission to change their residence or seek approval from local authorities for such changes, as well as delays in processing such written requests’.³¹

Thus, legislative trends concerning the implementation of the right to freedom of movement, both internal and external, emphasise the maximum simplification of permits and bureaucratic procedures. As previously mentioned, the value lies not only in the right to movement but also in the freedom of movement itself; therefore, the focus is on broad individual opportunities, which can be hindered by unjustified bureaucratic obstacles. The need to obtain permission to change one’s place of residence constitutes a significant restriction and an infringement of this right. Bureaucratic procedures should facilitate, rather than hinder, the right to enter and exit a country and internal movement.

In this context, the digitalisation of administrative procedures in Ukraine is directly relevant, as it can enhance the practical implementation of the right to freedom of movement by simplifying bureaucratic requirements for changing one’s place of residence. Procedures related to residence registration could be digitised through electronic services, and programs like ‘State in a Smartphone’ should include measures to reduce bureaucratic barriers associated with relocating.

The application of restrictions allowed under Article 12(3) of the Covenant must comply with other rights guaranteed by the Covenant and fundamental principles of equality and non-discrimination. Therefore, a violation of the Covenant would be considered if the rights enshrined in Articles 12(1) and 12(2) were restricted through any distinctions, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status. In reviewing state reports, the Committee found that measures preventing women from freely moving, requiring consent or accompaniment by a male, constitute a violation of Article 12.³²

Thus, the principles of equality and non-discrimination must be adhered to in the implementation of the right to freedom of movement. The Committee pays particular attention to traditional-religious type legal systems where religious doctrines are part of the legal system and certain traditions that violate the modern principle of equality persist. This is especially true for Muslim countries, some of which still maintain strict gender inequality. However, it is important to distinguish the contemporary

31 CCPR General comment No. 23.

32 Tulba, 2017, p. 302.

democratic paradigm of modern legal systems and Western civilisation from the less progressive legal systems and traditions (which may change very slowly) that do not conform to this paradigm. In such cases, the freedom of movement serves as a good indicator of the legal system's progress.

5. A Very Detailed Case-Law Analysis of the ECtHR Respecting of the Right of Movement

The structure of Article 2 of Protocol No. 4 is similar to that of other articles in the Convention, such as Articles 8, 9, 10, and 11, but has distinct features. Article 2 of Protocol No. 4 consists of four paragraphs, whereas Articles 8 through 11 of the Convention each consist of two paragraphs.

Paragraphs 1 and 2 of Article 2 outline the rights and conditions of applicability. Specifically,

Paragraph 1 states that 'Everyone lawfully within the territory of a State shall have the right to liberty of movement and freedom to choose his residence within that territory'.

Paragraph 2 provides that 'Everyone shall be free to leave any country, including his own'.

From the content of paragraphs 1 and 2 of Article 2, it is clear that these Convention provisions cover three aspects: freedom of movement, freedom to choose one's residence, and the right to leave a country, including one's own. These rights are guaranteed to everyone who is lawfully present in a state, including foreigners, and within the territory of that state.

Paragraphs 3 and 4 of Article 2 outline the conditions for restricting these rights.

Paragraph 3 establishes restrictions on the rights guaranteed by paragraphs 1 and 2, provided that such restrictions are

'prescribed by law and are necessary in a democratic society in the interests of national or public security, for the maintenance of public order, to prevent crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

Paragraph 4 allows for restrictions specifically related to the rights mentioned in paragraph 1, concerning the imposition of limitations on these rights in certain areas.

The significance of paragraphs 3 and 4 of Article 2 is equivalent in that they both provide autonomous limitations on the exercise of the rights outlined in paragraph 1. However, they differ in scope: Paragraph 3 specifies limitations for particular purposes without setting territorial boundaries, while Paragraph 4 refers to more general restrictions justified by public interest, but limited to "specific areas".³³

33 Case of *Garib v. the Netherlands*, 6 November 2017.

It is worth noting that unlike Article 11 of the Convention, which includes, among other things, restrictions on the exercise of its guaranteed rights for individuals who are members of armed forces, police, or administrative authorities of the state, Article 2 of Protocol No. 4 guarantees freedom of movement to everyone, regardless of whether they are state officials or not³⁴.

In addition to analysing the structure of Article 2 of Protocol No. 4 and comparing it with other Convention articles, it is also pertinent to consider the concept of “restrictions” used in this context. Unlike Article 8 of the Convention, which permits “interference” with the right to respect for private and family life, Article 2 of Protocol No. 4 refers to “restrictions” on rights.

Contrarily, “interference” means (1) to intrusively involve oneself in someone else’s affairs or relationships; (2) (rarely) to enter or penetrate somewhere or into something.

Owing to incorrect usage or understanding, both terms can sometimes acquire a negative connotation and be associated with severe and unlawful violations of rights and freedoms.

It is worth noting that by analysing the application of the ECtHR practice in the administration of justice (based on the analysis of decisions from the Unified State Register of Court Decisions), it can be concluded that certain substantive errors in application are, among other reasons, owing to misunderstandings of the scope of the relevant Convention article.³⁵

The ECtHR has consistently emphasised in its established practice that the Convention is a living instrument that must be interpreted in light of contemporary conditions and prevailing ideas in democratic states. However, this does not mean that, in response to current needs, conditions, views, and standards, the ECtHR can create new rights not provided for by the Convention or nullify existing rights or create new “exceptions” or “justifications” not explicitly foreseen by the Convention. The Convention should be considered as a whole and interpreted in a way that develops internal consistency and harmony among its various provisions.³⁶

One of the key aspects of correctly applying Article 2 of Protocol No. 4 is distinguishing its scope from that of Articles 5 (right to liberty and security) and 8 (right to respect for private and family life, home, and correspondence) of the Convention. Article 5 of the Convention, proclaiming the “right to liberty”, refers to physical freedom and aims to ensure that no one can be arbitrarily deprived of their liberty. This is not connected with the usual restrictions on freedom of movement as regulated by Article 2 of Protocol No. 4. The difference between a restriction on freedom of movement serious enough to qualify as deprivation of liberty under Article 5(1) of the Convention and the ordinary restrictions on freedom of movement regulated by

34 Case of *Soltysyak v. Russia*, 10 February 2011.

35 Fuley, 2018, p. 42.

36 Case of *Austin and Others v. the United Kingdom*, 15 March 2012.

Article 2 of Protocol No. 4 lies in the degree or intensity of the measure, rather than its nature or essence.

To determine whether a person has been “deprived of liberty” under Article 5(1) of the Convention, the starting point should be their specific situation, considering various criteria, including the nature of the measure, its duration, its consequences, and the manner of its implementation. The requirement to consider the “nature” and “manner of implementation” of a measure allows for accounting specific conditions and circumstances under which the restriction occurred, not necessarily related to traditional confinement in a prison cell. Indeed, the circumstances under which a measure is applied are important factors to consider, as modern society often encounters situations in which the public may be required to endure certain restrictions on movement or freedom for the sake of the common good.³⁷

Understanding the differences between Article 5 of the Convention and Article 2 of Protocol No. 4 is crucial, as illustrated by the two key cases against Italy: *Guzzardi v. Italy*³⁸ and *De Tommaso v. Italy*.³⁹

In both cases, special police surveillance was imposed on the applicants under the same law owing to criminal associations and similar restrictive measures. The main difference lies in the specific circumstances of each applicant, particularly their ability to establish social contacts. In *Guzzardi*, the applicant was not deprived of liberty in the traditional sense; he was required to live on a small island and was unable to establish social contacts. In contrast, in *De Tommaso*, the applicant was under house arrest but still had the opportunity to maintain social connections. The ECHR, analysing the measures applied to the applicants in their entirety and in the context of each individual’s situation, concluded that Article 5 of the Convention was applicable and violated in the *Guzzardi* case, whereas in *De Tommaso*, it found that the restrictions did not constitute deprivation of liberty but merely restricted freedom of movement, thus finding a violation of Article 2 of Protocol No. 4 to the Convention, as the law applied was not sufficiently foreseeable.⁴⁰

Given the importance and general sense of the provisions of Article 5 of the Convention and Article 2 of Protocol No. 4, Article 5 should not be interpreted to include the requirements of Protocol No. 4 for states that have not ratified it. The ECtHR highlighted this approach in the Grand Chamber decision of *Austin and Others v. the United Kingdom*, in which applicants complained about a violation of Article 5 of the Convention owing to being held within a police cordon during a demonstration in central London. This was the first case in which the ECtHR addressed the application of Article 5 to a police cordon or the detention of a group of people by the police for public safety reasons. The applicants did not invoke Article 2 of Protocol No. 4 because the United Kingdom had not ratified Protocol No. 4. Analysing the situation in

37 Handbook on the application of Article 5 of the ECHR.

38 Case of *Guzzardi v. Italy*, 6 November 1980.

39 Case of *De Tommaso v. Italy*, 23 February 2017.

40 Ibid.

this case based on the criteria mentioned above, the ECHR concluded that the detention of applicants within the police cordon could not be considered a deprivation of liberty within the meaning of Article 5 of the Convention, and thus, this article was not applicable.

Additionally, the ECHR noted that it cannot be excluded that under certain circumstances, the use of movement restrictions and crowd control could lead to unjustified deprivation of liberty in violation of Article 5 of the Convention. In each case, Article 5 must be interpreted in a way that considers the specific circumstances under which the restrictive measure was applied as well as the functions of the police in maintaining order and protecting the public, which they are obliged to fulfil both under national law and the Convention.⁴¹

The guarantees of Article 2 of Protocol No. 4 (P4-2), particularly regarding the freedom to choose one's residence, are closely linked to the right to respect for private and family life as guaranteed by Article 8 of the ECHR.

A notable case in this context is the Grand Chamber decision in *Garib v. the Netherlands*, where the Court emphasised that while earlier cases had applied approaches to Article 8 of the ECHR when addressing complaints under Article 2 of Protocol No. 4, the approach used for assessing the justification of interference under Article 8(2) was not directly applicable to Article 2(4) of Protocol No. 4.

Article 8 of the ECHR, which addresses respect for private and family life, does not establish the right to reside in a particular place, whereas the freedom to choose one's residence is a central aspect of Article 2(1) of Protocol No. 4. Therefore, when evaluating compliance with public interests under Article 2(4) of Protocol No. 4 concerning freedom of residence, the ECHR adopted an approach similar to that used in cases related to environmental protection.⁴²

This distinction highlights the nuanced application of the ECHR provisions and Protocols, where the interpretation and application of rights can vary depending on the specific context and particular rights involved.

The case *Kotiy v. Ukraine* highlights key issues related to the interpretation and application of Articles 8 and 2 of Protocol No. 4 (P4-2) of the ECHR. In this case, the applicant was subjected to a travel ban and his passports were confiscated, which prevented him from travelling to Germany, where he worked and lived with his family. The Court found a violation of Article 8 but deemed part of the complaint regarding P4-2 admissible, although it did not consider it necessary to address the question of whether there was a violation of Article 2 of Protocol No. 4, given the findings under Article 8.⁴³

Article 8 of the ECHR guarantees respect for private and family life, whereas Article 2 of Protocol No. 4 guarantees freedom of movement and right to choose one's residence. However, the Convention does not guarantee the right of a foreign national

41 Handbook on the application of Article 5 of the ECHR.

42 Case of *Garib v. the Netherlands*, 6 November 2017.

43 Case of *Kotiy v. Ukraine*, 5 March 2015.

to enter a particular country. In the case of *Nada v. Switzerland*, the Grand Chamber of the ECtHR emphasised that a state has the right to regulate the entry of non-citizens into its territory in line with international law and its international obligations.

Article 2 of Protocol No. 4 does not provide the right to enter a country, obtain a visa, or residence permit. Instead, it protects the rights of individuals who are lawfully present on a state's territory, including those in transit. This is broader in scope than Article 1 of Protocol No. 7, which provides procedural guarantees for the expulsion of foreigners who are lawfully residing in the country. Article 2 of Protocol No. 4 does not apply to situations involving the expulsion of foreigners.

Additionally, the guarantees under P4-2 do not extend to the right to choose the means of transportation. The concept of “territory” under Article 2 of Protocol No. 4 is also important. For instance, a country's embassy abroad is not considered part of its territory for the purposes of this Article. However, the country's overseas territories, which are separate from the mainland, may be considered part of its territory.⁴⁴

The applicability of Article 2 of Protocol No. 4 (P4-2) to the ECHR involves various jurisdictional issues. Similar to Article 8 of the ECHR, this article is relevant to different types of legal proceedings, including administrative, civil, and criminal cases as detailed below.

Administrative Cases: Issues related to restrictions on freedom of movement between administrative regions, choice of residence, or departure from one's country owing to decisions by authorities (e.g. those with access to state secrets) fall under the jurisdiction of administrative courts in countries where such courts exist.

Civil Cases: Restrictions related to debt obligations (such as bank loans, credit, or alimony payments) are usually handled in civil court proceedings.

Criminal Cases: Personal obligations, such as restrictions on leaving the country (e.g. under a travel ban or personal undertaking), are typically addressed in criminal proceedings. In Ukraine, such matters are governed by the Criminal Procedure Codes of 1960 (under a travel ban) and 2012 (under personal undertakings).

It is crucial to consider these distinctions to prevent “jurisdictional football” and to ensure that the right to an effective remedy, as guaranteed by Article 13 of the ECHR, is respected.

Despite various issues that may arise in complaints regarding P4-2, the principles applied in these cases are consistent. The ECtHR has upheld this approach in several decisions such as, *Battista v. Italy*⁴⁵, *Stamose v. Bulgaria*⁴⁶, *Bartik v. Russia*⁴⁷.

These cases illustrate the ECHR's consistent application of principles when assessing restrictions under Article 2 of Protocol No. 4.

The ECtHR evaluates whether freedom of movement has been restricted after determining the admissibility of a complaint under Article 2 of Protocol No. 4 (P4-2).

44 Case of *Nada v. Switzerland*, 12 June 2012.

45 Case of *Battista v. Italy*, 2 December 2014.

46 Case of *Stamose v. Bulgaria*, 27 November 2012.

47 Case of *Bartik v. Russia*, 21 December 2006.

The ECtHR's practice reveals that restrictions can occur through various means. Here are some examples from ECtHR case-law that illustrate different forms of restrictions: 1) Restrictions on International Travel Owing to Debt: *Battista v. Italy*: The applicant faced a travel ban owing to failure to meet civil obligations such as alimony payments; *Ignatov v. Bulgaria*: Restrictions were imposed because of unpaid bank loans⁴⁸; *Khlyustov v. Russia*: A similar restriction occurred because of unpaid credit.⁴⁹ 2) Administrative Restrictions: *Timishev v. Russia*: Restrictions on movement between administrative regions within the country.⁵⁰ Restrictions on Residence: *Garib v. the Netherlands*: Denial of the right to live in a chosen residence. Criminal Proceedings: *Antonenkov and Others v. Ukraine*, *Ivanov v. Ukraine*, and *Nikiforenko v. Ukraine*: Cases where personal obligations or travel bans were imposed as part of criminal proceedings.^{51,52}

It is important to note that not every interference with rights guaranteed by Articles 8–11 of the ECHR, or restriction on freedom of movement will necessarily constitute a violation of Article 2 of Protocol No. 4. A restriction on freedom of movement is not a violation if it meets the “three-part test” as follows: Prescribed by Law: The measure must have a legal basis in national law.

Pursue Legitimate Aims: It must pursue one or more legitimate objectives, as outlined in Article 2 of Protocol No. 4. Necessary in a Democratic Society: It must strike a fair balance between the general interests of society and the rights of the individual, meaning it must be necessary in a democratic society.

Understanding these principles helps ensure that restrictions are applied appropriately and that individuals' rights are effectively protected.

Based on the analysis of the established practice of the ECtHR, it can be concluded that freedom of movement is a fundamental value in modern society. The right to freedom of movement, guaranteed by Article 2 of Protocol No. 4 (P4–2), is interconnected with other convention rights. One of the key aspects of correctly applying P4–2 is to distinguish its scope from that of other provisions of the Convention, such as Articles 5 (right to liberty and security) and 8 (right to respect for private and family life, home, and correspondence).

Article 5 of the Convention: When assessing restrictions on freedom of movement under Article 5, one must consider the degree or intensity of the applied restrictions. Article 5 concerns physical deprivation of liberty and involves a different standard than Article 2 of Protocol No. 4.

Article 2 of Protocol No. 4: This article has a broad scope and covers various legal relations that can be addressed in administrative, civil, or criminal proceedings.

While the right to freedom of movement is fundamental, it is not absolute and may be restricted. Such restrictions must: a) Be Prescribed by Law: They must have a legal

48 Case of *Ignatov v. Bulgaria*, 2 July 2009.

49 Case of *Khlyustov v. Russia*, 11 July 2013.

50 Case of *Timishev v. Russia*, December 2005.

51 Case of *Antonenkov and Others v. Ukraine*, 22 November 2005.

52 Case of *Ivanov v. Ukraine*, 7 December 2006.

basis in national legislation. b) Pursue Legitimate Aims: They must aim to achieve one or more legitimate objectives. c) Be Necessary in a Democratic Society: They must be proportionate to the pursued lawful aim, meaning they must be necessary and not excessively restrictive in a democratic society.

The state has a certain margin of appreciation when imposing restrictions, but these must always be within the bounds of legality and proportionality to ensure that they align with democratic principles and the protection of individual rights.

6. An Analysis of the Case-Law of the ECtHR in Terms of the 16 Central and Eastern European Countries

The ECtHR has developed extensive case-law on the right to freedom of movement, which is guaranteed under Article 2 of Protocol No. 4 of the ECHR. This right encompasses the freedom to move within a country, right to leave any country, and right to enter one's own country. The following analysis covers the case-law related to the 16 Central and Eastern European countries: Albania, Bulgaria, Croatia, Ukraine, Azerbaijan, the Czech Republic, Hungary, Latvia, Lithuania, Russia, Moldova, Poland, Romania, Serbia, Slovakia, and Slovenia.

The right to freedom of movement under the ECHR is not absolute and may be subject to restrictions. These restrictions must be prescribed by law, which is necessary in a democratic society, and proportionate to the legitimate aims pursued, such as national security, public safety, public order, and the protection of health or morals.

6.1. Case-Law Analysis

6.1.1. Udislav and Aurel Brezny v. Slovak Republic

On 30 January 1973. The Bratislava Municipal Court (Mestsky sud) sentenced the first applicant to 22 months of imprisonment and to have all his possessions confiscated for deserting the Republic. On 11 December 1949, the investigating judge at Bratislava State Court ordered that the criminal proceedings commenced against the second applicant on 24 October 1949 for high treason (specifically, for refusing to return to the Republic) should be suspended on the ground that the accused's whereabouts were unknown. In 1956, in the course of the same proceedings, Bratislava Regional Court (Krajsky sud) confiscated his Czechoslovak possessions. On 18 September 1990, Bratislava Municipal District Court (Obvodny siid) held that, under section 2 of Law No. 119/1990 on Judicial Rehabilitation, the first applicant's conviction and any consequential decisions had been automatically annulled *ex tunc*.

On 14 December 1990, the Bratislava Regional Public Prosecutor decided to reopen the criminal proceedings against the second applicant and suspend them under sections 2 and 33 para 1 of the same Law. He ruled that there were no grounds to prosecute the second applicant.

On 26 August 1991, in pursuance of Law no 87/1991 on Extrajudicial Rehabilitation, the applicants wrote to the company in possession of their property that the Trencin Horticultural Company sought an agreement as to the restitution of their property. The company made it clear that it did not intend to comply with this request, so the applicants applied to the Trencin District Court (Okresny siid).

The applicants argued that the permanent residence requirement laid down in section 3 of Law no. 87/1991 was incompatible with Constitutional Law no. 23/1991 on the Charter of Fundamental Rights and Freedoms as well as with Protocol No. 4 and, in substance, Protocol No. 1 of the Convention. They claimed that using place of residence as a criterion to exclude claims constituted discriminatory treatment detrimental to them and that the refusal to recognise their property rights amounted to a disguised penalty, contrary to Article 7 of the Convention.

The national courts held that the applicants did not fulfil the permanent residence condition and, therefore, were not entitled to restitution of their property. The Bratislava Regional Court further concluded that the condition in question was not incompatible with the Constitution and that Law no. 87/1991 was designed solely as a measure to redress certain infringements of property rights. The courts also noted that the refusal to restore property could not be considered either a criminal conviction or the imposition of a penalty within the meaning of Article 7 of the Convention.

The Commission found that it lacked temporal jurisdiction to examine applications referring to events prior to the date on which the Convention came into force with respect to the relevant Contracting Party, noting that the sanctions imposed on applicants occurred in 1956 and 1973. It further concluded that the permanent residence requirement in Law no. 87/1991 did not violate the applicants' right to freedom of movement or to choose their residence and that the applicants had not raised this complaint before the national courts. Therefore, this part of the application was manifestly ill-founded.

For these reasons, Commission, by a majority, declares the application inadmissible⁵³.

6.1.2. *Case of Kotiy V. Ukraine*⁵⁴

The case of *Kotiy v. Ukraine* concerns a complaint lodged by a Ukrainian national, Mr. Andrey Pavlovich Kotiy, against Ukraine. The applicant alleged that his arrest and detention were not compatible with Article 5 para. 1 of the Convention, that he did not have an enforceable right to compensation as provided by Article 5 para. 5 of the Convention, and that the investigative authorities interfered with his private and family life contrary to Article 8 of the Convention and that their decisions restricted his liberty of movement which constituted a violation of Article 2 of Protocol No 4.

53 Case of *Udislav and Aurel Brezny v. Slovak Republic*, 4 March 1996.

54 Case of *Kotiy v. Ukraine*, Application no. 28718/09; Judgement 5 June 2015.

The applicant, along with his wife and two children, moved to Germany in 2003. He held various managerial roles in German companies and was also a co-owner and president of a Ukrainian company, L., which was managed by a director.

The applicant, Mr. Andrey Pavlovich Kotiy, argued that his arrest and detention were not compatible with Article 5 para. 1 of the Convention, he did not have an enforceable right to compensation as provided by Article 5 para. 5, and the investigative authorities interfered with his private and family life contrary to Article 8 of the Convention. He further claimed that these decisions restricted his liberty of movement, constituting a violation of Article 2 of Protocol No. 4. The applicant contended that the written undertaking not to abscond and the seizure of his passports were unlawful and disproportionate, causing significant interference with his private and family life, particularly because his family resided in Germany.

The Government acknowledged the interference with the applicant's rights but argued that it was lawful and necessary for investigating serious crimes, and that the measures were less intrusive compared to alternatives. They suggested that the applicant's family could have relocated to Ukraine, a solution which the applicant deemed unreasonable.

Regarding Article 8, the ECtHR found that the written undertaking not to abscond and the seizure of the applicant's passports constituted a violation. The interference was not 'in accordance with the law' because domestic legislation lacked sufficient safeguards against arbitrariness and adequate procedural guarantees. The measures were also disproportionate given the applicant's established life and family in Germany. Regarding Article 2 of Protocol No. 4, the Court did not evaluate the alleged restriction on leaving Ukraine separately, given the findings under Article 8.

The ECtHR found a violation of Article 8 of the Convention. The applicant's complaint under Article 2 of Protocol No. 4 was linked to the Article 8 violation and did not need separate assessment.

The ECtHR awarded the applicant EUR 6,000 for non-pecuniary damage and EUR 2,000 for legal costs and expenses. Default interest was to be calculated based on the European Central Bank's marginal lending rate plus three percentage points.

The applicant's complaints under Articles 5 paras. 1 and 5 were declared inadmissible, as were other parts of the application.

6.1.3. *S.E. v. Serbia*⁵⁵

In April 2015, the applicant was granted refugee status in Serbia based on his political activities in Syria and his fear of persecution or threats to his safety. Thereafter, he lawfully resided in Serbia and married a Serbian national in June 2018. In May 2015, the applicant requested the Serbian Government a travel document for refugees. His Syrian passport had expired sometime during that year. However, in June 2015, the Border Police Unit (a department of the Ministry of the Interior) notified the applicant

that they could not issue a travel document because of the absence of regulations that governed the content and design of such a document.

In August 2015, the applicant alerted the Minister of the Interior regarding the impossibility of obtaining a refugee travel document and asked him to enact regulations enabling its issuance. However, the Minister's office did not respond. In June 2015, the applicant lodged a constitutional appeal against the Border Police Unit's decision, complaining that the Minister of the Interior had failed to adopt regulations which would allow him to travel outside Serbia and requested that the Constitutional Court order the Minister to urgently adopt regulations concerning the content and design of travel documents for refugees. In June 2016, the Constitutional Court refused the applicant's appeal, stating that such an appeal could only be lodged against individual actions or decisions and not against inaction or non-adoption of general legal acts.

In May 2022, the applicant obtained a Syrian passport from the Syrian embassy in Belgrade. He then obtained a working visa to move to Germany. In October 2022, the applicant left Serbia and travelled to Germany using his new Syrian passport.

The applicant argued that Article 2 of Protocol No. 4 of the ECHR legally obliged Serbia to ensure his right to leave and return to the country. Serbia's compliance with the negative obligation to respect this right did not nullify the effect of noncompliance with its positive obligation to ensure freedom of movement. Thus, his inability to travel or leave Serbia because of the expiration of his Syrian passport, and inability to acquire a travel document for refugees from the Serbian authorities demonstrated that Syria had disregarded its obligation to protect him and ensure his freedom of movement.

The applicant acknowledged that he had not been precluded from leaving Serbia by any restrictive measure and could have obtained a Syrian passport to leave. However, he argued that no one could be expected to lawfully leave a country without a travel document, and a refugee could not be directed to his country of origin to have a passport issued as he no longer enjoyed its protection. While the applicant eventually obtained a Syrian passport during the proceedings, he did so by putting himself in danger by approaching the authorities of the country from which he had fled persecution, and risking revocation of his refugee status.

The Serbian Government first argued that it had not confiscated the applicant's passport or taken any other measures to restrict his freedom of movement.

Additionally, travel documents to "foreigners" had not been issued for technical reasons – the need to find a comprehensive solution for all travel documents issued by Serbia, which required financial resources.

The Government also argued that the applicant could legally leave using a Syrian passport as he had not lost or severed his legal link with Syria by obtaining refugee status in Serbia. There was an opportunity for him to renew his Syrian passport if he intended to leave the country. In response to the applicant's arguments regarding the risks of requesting or using a Syrian passport, the Government claimed, without a source, that thousands of refugees had obtained travel documents from their country of nationality in their country of new residence.

Lastly, the fact that the applicant was able to obtain a Syrian passport and leave for Germany demonstrated that his freedom of movement was not restricted, and he could freely apply to the Syrian authorities to obtain a travel document without any risk of political persecution or cessation of refugee status. Additionally, as a foreign national married to a Serbian national, the applicant could have applied for Serbian nationality, which would have enabled him to apply for a Serbian passport. His inability to leave Serbia resulted from his own failure.

Beginning with an interpretation of Article 2 of Protocol No. 4, the ECtHR held that any measure, including a refusal to issue or reissue a travel document by means of which a national or an alien is denied the use of a document to leave the country, is an interference with the rights guaranteed by the article. This is the case regardless of whether there were intentional restrictions by the state on the applicant's right to leave or no such intention. For a state's interference with a person's right to leave any country to be justified, it must be 'in accordance with law', pursue one of more of the legitimate aims in the provision, and be 'necessary in a democratic society'. (paras. 74–76)

Irrespective of the lack of intention by the Serbian authorities to restrict the applicant's right to leave Serbia, the Court found that the applicant's right had been interfered with. The refusal to issue him with a travel document for refugees was an obstacle to his right to leave the country for an extended period of seven years and as his Syrian passport had expired, and he was unable to obtain any other travel document. Regarding the option of obtaining a Syrian passport, the Court held that referring the applicant to his country of nationality would violate Serbia's international obligations and conflict with the rule of law, especially since the applicant had fled persecution there. The credibility of the applicant's fear of persecution, and his inability and unwillingness to avail himself of Syrian protection, had been recognised by the Serbian authorities as seen through the granting of refugee status in May 2015. The Serbian authorities never claimed that the applicant no longer required protection. Additionally, obtaining a Syrian passport would put the applicant at risk of losing his refugee status; and according to the Ministry of the Interior, whether the issuance of travel documents by the Syrian authorities would lead to the cessation of refugee status depended on an assessment of the individual case. For the Court, this was a risk that the Serbian authorities could not expect the applicant to take. Finally, regarding the applicant's failure to obtain Serbian nationality, the Court held that the state could not circumvent its accepted obligations, by imposing an obligation of naturalisation on the applicant to leave the country. Therefore, overall, there was an interference with the applicant's right to leave Serbia. (paras. 77–81)

Having found an interference with the right, the Court moved on to consider justifications for the interference. The requirement that the interference was 'in accordance with law' not only requires that the concerned measure should have some basis in domestic law, but also that it was compatible with the rule of law. Serbia's former 2008 Asylum Act and current 2018 Asylum and Temporary Protection Act recognise the individual right of a refugee to obtain a travel document and requires the Minister

of the Interior to enact subsidiary legislation to ensure their implementation within 60 days. The applicant's entitlement to a refugee travel document stems from these two pieces of domestic legislation and was triggered by Serbia's decision to grant him refugee status and his acquisition of lawful residence. However, it had been almost five years since the 2018 Act came into force, and no implementing regulations are adopted. No effective possibility of obtaining a travel document was available to the applicant, nor did the Serbian authorities demonstrate any effort to implement the domestic law and provide a possibility for the applicant and similar individuals to obtain a refugee travel document. Such a systemic failure rendered the effective right of refugees to leave Serbia illusory. By placing the applicant in uncertainty and forcing him to risk applying to the Syrian authorities for a passport, this situation conflicted with principles arising from the rule of law.

Furthermore, considering that both the 2008 Act and 2018 Act set the same time limit for the Minister to implement primary legislation, it was likely that the legislature did not consider that the time limit was too short or difficult to meet. Thus, the Government could not justify its inaction by relying on the lack of available resources or technical solutions. Competent authorities should have overseen national budget allocations and ensured timely and adequate technical support in managing the task. The Court also reiterated that 'economic wellbeing of the country' and related financial considerations were not legitimate aims that could justify restrictions on the right to leave one's country. Hence, the interference with the applicant's right to leave the country was not 'in accordance with law', and it was unnecessary for the Court to further determine if the interference pursued a legitimate aim or was necessary in a democratic society. (paras. 82–87)

The refusal by the Serbian authorities to issue the applicant with a refugee travel document for seven years owing to the absence of appropriate regulations had curtailed his right to leave Serbia freely, impairing the essence of the right and depriving it of effectiveness. Hence, there was a violation of Article 2 of Protocol No. 4.

6.1.4. *L.B. v. Lithuania*

The applicant fled from the Chechen Republic in 2001, where he fought alongside the Chechen forces in the two Chechen wars and arrived in Lithuania, where he subsequently applied for asylum. The Lithuanian authorities refused to grant the applicant refugee status in 2003 and 2005 because he failed to demonstrate that he was persecuted in his country of origin.

However, the applicant was issued a temporary residence permit on subsidiary protection grounds, which was granted yearly between 2003 and 2008. In 2008, the applicant obtained a permanent residence permit, valid for five years, on the grounds that he had been lawfully living in Lithuania for five years, which was further extended in 2013 and 2018.

In 2003, the applicant also applied for an alien's passport, which the Lithuanian authorities granted. Between 2004 and 2013, the applicant applied for a new passport and was issued a new one when it expired. In 2018, the applicant lodged a new passport

request, which Lithuanian authorities denied on the grounds that Russian nationals living abroad could obtain a passport at the embassy, so the applicant should be able to obtain a travel document from the Russian authorities.

The applicant requested a passport again, reasoning that he was unable to contact the Russian authorities without risking his safety. He further submitted that although in Lithuania he was considered a Russian national, there were no documents confirming this, and he should be considered stateless. He supported the creation of an independent Chechen Republic, had no links to Russia, had never applied for Russian citizenship, and never held a Russian passport.

The Lithuanian authorities refused again, countering there were no grounds to consider the applicant stateless, as he had been considered a Russian national since arriving in 2001 and had no documents to refute that. They further requested proof that he had applied for a travel document at the Russian embassy and had been refused.

The applicant complained that the Lithuanian authorities refused to acknowledge that he was at real risk of persecution. He contended that, during domestic proceedings, he had provided objective reasons why he could not contact the Russian authorities as former Chechen fighters were still being persecuted in Russia.

The applicant submitted that the Government had failed to demonstrate that the refusal to issue him a passport had pursued any legitimate aim and was necessary in a democratic society, emphasising that he had not committed any crimes and did not pose any threat to national security or public order.

The applicant further complained that he was unable to enjoy freedom of movement without having a valid travel document necessary to travel outside the Schengen Area. As the applicant worked in cargo transportation, the refusal also restricted his professional activities.

The Government acknowledged that the refusal to issue the applicant with an alien's passport had amounted to interference with his right to freedom of movement; however, they maintained that the interference was justified.

The Lithuanian authorities found that the applicant failed to provide objective reasons why he was unable to obtain a document from the authorities of his country of origin, to qualify for an alien's passport under the Law on the Legal Status of Aliens. Furthermore, domestic authorities properly considered all relevant circumstances of the applicant's situation and held that he failed to demonstrate that he was at risk of persecution by the authorities.

They argue that there is no longer any objective reason why the applicant would be unable to request a travel document from the Russian authorities. He was issued an alien's passport between 2003 and 2013 because Russian nationals could not obtain a travel document outside Russia; however, it was no longer necessary owing to a change in the procedure.

Lastly, the Government submitted that the restrictions on his freedom of movement had not been disproportionate. As a permanent resident of Lithuania, the

applicant had the right to move freely within the territory of EU Member States for 90 days in any 180-day period without a travel document.

The Court found that there had been a violation of Article 2 of Protocol No. 4 of the Convention as the Lithuanian government failed to demonstrate that the interference with the applicant's right to freedom of movement was necessary in a democratic society.

Any measure by means of which an individual is denied the use of a document which, had he wished, would have permitted him to leave the country, amounts to an interference of the rights guaranteed by Article 2 of Protocol No. 4 of the Convention. Accordingly, the Court has no reason to doubt that the refusal by Lithuanian authorities to issue the applicant with an alien's passport constituted an interference with his freedom of movement.

An interference with a person's right to leave must be 'in accordance with law' and pursue one or more of the legitimate aims set out in Article 2 § 3 of Protocol No. 4 and be 'necessary in a democratic society' to achieve such an aim. This refusal could not be considered 'necessary in a democratic society'.

The Court noted that the Lithuanian authorities acknowledged that the applicant could not safely return to his country of origin. It is not disputed that the applicant left his country of origin to seek asylum abroad and was granted subsidiary protection in Lithuania on several occasions. At no point did the domestic authorities decide, after assessing the situation in the applicant's country of origin and his individual circumstances, that he was no longer in need of subsidiary protection and could approach the Russian authorities without fear. Although the applicant argued that he was afraid to contact the Russian authorities for the same reasons he had previously been granted subsidiary protection, those arguments were not adequately addressed in the domestic proceedings.

The refusal to issue an applicant with an alien's passport was taken without ensuring that such a measure was justified and proportionate to his individual situation. The refusal was based on formalistic grounds without adequate examination of the situation in his country of origin as well as on the purported possibility of obtaining a Russian passport, without any assessment of whether that possibility was accessible to him in practice in view of his particular circumstances.

The Court held that there had been a violation of Article 2 of Protocol No. 4 of the Convention.⁵⁶

6.1.5. *Tatishvili v. Russia*

The applicant was born in Georgia and held former USSR citizenship until 2000 when she became stateless. Consequently, she applied for residence registration in Moscow. Her residence registration was refused as she 'failed to provide the complete set of documents'. In 2001, the applicant challenged the refusal claiming that there was

no legal basis for restricting her right to obtain residence registration, provided she made correct document submission.

The decision was appealed, on the ground that the District Court had incorrectly referred to the applicant's Georgian citizenship and a visa requirement for her entry into the Russian Federation, given that the applicant had never held Georgian citizenship. Finally, in August 2001, the Moscow City Court reiterated the District Court's findings and dismissed the claim, as she had failed to prove her Russian citizenship or an intention to obtain it.

The case originated from an application against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms in December 2001. The applicant complained of an arbitrary denial of residence registration at her chosen address and a claim of unfair judicial proceedings.

The applicant criticised the Government's refusal of her residence status as mutually exclusive and inconsistent. She held that she continued to hold former USSR citizenship and never acquired Georgian citizenship. Consequently, she did not require an entry visa as a Georgian citizen. In any event, she had not crossed the Russian border in 2000 or later. The 1981 USSR Law on the Legal Status of Foreign Citizens in the USSR and the 1991 Rules on the Stay of Foreign Citizens in the USSR section 1 did not apply to the USSR citizens and therefore, did not apply to the applicant. Until a new Russian law on the Legal Status of Foreign Citizens was adopted in 2002, Russia had no legislation imposing an obligation on citizens of the former USSR to obtain residence permits as a condition for their lawful residence in Russia. Thus, there had been a breach of her rights under Article 2 Protocol 4, as the denial of residency registration affected her right to liberty of movement, despite her lawful presence in the Russian Federation.

The Government denied that there had been an interference with the applicant's right to liberty and movement, because her presence in the Russian Federation was not lawful. They relied on the fact that the applicant, who arrived from Georgia, had failed to take any steps to determine her citizenship and make her residence in Russia lawful, such as confirming her Georgian citizenship or applying for Russian citizenship.

The Government stated that the applicant's situation was governed by 1981 USSR Law on the Legal Status of Foreign Citizens in the USSR and by the 1991 Rules on the Stay of Foreign Citizens in the USSR. According to sections 5 and 32 of the 1981 USSR law, the applicant, as a stateless person, should have obtained a residence permit from the Department of the Interior. As the Government perceived the applicant as a Georgian Citizen, it concurrently held that, after the introduction of entry visa requirements for Georgian Citizens on 5 December 2000 the applicant could only lawfully be a Russian resident on 25 December 2000 if she had crossed the border with a valid Russian visa in her national passport.

Russia incorrectly held that the applicant needed an entry visa as a Georgian citizen because the Court observed that the applicant relied on her former USSR citizenship.

The Court found that the registration of the applicant's residence in Georgia dating back to the early 1990s had no automatic bearing on her citizenship determination under either Russian or Georgian laws. It dismissed the Government's allegation that the applicant held Georgian citizenship, as the denunciation of the Bishkek Agreement on visa-free exchanges should not affect the lawfulness of her residence in the Russian territory.

Moreover, it contested the Government's argument that the appellant was stateless at the material time and had consequently been required to hold a residence permit in accordance with the 1981 USSR Law on Foreign Citizens. Noting that before 31 December 2000 individuals who had not obtained the citizenship of one of the newly independent States, held the special legal status of a "citizen of the former USSR" in Russia. It was only after that date they were to be considered stateless. At the material time, early December 2000, the requirement to have a residence permit established under the 1981 USSR law, did not apply to her because as she was neither a foreign citizen nor a stateless person.

The Court found that the Government's claim that the applicant's presence in Russia was unlawful was concluded without a legal and/or factual basis. The Court accepted that the applicant, as a "citizen of the former USSR" at the material time, was lawfully present in Russia under Article 2 para. 1 of Protocol No. 4.

Furthermore, the Court ruled under Article 41 applicant had to be compensated owing to her loss of earnings and administrative fines for the absence of registration of residency.

The Court judged in favour of the appellant and held that there had been a violation of Article 2, of Protocol No. 4, and Article 6 para. 1 of the Convention.⁵⁷

6.1.6. *Case of Bessenyei v. Hungary*

The applicant, born in 1956 and living in Kál, Hungary, was involved in criminal proceedings initiated in early 2001. He was charged with forgery of official documents alongside an accomplice, with a formal indictment issued on 5 June 2001. The trial proceeded with five hearings and expert opinions, leading to a judgement by the Hatvan District Court on 28 May 2003. On appeal, the Heves County Regional Court quashed this judgement on 27 February 2004 and remitted the case back to the first-instance court. The case was later joined with another trial on 6 October 2004. After four additional hearings, the applicant was acquitted on 29 September 2005. This acquittal became final on 7 December 2005 and the applicant was notified on 17 January 2006. During the proceedings, the applicant was subject to a travel ban from 25 June 2001 to 1 July 2003 under Hungarian law owing to the serious charges against him. This ban was lifted following a change in the legislation.

57 Case of *Tatishvili v. Russia*, Application no. 1509/02, Judgement 22 February 2007.

Violation of Article 6 para. 1 of the Convention (Right to a Fair Trial - Reasonable Time): The applicant argued that the criminal proceedings took an unreasonable amount of time, approximately five years, which violated his right to a fair trial within a reasonable time as guaranteed by Article 6 para. 1 of the ECHR.

Violation of Article 2 § 2 of Protocol No. 4 of the Convention (Right to Freedom of Movement): The applicant also claimed that the travel ban imposed on him during the trial was disproportionate and violated his right to leave his country, as protected under Article 2 § 2 of Protocol No. 4.

Legal Arguments by the Opposing Party (Government): Reasonable length of proceedings: The Government contested the applicant's claim, arguing that the length of the proceedings was not unreasonable given the circumstances of the case. Legitimacy of the travel ban: Regarding the travel ban, the Government contended that it was a lawful and necessary measure to ensure applicant's availability for trial. They also noted that the ban was lifted on 1 July 2003, after which the applicant was free to travel.

Article 6 para. 1 (Reasonable Time): The Court found that the duration of the proceedings, lasting nearly five years was excessive, especially considering that the applicant was ultimately acquitted. The Court determined that the length of the proceedings failed to meet the "reasonable time" requirement under Article 6 § 1, resulting in a violation of this provision.

Article 2 para. 2 of Protocol No. 4 (Freedom of Movement): The Court acknowledged that the travel ban was lawful and pursued a legitimate aim of maintaining public order by securing the applicant's presence at trial. However, the Court criticised the automatic and prolonged nature of the ban, which lasted for over two years without reassessment. The Court held that this lack of reassessment rendered the travel ban disproportionate, leading to a violation of the applicant's right to leave his country under Article 2 para. 2 of Protocol No. 4.

The Court unanimously found violations of both Article 6 para. 1 and Article 2 para. 2 of Protocol No. 4. It awarded the applicant EUR 4,000 in non-pecuniary damages, payable within three months, with interest accruing for any delay. The Court dismissed the remainder of the applicant's claim for just satisfaction.⁵⁸

6.1.7. *Sissanis v. Romania*

The applicant, involved in criminal proceedings in Romania, was twice prohibited from leaving the country. The first prohibition was imposed by the police, who stamped his passport with the letter "C" and ordered him not to leave Romania. After a 30-day period during which the public prosecutor also barred him from leaving, the applicant successfully petitioned the court to have the mark removed from his passport. However, new criminal charges were later brought against him, leading the police to re-stamp his passport with the letter "C", and the public prosecutor ordered him into custody for 30 days. The county court sentenced him to immediate imprisonment, but

58 Case of *Bessenyei v. Hungary*, Application no. 37509/06, Judgement 1 October 2008.

the Court of Appeal later overturned the sentence, ordered his release, and remitted the case to the provincial court, which eventually acquitted him.

Despite his acquittal, the applicant struggled to have the “C” mark removed from his passport, arguing that such a preventive measure should only be ordered by a member of the state legal service, not the police. He faced numerous dismissals and setbacks in his applications to various domestic authorities before the provincial court finally ordered the removal of the mark. However, his request for compensation for pecuniary and non-pecuniary damages was denied.

The applicant contended that the preventive measure prohibiting him from leaving the country was unlawful because it had been imposed by the police rather than by a member of the state legal service, as he argued was required by law. He further argued that domestic law lacked the necessary precision in defining the conditions under which such a measure could be imposed and failed to provide adequate safeguards, such as a review procedure.

The Romanian authorities argued that the applicable law at the time did not require that such a preventive measure be ordered by a member of the state legal service. They also criticised the applicant for not providing evidence that the criminal proceedings had ended or that he had been acquitted. The authorities maintained that the measure was lawful under the existing legal framework.

The ECtHR found that the measure imposed on the applicant, which effectively dispossessed him of his passport by marking it with a “C” and preventing him from leaving the country, constituted an interference with his right to freedom of movement under Article 2 of Protocol No. 4 of the ECHR. The Court noted that the interference had to have a basis in domestic law, which should be accessible and foreseeable in its effects.

The ECtHR determined that the relevant domestic law was vague and lacked sufficient precision to establish conditions for imposing such a preventive measure. The law did not clearly identify the authority empowered to impose the measure or define the grounds for doing so with sufficient precision. Furthermore, the Court emphasized that interference with an individual’s rights by executive authorities must be subject to effective judicial control, which was absent in this case. The preventive measure in question was applied automatically and for an indefinite period, without any review procedure, thereby interfering with the applicant’s rights in a manner that was not ‘in accordance with the law’.

The Court also noted that the law under which the measure was imposed had been declared unconstitutional and replaced by a new law requiring that all preventive orders prohibiting someone from leaving the country be made by a member of the state legal service. However, the Court found that the applicant had not been compensated for the damage sustained as a result of the unlawful extension of the preventive measure.

The ECtHR unanimously concluded that there was a violation of Article 2 of Protocol No. 4, as the interference with the applicant’s freedom of movement had not been ‘in accordance with the law’. The Court did not find it necessary to examine whether

the interference pursued a legitimate purpose and was necessary in a democratic society, as the lack of a lawful basis was sufficient to establish the violation⁵⁹.

6.1.8. *Dremlyuga v Latvia*

The applicant, born in Russia, moved to Latvia in 1948 at age two. After completing education and military service in Russia, he intermittently returned to Latvia before settling permanently in June 1990. He was demobilised in December 1991. Following the dissolution of the Soviet Union, the applicant and his family were issued former USSR passports with permanent resident status in Latvia. In March 1993, they received passports with residency confirmation.

First Procedure:

In 1995, the Latvian Department of Citizenship and Immigration confiscated the applicant's passport without explanation. The District Court ruled in 1995 that the passport was valid, and the applicant should be registered as a "permanent resident non-citizen". This decision was executed but in 1998, the Directorate for Citizenship and Migration Affairs challenged the decision citing new facts: the applicant had acquired Russian citizenship in 1996. The Regional Court dismissed this appeal in 1999 as the facts were not considered new.

Second Procedure:

In 1999, the Directorate cancelled the applicant's family's registration, leading to the loss of identification numbers. The applicant's request for a permanent residence permit was denied in July 1999 based on the Foreigners Act. The District Court upheld this denial in January 2000, stating the applicant's failure to apply for a permit by the legal deadline. The Riga Regional Court also upheld the decision in January 2001, ruling that his Russian citizenship changed his legal status and he did not follow the proper procedure for regularisation. The Senate of the Supreme Court declared the appeal inadmissible in April 2001.

The case involves several key legal provisions: Law on the Entry and Stay of Foreigners and Stateless Persons (1992): Articles regarding residence permits, including for spouses and non-citizens; Law on the Status of Citizens of the Former USSR (1995): Stipulates conditions for non-citizen status, which the applicant lost upon acquiring Russian citizenship; Agreement between Latvia and Russia on Social Protection of Retired Servicemen (1994): Provides rights to reside in Latvia for retired Russian servicemen and their families.

The applicant argued that his refusal to issue a residence permit violated his right to respect for private and family life under Article 8 of the ECHR.

He claimed his irregular status caused significant personal and professional difficulties. He also contended violations of his right to life (Article 2), freedom of movement (Article 2 of Protocol No. 4), and excessive delays in legal proceedings (Articles 6 paras. 1 and 13). He argued the Latvian authorities abused their rights under Article 17.

59 Case of *Sissanis v. Romania*, Application no. 23468/02, Judgement 25 January 2007.

The Latvian authorities argued that the applicant's failure to apply for a residence permit within the required timeframe after obtaining Russian citizenship led to his status as an illegal resident. They contended that the applicant had not used available legal avenues for regularisation and had not faced an imminent expulsion as no formal expulsion order had been issued.

Decision and Reasoning: Article 8 of the Convention: The ECtHR found no violation because Latvia's requirements for residence permits were clear and applicable. The applicant had not used the available regularisation routes. The applicant was not subject to imminent expulsion, and no formal expulsion order had been issued. Article 2 of the Convention: The ECtHR held that Article 2 only protects against death and does not guarantee a certain quality of life. The complaint was deemed incompatible with the Convention's provisions. Article 2 of Protocol No. 4: The ECtHR ruled that this article applies to individuals lawfully within a state. As the applicant's legal status in Latvia was irregular, the article did not apply to his case. There was no evidence of restriction on his movement or residence within Latvia. Article 17 of the Convention: The ECHR did not find evidence of abuse of rights by the Latvian authorities.

The ECHR rejected the applicant's complaints, concluding that his legal status issues did not amount to violations of the Convention's articles. The application was deemed premature as there was no imminent expulsion, and the applicant had not exhausted all available legal remedies⁶⁰.

6.1.9. *Makuc and Others v. Slovenia*

The case involved 11 applicants from various countries, who were previously citizens of the Socialist Federal Republic of Yugoslavia (SFRY) and had acquired permanent resident status in Slovenia before its independence. Following Slovenia's declaration of independence on 25 June 1991, the enactment of the Citizenship Act and 1991 Aliens Act, their names were removed from the Register of Permanent Residents on 26 February 1992. Consequently, they became subject to the provisions of the 1991 Aliens Act, which led to their treatment as foreigners or, in some cases, stateless individuals. This erasure resulted in the loss of their rights and led to significant hardships, including forced emigration, detention, and loss of property and social benefits.

The applicants argued that their erasure from the Register deprived them of their right to freedom of movement and the right to choose their residence within Slovenia. They claimed that this violated their rights under Article 2 of Protocol No. 4 of the ECHR.

Article 14 of the Convention, read in conjunction with Articles 6 and 8, Article 3 of Protocol No. 1, and Article 2 of Protocol No. 4: The applicants alleged discrimination in the enjoyment of their Convention rights. They claimed that they were treated less favourably compared to others who retained their residence status or received citizenship or permanent residence under more favourable conditions.

60 Case of *dremlyuga v. Latvia*, Application no. 66729/01, Judgement 29 April 2003.

The opposing party argued that Article 2 of Protocol No. 4 did not apply because the applicants were not ‘lawfully within the territory’ of Slovenia following their erasure. The provision does not grant an alien the right to reside or remain in a country where they are no longer legally recognised.

The opposing party contended that because Articles 6, 8, and 2 of Protocol No. 4 were not applicable, Article 14 could not be applied in relation to the complaints raised under these provisions.

Decision and Reasoning: Article 2 of Protocol No. 4: The Court ruled that Article 2 of Protocol No. 4 was inapplicable because the applicants were not legally residing in Slovenia after their names were erased from the register. This article pertains only to individuals lawfully within the territory and does not grant them the right to remain or reside in a country where one is no longer legally recognised. Article 14: The Court found that since the substantive provisions (Articles 6, 8, and 2 of Protocol No. 4) were not applicable, Article 14 could not be applied to complaints related to these provisions. The Court also could not determine the admissibility of complaints related to the failure to comply with the Constitutional Court’s decision and discriminatory treatment under Article 8, read in conjunction with Article 14.

The Court declared the complaints under Article 2 of Protocol No. 4 inadmissible.

The Court decided to adjourn the examination of complaints related to the overall situation affecting the applicants, including the failure to afford retrospective recognition of permanent residence, lack of an effective legal remedy, allegedly discriminatory treatment, and denial of pension benefits.

The remainder of the application was declared inadmissible.⁶¹

6.1.10. Mursaliyev and Others v. Azerbaijan

Between 2012 and 2016, the applicants discovered that their ability to leave Azerbaijan was restricted by travel bans imposed by the investigating authorities. These restrictions were applied without judicial decisions and imposed during various criminal proceedings in which the applicants were merely witnesses and not suspects or accused persons. The bans for applications nos. 62775/16 and 43327/16 were later lifted in early 2016.

Legal Arguments by the Applicants: Unlawfulness of restrictions: The applicants argued that Azerbaijani domestic law did not authorise the imposition of travel bans on witnesses in criminal proceedings. Absence of justification: They claimed that the travel bans were unjustified and did not serve any legitimate purpose or meet the criteria of necessity in a democratic society. Ineffective remedies: The applicants contended that they lacked effective legal remedies to challenge the travel bans.

Legal Arguments by the Opposing Party (Government): General reference to case law: The Government relied on the Court’s case-law regarding Article 2 of Protocol No. 4 but did not provide specific arguments related to the applicants’ complaints. No

61 Case of *Makuc and others v. Slovenia*, Application no. 26828/06, Judgement 31 May 2007.

comments on remedies: The Government did not make submissions regarding the effectiveness of domestic remedies available to the applicants.

The Court declared the complaints admissible. It found that despite the lifting of the bans, the applicants remained victims as no domestic authority acknowledged or provided redress for the violations. Violation of Article 2 of Protocol No. 4: The Court held that the imposition of travel bans on witnesses, without any legal basis in domestic law, constituted an interference with their right to leave the country that was not ‘in accordance with law’. The Court did not need to examine whether the restrictions pursued a legitimate aim or were necessary in a democratic society. Violation of Article 13: The Court found a violation of Article 13 in conjunction with Article 2 of Protocol No. 4 for applicants who did not have effective domestic remedies to challenge the travel bans. No separate violation under Article 8: Although one applicant claimed that the ban prevented him from travelling abroad for medical treatment, the Court did not need to examine this claim separately, given the findings under Article 2 of Protocol No. 4. No violation of Article 34: The Court found no evidence of interference with the applicants’ right to individual application under Article 34.

Outcome: Violation of Article 2 of Protocol No. 4: The Court found that the travel bans imposed on the applicants violated their right to leave their own country. Violation of Article 13: The Court found that the applicants (except one) did not have effective domestic remedies to challenge the bans. No additional findings: No separate violation under Article 8 or Article 34 was established based on the available evidence.⁶²

6.1.11. *Rotaru v. The Republic of Moldova*

The applicant was V. R., a Moldovan citizen residing in Chisinau. The opposing party was bank E.

On 11 June 1998, the Botanica Court in Chisinau ordered V. R. to pay bank E. 77,908.51 Moldovan lei (approximately \$16,450 USD at the time) for an unpaid loan plus late payment penalties.

V. R. failed to comply with the court’s decision and left Moldova in 2004 to settle in Romania. In 2010, upon returning to Moldova, he applied for a new passport, which was rejected by the civil registry office owing to the outstanding debt.

The applicant argued that the refusal to issue a passport was an unlawful and disproportionate interference with his right to freedom of movement under Article 2 of Protocol No. 4 of the Convention.

He contended that the legal time limits for enforcing the 1998 court decision had expired, making the refusal to issue a passport unjustifiable.

He claimed that the national authorities failed to conduct an effective review of the proportionality of the passport ban.

62 Case of *Mursaliyev and others v. Azerbaijan*, Application nos. 66650/13, 24749/16, 43327/16 etc., Judgement 13 December 2018.

Justification for refusal: The opposing party, bank E., justified the refusal by citing Article 8 (g) of Law No. 269, which permitted denial of passport issuance in cases of unpaid debts.

Bank E had requested the bailiff to enforce the 1998 decision, leading to instructions for the civil registry office not to issue a passport to the applicant.

The Court noted that the authorities relied on Article 8 (g) of Law No. 269, which allowed passport denial for unpaid debts. However, the Court found that there was no specified duration for the passport ban and that the proportionality of the measure was not considered.

The Court concluded that the passport refusal resembled an automatic and indefinite measure, which is contrary to the obligations under Article 2 of Protocol No. 4 of the Convention.

The Court observed that national courts had only acknowledged the legality of the measure without evaluating its proportionality or the specific circumstances of the applicant's case.

The Court found that no regular or periodic review of the travel ban grounds was conducted, leading to the conclusion that the national legislation lacked adequate procedural safeguards against arbitrariness.

ECtHR found a violation of Article 2 of Protocol No. 4 of the Convention (freedom of movement).

The decision was made by the Chamber on 8 December 2020 and will become final according to Article 44, paragraph 2 of the Convention.⁶³

6.1.12. *Beshiri and Others v. Albania*

Mr. Beshiri and several other Albanian nationals were subjected to travel restrictions owing to ongoing criminal investigations. They were prohibited from leaving Albania to ensure their availability for questioning and trial.

The travel bans were imposed based on Albanian legal provisions allowing such restrictions during criminal investigations.

Legal Arguments by the Applicant: Violation of rights: The applicants argued that the travel bans infringed upon their right to freedom of movement under Article 2 of Protocol No. 4 of the ECHR. **Proportionality:** They claimed that the restrictions were not proportionate to the aim of ensuring their availability for investigation and trial, particularly given the indefinite nature and severe impact of the ban. **Less severe alternatives:** The applicants contended that less severe measures could have been used, such as regular reporting requirements or financial guarantees, rather than a complete travel ban.

The Albanian government argued that travel bans were legally justified under Albanian law, which permits such measures during criminal proceedings.

63 Case of *Rotaru v. The Republic of Moldova*, Application no. 26764/12, Judgement 8 December 2020.

The government asserted that the restrictions pursued a legitimate aim, such as ensuring the proper conduct of criminal investigations and securing applicants' availability for trial.

The ECtHR found that the travel bans had a legal basis under Albanian law, meeting the requirement of being 'prescribed by law'.

The Court agreed that the restrictions aimed to ensure the proper conduct of criminal investigations and the applicants' availability for trial, which were deemed legitimate aims.

The Court assessed whether the restrictions were necessary and proportionate.

The Court examined whether travel bans were necessary to achieve the legitimate aim. While the necessity of ensuring the applicants' presence was recognised, the Court questioned whether the measures were the least restrictive means available.

The Court found that the indefinite and severe nature of travel bans was disproportionate to the aim pursued. The bans had a significant impact on the applicants' personal and professional lives. The Court noted that less severe alternatives, such as regular reporting or financial guarantees, could have been considered.

The ECtHR concluded that Albania had violated the applicants' right to freedom of movement under Article 2 of Protocol No. 4 of the ECHR. The travel bans were found to be disproportionate and excessive, given their indefinite duration and severe impact.

Alternatives: The Court emphasised that less restrictive measures should have been explored before resorting to such stringent travel bans.

The ECtHR held that the restrictions imposed on the applicants violated their right to freedom of movement. The judgement underscored the importance of ensuring that restrictions on movement are proportionate and that less severe alternatives are considered.⁶⁴

6.1.13. *Napijalo v. Croatia*

In February 1999, the applicant was fined at a border control checkpoint for failing to declare certain goods he carried in his customs declaration. As he did not pay the fine, his passport was confiscated by a customs officer and not returned. The applicant sent a letter to the Ministry of Finance, demanding the return of his passport. However, he was not informed when his passport would be returned; the Ministry's response only mentioned that his passport had been confiscated on legal grounds owing to his refusal to pay the fine.

In March 1999, the applicant initiated legal proceedings in the municipal court, requesting the court to issue an interim injunction to ensure the return of his passport and to order the authorities to compensate him for damages caused by his inability to leave Croatia. The municipal court rejected the applicant's request for an interim injunction. In April 2001, during the court proceedings, the police returned

64 Case of *Beshiri and Others v. Albania*, Application nos. 29026/06, 3165/08, 56956/10 etc., Judgment 22 August 2012.

the passport to the applicant (the police claimed that they had twice written to the applicant at his registered address, inviting him to collect the passport from the police station). After the passport was returned, the applicant amended his claim, requesting the court to issue a declaratory judgement and order the reimbursement of his legal expenses and other costs incurred in connection with the litigation. The court rejected this request and ordered the applicant to pay his own legal expenses and costs. The applicant's appeal against this decision, filed with the district court in December 2002, was also rejected.

Regarding Article 6(1) of the Convention (the provision concerning the right of the accused to have their case heard within a reasonable time), the applicant's request for a declaratory judgement was closely linked to his claims for monetary compensation for damages and the costs and expenses incurred in connection with the litigation, making the provisions of Article 6 applicable to the case as a whole. The proceedings continued for three years and six months, with two prolonged periods of inactivity in the municipal court, for which no explanation was given. Given that the applicant's right to freedom of movement was at stake, such a duration cannot be considered "reasonable".

The European Court concluded that there was a violation of the requirements of Article 6(1) of the Convention (unanimously).

Regarding Article 2 of Protocol No. 4 of the Convention, the state's interference with the applicant's rights under Article 2 of Protocol No. 4 of the Convention occurred in this case, as the applicant was deprived of his passport, which would have allowed him—had he wished—to leave the country. Although the respondent state argued that passport was confiscated in accordance with the law, the European Court did not examine this aspect of the case in light of the conclusions it had reached regarding the applicant's complaint. Since no proceedings were initiated against the applicant for the customs offence, there was no justification for the authorities' failure to return his passport or for the municipal court's rejection of his request for an interim injunction. Consequently, the state's interference with the applicant's right to freedom of movement was not 'necessary in a democratic society'.

The European Court concluded that there was a violation of Article 2(2) of Protocol No. 4 of the Convention (unanimously).

In accordance with Article 41 of the Convention, the European Court awarded the applicant compensation of EUR 2,000 for non-pecuniary damage.⁶⁵

6.1.14. *Miażdżyk v. Poland*

Born in 1950, resides in Poznań, Poland. Arrested on 19 November 2004 and was initially placed in detention. Released on 14 November 2005 under preventive measures: bail, police supervision, and a prohibition on leaving Poland, along with the withholding of his passport. The prohibition lasted five years and two months, including one year of pre-trial detention.

65 *Case of Napijalo v. Croatia*, Application no. 66485/01, Judgement 13 November 2003.

The applicant faced charges related to running an organised criminal group, fraud, car theft, and handling stolen goods. Over 100 witnesses were involved in the case.

Health and personal impact: The applicant's lawyer requested multiple times for the travel ban to be lifted owing to the applicant's deteriorating health, financial hardship, and separation from his children in France. All requests were denied.

The applicant argued that the indefinite prohibition on leaving Poland, which lasted over six years, was a disproportionate restriction on his right to freedom of movement, safeguarded under Article 2 § 2 of Protocol No. 4 of the ECHR.

The applicant's lawyer emphasised that the preventive measure was unnecessarily restrictive, given that the applicant had consistently appeared in court and had not shown any intention to abscond. They also pointed out the impact on the applicant's personal and professional lives, given that he was a foreign national forced to stay in Poland.

The Government defended the travel ban as a lawful and proportionate preventive measure necessary to ensure the proper conduct of criminal proceedings, given the complexity of the case and the need for the applicant's presence at the trial.

They cited previous cases (e.g. *Goffi v. Italy*, *Fedorov*, and *Fedorova v. Russia*) in which similar or longer restrictions were found to be proportionate, arguing that the case was complex and that a heavy penalty could be expected, justifying the travel ban.

The ECtHR agreed that the restriction was in accordance with Polish law and pursued legitimate aims such as preventing crime and ensuring the applicant's presence at trial.

The Court found the five-year and two-month restriction disproportionate, particularly given that the applicant was forced to remain in a foreign country and was not permitted to leave, even temporarily. The Court noted the severe impact on the applicant's life, the prolonged nature of the proceedings without a first-instance judgement, and the eventual lifting of the travel ban.

Although the Government argued the case was complex, the Court did not find this sufficient to justify the prolonged restriction on the applicant's freedom of movement, especially considering the applicant's circumstances as a foreign national.

The Court ruled that there was a violation of Article 2 of Protocol No. 4 of the ECHR.

The applicant was awarded EUR 4,000 for non-pecuniary damage and EUR 1,500 for costs and expenses. The claim for pecuniary damage was rejected owing to the lack of causal link.

The decision highlighted the need to balance public interest and individual rights, emphasising that prolonged and severe restrictions must be proportionate and justified by genuine public interest.⁶⁶

66 Case of *Miażdżyk v. Poland*, Application no. 23592/07, Judgement 12 January 2012.

6.1.15. *Prescher v. Bulgaria*

The applicant, born in 1962, resided in Hanover, Germany, and was married to a German national. In 1992, Bulgarian authorities began investigating her for issuing fraudulent cheques, leading to her being charged in absentia and a warrant being issued for her arrest. She learned of these proceedings in 1995 and was subsequently arrested in Germany for extradition purposes. After some delays and legal proceedings in Germany, she was extradited to Bulgaria in 1998, where she was detained. The criminal proceedings were resumed but later terminated owing to insufficient evidence. However, the proceedings were reopened in 2001, leading to her re-arrest in 2002 when she returned to Bulgaria. The case saw multiple delays, jurisdiction disputes, and remittals until it was finally terminated in 2007 as time-barred.

Additionally, in 2002, a travel ban was imposed on the applicant, preventing her from leaving Bulgaria. She made multiple requests to lift the ban to visit her sick husband in Germany, all of which were denied. The travel ban was eventually lifted in 2007 when the criminal proceedings ended.

Legal Arguments by the Applicant: Article 6 para. 1 (Right to a fair trial within a reasonable time): The applicant argued that the criminal proceedings, which lasted about 15 years, exceeded the “reasonable time” requirement. Article 2 of Protocol No. 4 (Right to freedom of movement): The applicant contended that the travel ban was unjustified and disproportionate, significantly impacting her ability to maintain a family life. Article 8 (Right to respect private and family life): She claimed that the travel ban interfered with her family life, particularly her ability to care for her ill husband in Germany. The applicant also alleged violations of her rights under Article 6 para. 3 (a) and (c) and Article 5, paras. 1–3 related to her arrests and the conditions under which they were carried out.

Regarding Article 6 para 1, the Government argued that the case was complex and that delays were partly owing to the applicant absconding and obstructing the investigation.

Regarding Article 2 of Protocol No. 4, the Government maintained that a travel ban was necessary to prevent the applicant from fleeing and obstructing the proceedings.

Regarding Article 8, the government argued that the applicant’s husband could have joined her in Bulgaria, and that the applicant had other means of maintaining contact with him.

Decision and Reasoning: Article 6 para. 1 (Reasonable time requirement): The ECtHR found that the length of the proceedings, which totalled approximately nine years and seven months when considering the active periods, was excessive and violated reasonable time requirement. The Court noted that while the applicant contributed to some delays, the significant delays caused by the authorities were unjustifiable. Article 2 of Protocol No. 4 (Freedom of movement): The Court found that the prolonged travel ban, lasting over five years, became disproportionate over time. Initially justified, the continued imposition of the ban, especially as the risk of the applicant absconding diminished, was deemed excessive. The authorities failed to

provide adequate justification for maintaining the ban throughout its duration. Article 8 (Family life): The Court considered this complaint admissible but concluded that it was unnecessary to examine it separately since the violation of Article 2 of Protocol No. 4 had already addressed the significant impact on the applicant's family life.

Violation of Article 6 § 1: The Court ruled that the length of the criminal proceedings violated the "reasonable time" requirement.

Violation of Article 2 of Protocol No. 4: The Court found that the extended travel ban violated the applicant's right to freedom of movement.

No separate examination of Article 8: Given the findings under Article 2 of Protocol No. 4, the Court did not separately consider the alleged violation of Article 8.

Other complaints: The Court dismissed the applicant's other complaints as manifestly ill-founded.

The applicant's claims for pecuniary damage were dismissed owing to the lack of convincing evidence. The Court acknowledged the violations but dismissed the claims for compensation for pecuniary damage, although it recognised the non-pecuniary impact.⁶⁷

6.1.16. *O.I.J. v. Czech Republic*

The applicant, an international organisation with its registered office in Prague, had been operating in Czechoslovakia since February 1946. In 1991, the Federal Ministry of the Interior of Czechoslovakia decided to withdraw the applicant's authorisation to operate within the country, citing the organisation's connections with the former totalitarian regime and alleged abuse of its privileged position in economic activities. This decision was confirmed by the Federal Minister of the Interior, who set a deadline for the organisation to cease its operations. Although the applicant appealed the decision, the Federal Minister of the Interior upheld the withdrawal of authorisation, particularly in relation to the organisation's registered office in Czechoslovakia.

Following the dissolution of Czechoslovakia on 31 December 1992 the applicant sought to retain its headquarters in the newly formed Czech Republic. However, the Czech Minister of the Interior confirmed the refusal to comply with a previous protest by the Public Prosecutor to revoke the withdrawal of the applicant's authorisation. The applicant filed an administrative appeal with the High Court, which was dismissed and subsequently lodged a constitutional complaint.

The applicant argued that the withdrawal of its authorisation violated its right to a fair trial under Article 6 of the ECHR and infringed upon its civil and social rights as well as those of its officials and employees.

The applicant claimed that as per Article 19(c) of the Civil Code, the withdrawal of its registered office led to the cessation of its activities, violating its property, housing, employment, and other civil rights.

The applicant also alleged a violation of Article 4 of the European Convention on the Recognition of the Legal Personality of International Non-Governmental

67 Case of *Prescher V. Bulgaria*, Application no. 6767/04, Judgment 7 June 2011.

Organisations, asserting that it had always complied with national legislation and that its activities never justified the withdrawal of its authorisation.

The Constitutional Court of the Czech Republic argued that the right to have a registered office in the country did not constitute a “civil right” under Article 6 of the ECHR. Therefore, the proceedings did not involve the determination of civil rights and obligations.

The Court noted that the applicant was still authorised to continue its activities in the Czech Republic despite the withdrawal of its registered office, thereby not infringing on its ability to operate.

It was further argued that the withdrawal of the applicant’s authorisation was a matter of domestic law and state interest, not a violation of the applicant’s right to free association.

The Court dismissed the applicant’s constitutional complaint, finding the following:

The right to have a registered office in a country is not a civil right and thus, Article 6 of the ECHR is not applicable.

The decision of the High Court to not review the withdrawal of the applicant’s authorisation was not arbitrary as it pertained to a procedural matter, not a substantive civil right.

The Court held that the applicant, as an international organisation, could not claim victim status under the Convention for violations alleged on behalf of its officials, employees, or other associated persons.

The Court also rejected the claim under Article 4 of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, stating that this provision could not be applied by the ECtHR in the applicant’s case.

The application was declared inadmissible by the ECtHR as it was found to be incompatible *ratione materiae* and *ratione personae* with the provisions of the ECHR. The applicant’s claims under Articles 6 and 4 of the relevant conventions were dismissed, and the withdrawal of authorisation to have its registered office in the Czech Republic was upheld.

In this case, the provisions of Article 2 of Protocol No. 4 of the ECHR and those of Article 1 of Protocol No. 7 of the Convention, the content of which is closest to the guarantees contained in Article 4 of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, apply only to natural persons.

The case-law of the ECtHR regarding the right to freedom of movement in Central and Eastern European countries highlights the balance between individual freedoms and the legitimate interests of the state. The ECtHR consistently emphasises that any restrictions on movement must be prescribed by law, necessary, and proportionate to the legitimate aims pursued. Violations typically occur when restrictions are indefinite, lack a clear legal basis, or are disproportionate to the situation. The ECtHR’s

jurisprudence serves as a critical check on state power, ensuring that individual rights are protected in the face of restrictive measures.⁶⁸

7. Summary

The jurisprudence of the ECtHR concerning Article 2 of Protocol No. 4 as well as other relevant provisions consistently affirms the fundamental nature of the right to freedom of movement. This right encompasses both the ability to leave one's country and to return without undue restriction. Across the cases analyzed, a clear pattern emerges in which the ECtHR emphasises that any interference with these rights must satisfy stringent requirements of legality, necessity, and proportionality, reflecting the overarching principle that fundamental freedoms cannot be subordinated to administrative convenience or procedural formalities.

In *Udislav and Aurel Brezny v. Slovakia*, the ECtHR acknowledged the importance of procedural and temporal limitations in property restitution claims while affirming that national legal frameworks can justify certain restrictions when constitutional and legislative safeguards are observed. In contrast, cases such as *Kotiy v. Ukraine*, *S.E. v. Serbia*, *L.B. v. Lithuania*, and *Tatishvili v. Russia* reveal instances in which state authorities failed to implement domestic laws in a manner consistent with human rights obligations. Administrative inaction, bureaucratic delays, or formalistic interpretations of citizenship and refugee status resulted in direct violations of individuals' freedom of movement, highlighting the ECtHR's insistence on effective and timely protection of rights.

Similarly, in *Bessenyei v. Hungary* and *Sissanis v. Romania*, travel restrictions imposed during criminal proceedings were deemed disproportionate or insufficiently justified, reinforcing the principle that preventive measures affecting movement must be carefully balanced against individual rights and subjected to rigorous judicial oversight. *Dremlyuga v. Latvia* further illustrates the necessity for domestic administrative procedures, particularly regarding residence registration and travel documentation, to be both accessible and effectively enforceable. While the ECtHR recognised that compliance with procedural deadlines could justify certain state actions, prolonged inaction or excessive rigidity is incompatible with the Convention's protective regime.

Across these decisions, several overarching principles become evident:

Positive obligations of the state. States must ensure practical, timely access to travel documents, especially for refugees, stateless persons, and other vulnerable populations.

Protection against bureaucratic obstacles. Procedural or bureaucratic barriers cannot undermine substantive rights.

68 Case of *O.I.J. v. Czech Republic*, Application no. 41080/98, Judgement 27 April 1999.

Proportionality and necessity. Restrictions on movement must always be proportionate, necessary, and subject to periodic reassessment.

Effective remedies. States must provide effective remedies, including judicial review, to address violations of movement rights.

De lege ferenda, the following reforms are recommended to enhance legal compliance and protect individual freedoms:

Strengthening positive obligations. National legislation should explicitly require authorities to facilitate timely access to travel documents and residency permits for all eligible individuals, particularly refugees and stateless persons.

Codified procedural safeguards. Clear, legally enforceable steps, deadlines, and competent authorities should be specified to reduce arbitrariness and ensure accountability.

Proportionality and review mechanisms. Legal frameworks should mandate periodic reassessment of any restrictions on movement, ensuring that limitations are proportionate to their purpose and time-bound.

Refugee and stateless person protections. Alternative mechanisms for document issuance should be provided for individuals unable to rely on their country of origin, thus guaranteeing their effective enjoyment of movement rights.

Compensation and remedies. Legislative frameworks should include explicit provisions for compensation and redress where violations occur, thereby further reinforcing the enforcement of fundamental freedom.

In conclusion, the right to freedom of movement, as enshrined in Article 2 of Protocol No. 4 of the ECHR, constitutes a fundamental element of individual liberty and a democratic society. Although this right ensures that individuals can move freely within a state, choose their residence, and leave or return to their country, it is not absolute and may be subject to restrictions under specific conditions. Such restrictions must be in accordance with the law, restrictions may only serve purposes such as national security, public safety, crime prevention, protection of health or morals, or safeguarding the rights and freedoms of others, limitations must correspond to a pressing social need and represent the least restrictive means of achieving the intended aim.

In times of emergency, states may derogate certain obligations under Article 15 of the ECHR; however, such measures must adhere to strict criteria and not violate other international obligations. Overall, the ECHR provides a robust framework for safeguarding freedom of movement, while allowing for reasonable and justified restrictions. Comprehensive legislative reforms, coupled with effective judicial oversight, would prevent systemic violations, strengthen the protection of vulnerable groups, and contribute to a more just and rights-respecting society.

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Protection Against Expulsion

Marcin WIELEC – Bartłomiej OREŹIAK – Julia STARYBRAT

ABSTRACT

This chapter explores the international legal duties related to the expulsion of individuals, as shaped by Council of Europe standards. It starts by presenting the core principles of international human rights law, paying particular attention to the European Convention on Human Rights (ECHR) and its additional protocols. The discussion focuses on key restrictions, such as the ban on expelling nationals of a country and the prohibition of collective expulsions of foreigners, as well as the procedural guarantees that must be observed during expulsion processes. These aspects are examined not only through the wording of treaty provisions but also in light of the case law of the European Court of Human Rights, which has played a central role in defining the meaning and scope of these safeguards. The chapter then describes how these protections intersect with the principle of non-refoulement, stressing its absolute nature under Article 3 of the ECHR and based on an analysis of its application in present-day migration contexts. By linking the legal framework with practical mechanisms and recent developments – such as large-scale migration movements and the adoption of the new European Union Pact on Migration and Asylum – the text sheds light on the ongoing tension between state sovereignty and international commitments. The chapter concludes with reflections on the shifting balance between national security concerns and the obligation to protect fundamental rights, offering broader insights into the resilience and adaptability of the European system of human rights protection.

KEYWORDS

expulsion of nationals, state sovereignty, collective expulsion, non-refoulement

1. Introduction

International human rights law constitutes one of the most fundamental pillars of public international law as understood within the classical, state-centred conception of international law.¹ The significance of this legal system is growing, particularly in light of the dynamic changes and events affecting the current state of global society.

1 Sohn and Buergenthal, 1973; Matscher and Macdonald, 1993; Robertson and Merrills, 1996; Cross, 1999; Moreno-Lax, 2018.

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Armed conflicts, pandemics, political shifts, as well as social and migration changes are merely examples of factors driving the development and contemporary perception of human rights. This perception has evolved over time; it is not static but rather exhibits characteristics of a dynamic process. As T. Jasudowicz once stated, six stages can be distinguished in the development of human rights: idealisation, conceptualisation, narrativisation, constitutionalising, internationalisation, and implementation.² Accepting this framework as valid, it is important to note that the stages of human rights development presented here are model-based, which does not imply that any of the six stages have reached completion. Moreover, these stages may overlap. This suggests, which is not difficult to accept, that many human rights and freedoms have yet to emerge,³ with many still awaiting the constitutionalising or internationalisation phases. The perception of human rights evolves over time, as evidenced by the implementation stage, which is marked by the active engagement of international judicial or quasi-judicial institutions. Such institutions frequently alter the interpretation of specific legal norms within the field of human rights protection; this is particularly so in recent times, by imposing additional positive and negative obligations on responsible entities. Consequently, a substantial layer of obligations is added to the edifice constructed by the international human rights system, especially when a new armed conflict arises globally or a wave of refugee migration sweeps across a continent. In such situations, one may speak of a test of the effectiveness of the obligated entities. One area where such dilemmas at the intersection of law, ethics, and morality are particularly evident is the broadly understood domain of the rights of foreigners. Here, a dilemma arises concerning the balance between safeguarding national security or public interest and respecting individual rights. This dilemma often escalates into broader discussions about reconciling state sovereignty with the fulfilment of international obligations by nation-states. In this context, the system established by the Council of Europe (CoE) plays a central role, introducing extensive requirements and striving to protect individual rights from abuse or violation. The subject of the current study falls within this scope, focusing on the prohibition of both the expulsion of nationals and the collective expulsion of aliens, along with procedural safeguards relating to the expulsion of foreigners. In this study, the aims are to conduct an analysis to reveal the spectrum of international obligations in this domain and, accordingly, to draw well-founded conclusions. The main part of the study focuses on the relevant legal foundations, accompanied by a discussion and an examination of the appropriate and relevant interpretations by competent authorities. The analysis also addresses issues significant to the current challenges of human rights implementation in the context of the migration crisis. The study presents findings that contribute to the ongoing discourse on the preservation of state sovereignty,

² Jasudowicz, 2010, pp. 23–39.

³ For example, this refers to human rights issues related to the application of so-called artificial intelligence. See: Aloamaka and Omozue, 2024, pp. 189–201.

which is burdened with numerous international obligations, particularly in the face of events that rapidly trigger these obligations.

2. Prohibition of the Expulsion of Nationals

2.1. Article 3 of Protocol No. 4 of the European Convention on Human Rights

Article 3 of Protocol No. 4 to the European Convention on Human Rights (ECHR)⁴ is a vital component of the European system for the protection of individual rights, aimed at ensuring citizens' inalienable right to nationality and security within the territory of their own country. The provision states:

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national. 2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

This is one of the most significant provisions safeguarding individuals against forced expulsion from their country of origin. The norm contained within it categorically prohibits state parties to the ECHR from employing any measures that would result in the expulsion of their own citizens beyond the borders of the state. This provision applies to scenarios where the government might attempt to deprive its citizens of the right to remain within the territory of their own country, regardless of the circumstances. It is directly linked to the protection of human rights, particularly the right to nationality and freedom of movement.⁵

The introduction of Article 3 of Protocol No. 4 to the ECHR was a response to events that took place during the 20th century when mass deportations were used as a political tool to eliminate groups perceived as a threat to those in power. Such actions often targeted against citizens based on their views, nationality, religion, or social affiliation led to forced departure from their homeland. Consequently, the prohibition against the expulsion of nationals by the state, as enshrined in this article, became not only a form of individual rights protection but also a symbol of resistance against abuses of power. This provision creates a significant barrier to any attempts to deprive citizens of their right to remain in their own country. It serves as a safeguard against arbitrary decisions and repressive actions by the government, while also emphasising that every citizen has the right to live in a stable and secure environment. This right enhances individual security and underscores the state's responsibility to protect its citizens from social and political exclusion.⁶

4 Council of Europe, 2021.

5 Cassese, 1990; Mowbray, 2004; Bradley and Cohen, 2010, pp. 95–142; Alston and Goodman, 2013; Majcher, 2019.

6 Arendt, 1951/1973; Weis, 1979; Van Waas-Hayward, 2008; Blitz and Lynch, 2011; Nowak, 2021.

This provision plays a fundamental role in ensuring the right of every individual to nationality and protection against actions that may lead to social exclusion or statelessness. Statelessness carries severe consequences, as a person deprived of nationality is restricted in their access to fundamental rights such as the right to work, education, healthcare, and participation in social life. The absence of formal state affiliation often results in legal invisibility, where the individual lacks support from social security systems and is frequently excluded from official state structures, leading to even deeper marginalisation. Protection against such situations is crucial, as it guarantees that every person, regardless of political or social circumstances, has the right to a formal place in society. It is therefore reasonable to assert that the state bears the responsibility to prevent statelessness, ensuring that no one is at risk of losing their nationality, which is a foundational element of identity and legal stability. Such safeguards in international law protect against arbitrary decisions by authorities and serve as a basis for individuals to live within society with a sense of security, granting them access to fundamental rights, services, and freedoms. These are often guaranteed not only by the state's negative obligations but, more importantly, by its positive actions and commitments.⁷

2.2. State Sovereignty Versus Individual Rights

The traditional concept of state sovereignty assumed full authority and independence in decision-making within a state's own territory, covering issues such as national security, public order, and immigration policy. However, the development of international human rights standards has imposed new constraints on states, which redefine the notion of sovereignty in the modern context.

Current international norms assert that state sovereignty is no longer an absolute right but is instead linked to specific obligations towards individuals, including both citizens and foreigners. The international community places an expectation on states to respect at least basic standards of human rights protection. In the European context, this role is fulfilled by the ECHR, which establishes a binding regional system that restricts state discretion through enforceable obligations, as interpreted by the European Court of Human Rights (ECtHR). The Court applies these obligations with reference to the principles of subsidiarity and the margin of appreciation. Although the Convention does not have a global reach, its impact goes beyond the CoE: the extensive case law it has generated has influenced national constitutions, secondary European Union (EU) legislation, and the broader principles of European public

7 Batchelor, 1995, p. 232; Piechowiak, 2004, pp. 33–54; Bauböck, 2006, p. 128; Guild, 2006, pp. 1–6; McAdam, 2007; Bhabha, 2011; Buitrago, 2011, pp. 7–23; Eriksen and Fossum, 2013; Gragl, 2013; Chetail, 2014; Goodwin-Gill, 2014, pp. 36–47; UNHCR, 2014; Rainey, McCormick and Ovey, 2021.

order. In practice, this means that states' freedom of action is significantly narrowed whenever the protection of individual rights is at issue.⁸

One of the key challenges for states is balancing national interests with the obligation to protect individual rights. In the interest of national security or public order, states often implement measures that may lead to restrictions on certain individuals' rights. However, international human rights standards require that such measures be proportionate, justified, and consistent with international norms. For example, states cannot make decisions resulting in the expulsion of individuals to countries where they face the risk of torture or inhuman treatment. Thus, sovereignty entails not only the right to protect one's own territory but also the responsibility to ensure protection for those under their jurisdiction.⁹

The modern understanding of sovereignty also encompasses the principle of mutual recognition among states, which obligates every sovereign state to respect the sovereignty of others and adhere to the international standards it has committed to. This means that when states make decisions affecting individuals, they must take into account international reactions and potential consequences. Thus, international law governs not only the domestic actions of states but also their interactions with each other, establishing a framework of global responsibility for upholding human rights standards.¹⁰

In light of the above facts, sovereignty is increasingly perceived not only as a privilege but also as an obligation to comply with universally recognised international norms. states have a duty to protect their citizens; however, they cannot do so at the expense of other individuals' fundamental rights. The incorporation of human rights norms into international law requires states to make decisions that reconcile their sovereignty with the demands of international responsibility. Modern international relations are characterised by a tension between sovereignty and individual rights. While sovereignty grants states broad authority to take actions within their territory, international norms, particularly those related to human rights protection, impose significant limitations on this freedom. As members of the international community, states are obliged to act with respect for individual rights and strive for their protection, which forms the cornerstone of the contemporary international legal system.

8 Raab, 2004; Murray, 2007; Lodge, 2007, pp. 309–335; Solove, 2008; De Schutter, 2010; Shaw, 2011; Barnard-Wills, 2011; Sorell and Briskman, 2013; Fuster, 2014; Schrems, 2014, pp. 1145–1170; Murphy and Acquisti, 2014, pp. 330–347; Lyon, 2014; Kosta, 2015; Zureik and Hindle, 2015; Martin, 2015, pp. 607–622.

9 Henrard, 2000, vol. 62; Meijknecht, 2001, vol. 10; Bigo and Guild, 2005; Foster, 2007, No. 51; Lodge, 2007; Murray, 2007; Gondek, 2009; Solove, 2010; Kosta, 2013, vol. 3; Fuster, 2014, vol. 16; Lyon, 2015; Schabas, 2015; Ślupczyński, 2018, pp. 45–50; Bianchini, 2018, pp. 39–73; De Schutter, 2019.

10 Guild, 2006, pp. 1–6; Saul, 2008; Moeckli, 2008; Baldaccini, 2008, pp. 31–49; Weill, 2014; Dembour, 2015; Barnard-Wills, 2016; Van Dijk and Van Hoof, 2023.

2.3. Case Law Review

Modern states face the challenge of reconciling sovereignty with the requirements of human rights protection – a dilemma that is particularly evident in case law of the ECtHR. An analysis of cases examined by the ECtHR helps to understand how the Court delineates the boundaries of state actions when public interest conflicts with the fundamental rights of individuals. In this context, the case of *Bojilov v. Bulgaria* serves as an example where the ECtHR was required to take a position on the issue of proportionality in the state's interference with an individual's right to privacy, emphasising the importance of balancing public interest against the protection of individual human rights.¹¹

The case of *Bojilov v. Bulgaria* concerned violations of Article 5 of the ECHR, which relates to the right to liberty and security of the person.¹² The applicant alleged that he had not been promptly brought before a judge following his arrest, and that his pre-trial detention was unduly prolonged without sufficient justification. Furthermore, delays in his release and the lack of an opportunity to obtain compensation constituted violations of paragraphs 1, 3, and 5 of Article 5 of the ECHR. The ECtHR ruled that the actions of the Bulgarian authorities were inconsistent with the ECHR, highlighting inadequate procedural safeguards and the absence of an effective remedy.¹³

The case of *Haralambie v. Romania* concerned violations of the right to a fair trial (Article 6 of the ECHR) and the right to respect for private life (Article 8 of the ECHR).¹⁴ The applicant, Nicolae Haralambie, a Romanian citizen, sought access to his personal file, which had been compiled by the communist secret services. Although the documents had been available since 1996, Haralambie was granted access only six years after submitting his request, significantly exceeding the 60-day deadline stipulated by domestic law. The ECtHR found that this delay constituted a violation of Article 8 of the ECHR, as there was no effective procedure in place to ensure timely access to information. Additionally, the national courts refused to consider the applicant's claim regarding the restitution of his mother's property, which violated his right to a fair hearing (Article 6 of the ECHR). The ECtHR awarded Haralambie compensation for both material and non-material damages, affirming the state's obligation to provide effective remedies and access to documentation related to an individual's private life.¹⁵

Contemporary challenges in the protection of human rights underscore the need to balance state sovereignty with international obligations, as reflected in case law of

11 Peers, 2001, p. 141; Brouwer, 2008; Murphy, 2012; Mowbray, 2012; Schabas, 2015; Harris et al., 2023.

12 *Bojilov v. Bulgaria*, Application no. 45114/98, Judgment 22 December 2004.

13 Dembour, 2006; Voeten, 2007, pp. 669–701; Keller and Sweet, 2008; Bates, 2010; Schabas, 2015; Goold and Lazarus, 2019.

14 *Haralambie v. Romania*, Application no. 21737/03, Judgment 27 October 2009.

15 Arai-Takahashi and Arai, 2002; Book Review: National Security and the European Convention on Human Rights, 2004, pp. 695–698; Fuster, 2014; Schabas, 2015; Mowbray, 2016, pp. 287–304; Harris et al., 2018; Rainey, McCormick and Ovey, C., 2021.

the ECtHR. In cases such as *Bojilov v. Bulgaria* and *Haralambie v. Romania*, the ECtHR clearly delineated the limits of state actions, emphasising that even in matters of national security or public interest, respect for individual rights must remain a priority. In the first case, the ECtHR highlighted the necessity of a thorough assessment of the risks associated with deportation and the need to ensure access to effective remedies. In the second case, involving access to personal documents collected by the secret services, the ECtHR underscored the importance of protecting private life and the state's obligation to provide a timely and transparent procedure. Both judgments clearly indicate the importance of adhering to international human rights standards and the role of the ECtHR as a guarantor of these rights, reminding states that sovereignty does not absolve them from the responsibility to uphold recognised international principles, including the principle of non-refoulement and the right to a fair trial.

2.4. Dual Nationality, Denaturalisation, and Terrorism-Related Expulsions

In the context of international human rights standards, issues related to the deprivation of citizenship and expulsions in cases of suspected terrorist activity raise serious controversies and are the subject of intense legal debate.¹⁶ These issues primarily affect individuals with dual citizenship, against whom states often apply legal provisions that allow for the revocation of citizenship or expulsion from the country. While such decisions are frequently justified on the grounds of national security and public order, they raise questions about their compliance with the principles of non-discrimination and the prohibition against depriving individuals access to legal protection. These practices can result in situations of statelessness, which severely limit individuals in exercising many fundamental rights and international guarantees, such as the right to a fair trial, protection from inhuman treatment, and participation in social and political life. Debates in this area focus on the principle of proportionality in State actions and the need to ensure minimum standards of human rights protection. A key issue is whether such measures are compatible with the ECHR and other international instruments, which require that actions taken in the name of national security be balanced and not lead to arbitrary restrictions on individual rights.¹⁷ Nevertheless, dual citizenship provides States with the option to revoke the citizenship of individuals deemed a threat, allowing some countries to sidestep concerns related to statelessness. Meanwhile, in cases involving individuals who hold only a single citizenship, revoking it may result in statelessness, which can constitute a violation of human rights, particularly in the context of international conventions such as the 1961 Convention on the Reduction of statelessness.¹⁸

16 Brouwer, 2002, p. 399; Forcese, 2013, p. 551; Dickson, 2016, pp. 213–232.

17 Van Waas, 2016, pp. 469–487; Strik, 2019; Bolhuis and Van Wijk, 2020, pp. 338–365.

18 Convention on the Reduction of Statelessness of 1961; Weissbrodt and Collins, 2006, pp. 245–276; Blitz and Lynch, 2009; Molnár, 2014, p. 67; Vlieks, 2022.

The revocation of citizenship should be based on clear and precise legal regulations that meet the requirements of necessity, proportionality, and procedural fairness. Any decision to withdraw citizenship must be adequately justified and provide for the right of appeal, in accordance with the requirements of the European Convention on Nationality.¹⁹ It is worth noting that in the context of suspected terrorist activity, many states require a criminal conviction before proceeding with the revocation of citizenship. This requirement aims to prevent situations where the withdrawal of citizenship becomes a form of administrative sanction or repression imposed without prior proof of guilt, which could violate individual rights and undermine public trust in the legal system. This also carries the risk of social alienation and the escalation of radicalisation, especially when individuals deprived of legal protection and support are left without any viable options. Such circumstances may lead them to seek connections with criminal or terrorist organisations. Exclusion and the lack of state protection often result in marginalisation and alienation, which may only deepen extremist attitudes rather than prevent them. It is important to note that stripping individuals of citizenship shifts the problem to other states, potentially exacerbating global challenges related to international security.²⁰

In the face of growing terrorist threats, states are confronted with the challenge of reconciling their security interests with the obligation to respect individual rights. Measures such as the revocation of citizenship can only be justified if they meet the criteria of necessity, proportionality, and compliance with international human rights standards. Such actions should be taken only in exceptional cases and with the highest level of procedural transparency, to strike a balance between state sovereignty and the protection of the rights of individuals under its jurisdiction.

3. Prohibition of the Collective Expulsion of Aliens

3.1. Article 4 of Protocol No. 4 of the ECHR

The provision in Article 4 of Protocol No. 4 to the ECHR plays a crucial role in the protection of the rights of foreigners, prohibiting their collective expulsion from the territory of a state. The purpose of this regulation is to guarantee every foreign individual legal protection, particularly in situations where there is a risk of mass deportation without consideration of the personal circumstances of each case. This provision addresses the need to protect groups that might be deemed a threat to public or political security due to their national, ethnic, or social affiliation. The introduction of this article was a response to instances where states used collective expulsions as a

19 European Convention on Nationality, 1997.

20 Zedner, 2016, pp. 222–242; Jaghai and Van Waas, 2020, pp. 153–179; Paulussen, 2021, pp. 605–618.

political tool, thereby depriving foreigners of the opportunity to individually defend their rights.²¹

The obligation for states to individually assess the circumstances of each foreigner before making a decision on expulsion serves as a safeguard for the dignity and rights of individuals. It also aims to prevent situations where governments make arbitrary decisions, thereby subjecting foreigners to unjust deprivation of the opportunity to live in the host country. The prohibition of mass expulsions provides robust protection against potential abuses and human rights violations, counteracting situations where individuals are forced to leave the country without a thorough examination of their personal, health, or social conditions.²²

Article 4 of Protocol No. 4 plays a crucial role in preventing mass displacements, which can lead to severe humanitarian crises, especially when groups of people are forced to leave a country without being granted basic rights or access to international protection. This provision requires that decisions on the expulsion of foreigners be made on an individual basis, with respect for their rights and in consideration of their specific circumstances. Such a requirement reinforces international standards for the protection of refugees and migrants, enhancing their safety and ensuring more humane treatment.

By implementing this provision, state parties to the ECHR contribute to building a fairer system for the protection of foreigners, which takes into account their individual rights and needs. This article serves as a reminder of the state's responsibility towards individuals present on its territory, emphasising the obligation to uphold human rights regardless of a person's nationality or status. It is, therefore, a fundamental component of the human rights protection system, acting as a safeguard against abuses that could lead to violations of individuals' fundamental rights, while simultaneously promoting responsibility and a humane approach in migration policy.

3.2. Case Law Review

A direct reference to case law illustrates various situations in which states have carried out deportations, often justifying them by the need to protect public interest. The ECtHR, in assessing these cases, sets the framework within which states may undertake such actions while indicating when these interferences become excessive and disproportionate. One such case is *Conka v. Belgium*, where the ECtHR had to consider the compatibility of the state's actions with the protection of fundamental human rights, including the right to a fair trial and protection against discrimination.

The case *Conka v. Belgium* involved a Roma family from Slovakia who sought asylum in Belgium, fearing persecution in their home country.²³ Belgian authorities summoned the Conka family, along with other Roma individuals, to a police station

21 Schabas, 2015; March, 2024, p. 2; Czepek, 2024, pp. 48–60.

22 Grześkowiak, 2018, pp. 199–217.

23 *Čonka v. Belgium*, Application no. 51564/99, Judgment 5 February 2002.

under the pretext of completing additional asylum documentation. Upon their arrival, they were detained and swiftly deported to Slovakia. The applicants argued that the deportation was carried out deceitfully, depriving them of the opportunity to effectively appeal and defend their rights. The ECtHR found that Belgium's actions violated Articles 5 and 13 of the ECHR, concerning the right to liberty and right to an effective remedy, as well as Article 4 of Protocol No. 4 to the ECHR, which prohibits the collective expulsion of foreigners. The Court held that Belgian authorities had failed to provide the necessary procedural safeguards required in the expulsion of foreigners, and that the use of a deceptive summons for their detention was unethical and discriminatory. In the Court's view, the manner in which the deportation was carried out demonstrated a disregard for the prohibition on collective expulsion, as the entire group was deported without an individualised assessment of their circumstances. Furthermore, the ECtHR noted that using an administrative invitation as a means to achieve deportation undermines trust in asylum procedures, which are expected to be transparent and aimed at protecting those seeking international protection.

Another relevant case is *Hirsi Jamaa and Others v. Italy*, which concerned a group of migrants from Somalia and Eritrea intercepted by the Italian Coast Guard in the Mediterranean Sea while attempting to reach Europe to seek asylum.²⁴ In accordance with its policy of preventing illegal migration, Italy returned the intercepted migrants directly to Libya without conducting an individualised assessment of their applications for international protection or evaluating the risk of human rights violations in the country to which they were deported. The migrants argued that being sent back to Libya exposed them to persecution, torture, and inhuman or degrading treatment, as well as to the risk of further deportation to their countries of origin, where their lives would be in danger. The ECtHR found that Italy had violated Article 3 of the ECHR, which prohibits inhuman and degrading treatment, as well as Article 4 of Protocol No. 4, which prohibits the collective expulsion of foreigners. The Court held that the state had a duty to individually assess each migrant's circumstances and evaluate the risk associated with their return to Libya. Additionally, the lack of access to effective remedies constituted a violation of Article 13 of the ECHR, which guarantees the right to an effective legal remedy. The ECtHR emphasised that Italy's actions failed to meet the required procedural safeguards, thereby disregarding the migrants' fundamental rights and need for protection.

This ruling established an important precedent, emphasising that states cannot transfer their responsibility for protecting the rights of migrants to third countries by returning them without a thorough risk assessment. The case of *Hirsi Jamaa and Others v. Italy* contributed to strengthening the protection of migrants' rights in the context of migration control measures, highlighting the need to provide adequate procedural safeguards even when state actions occur outside their territory.

In analysing these cases, the ECtHR has established a legal framework that imposes on states the obligation to maintain proportionality and procedural fairness

24 *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment 23 February 2012.

and to conduct an individualised assessment of each person whose expulsion is being considered. Practices that fail to meet these requirements and instead result in the collective expulsion of foreigners without assessing their individual circumstances are deemed by the ECtHR to be incompatible with the ECHR. The Conka case highlighted the importance of transparency and fairness in asylum procedures, while the Hirsi Jamaa case set a significant precedent, reminding states of their duty to provide legal protection for migrants even when control measures are implemented beyond the state's borders. These rulings indicate that migration control, though necessary, must be conducted with respect for fundamental human rights. The conclusions drawn from these cases reinforce international standards for the protection of foreigners, affirming that states cannot evade their responsibility for the rights of asylum seekers. Accordingly, the ECtHR clearly delineates the boundaries between legitimate security measures and arbitrary decisions that may lead to violations of individual rights.

3.3. Application to Recent Mass Migration Issues in Europe

In recent years, Europe has become one of the main target regions for mass migration triggered by armed conflicts, persecution, economic disparities, and political destabilisation. This phenomenon has imposed unique legal and political challenges on the Member States of the EU, requiring them to simultaneously ensure border protection, public security, and compliance with fundamental human rights. As the number of migrants and asylum seekers continues to rise, the need to balance the protection of national security interests with respect for international asylum obligations, such as the Geneva Convention and the ECHR, has become the subject of intense debate. While the 1949 Geneva Conventions²⁵ remain central to international humanitarian law in armed conflict situations, protection against expulsion and return in peacetime is primarily governed by the 1951 Geneva Refugee Convention (Article 33) and by human-rights instruments such as the ECHR (Article 3), the International Covenant on Civil and Political Rights (ICCPR) (Article 7), and the Convention Against Torture (Article 3). Therefore, in this chapter, the analysis of non-refoulement is grounded in the 1951 Convention and international human rights law, while recognising that the 1949 Geneva Conventions acquire direct relevance when expulsion measures overlap with armed conflict contexts.²⁶

Discussions on the effectiveness of the current legal framework focus on the need to establish a system that addresses both the obligation to protect individuals fleeing persecution and the capacity of states to manage migration in a manner that does not compromise their sovereignty. This issue also touches upon the question of burden-sharing among EU Member States and the necessity for a more equitable common migration policy. The current situation highlights the urgent need to strike a balance between migration control and the protection of individual rights – an

25 The Geneva Conventions of 12 August 1949.

26 Okolski, 2000, pp. 329–341; Kahanec and Zimmermann, 2010, pp. 63–94.

ongoing challenge that requires continuous dialogue and updating of legal provisions in response to shifting geopolitical realities.²⁷

Article 4 of Protocol No. 4 of the ECHR prohibits the collective expulsion of foreigners, establishing the principle that each migrant's case must be examined individually to ensure full respect for their rights. However, in practice, the increasing number of people arriving at Europe's borders puts pressure on states, prompting them to implement various migration control strategies. One such measure involves the so-called push-backs – the forced return of migrants across the border without the prior opportunity to file an asylum application or undergo an individual assessment of their situation. These practices have faced criticism from stakeholders in human rights organisations, who argue that such actions violate individuals' rights to a fair asylum procedure and access to international protection. Critics contend that push-backs pose a significant threat to the fundamental rights of migrants, depriving them of the right to an individualised assessment, which can lead to inhumane and degrading consequences, particularly when individuals are returned to countries where their safety is at risk.²⁸

The ECtHR's case law on deportations and expulsions, such as in *Conka v. Belgium* and *Hirsi Jamaa and Others v. Italy*, emphasises the necessity of respecting individual rights, even in the context of measures undertaken by states in public interest. In analysing these cases, the ECtHR highlights key principles that states must adhere to when implementing deportation measures, including proportionality, individualised consideration, and the guarantee of procedural fairness. These rulings delineate the boundaries within which states may operate, while avoiding disproportionate and arbitrary interference with human rights. The case *Conka v. Belgium* underscored the importance of transparency and fairness in asylum procedures, indicating that deceptive practices and the absence of a thorough assessment of individual circumstances violate the rights of foreigners. By contrast, the ruling in *Hirsi Jamaa and Others v. Italy* established a critical precedent, reminding states that the protection of migrants' rights does not end at national borders but requires adequate procedural safeguards, even in actions taking place at sea or in third countries. The conclusions drawn from these judgments strengthen international standards for the protection of migrants, affirming that states cannot evade their responsibility for the rights of asylum seekers by transferring them to third countries without a comprehensive risk assessment. The ECtHR's rulings emphasise that while migration control is important for public security, it must be carried out in a manner that respects fundamental human rights, striking a balance between public interest and the protection of individuals. Thus, the ECtHR sets clear limits to ensure that legitimate migration control measures do not become abuses but remain consistent with the principles of international law.²⁹

27 Ohlsson, 2015; Garlick, 2016; Mavropoulou, 2021.

28 Augustová, 2023.

29 Karageorgiou, 2013; Smouter, 2015.

In the face of an escalating migration crisis, the EU has introduced the new Pact on Migration and Asylum, aimed at modernising the existing framework and implementing a more effective EU migration and asylum policy.³⁰ The Pact sets out a framework on migration and asylum developed by EU Member States. Importantly, it focuses on elements essential for holistic migration management that is both humane and effective. One of the key components of this initiative is the European Commission's proposal to standardise border procedures, subjecting all third-country nationals without authorisation to pre-entry checks to enter EU Member States. Equal emphasis is placed on integrated and unified border management. This involves enhanced cooperation through the establishment of a special Schengen forum by the European Commission, with full participation from the Ministries of Interior and border police forces. The new Pact on Migration and Asylum underscores the importance of solidarity among Member States receiving the highest number of immigrants. The European Commission outlined the measures that should be undertaken by Member States to assist a country struggling with an excessive influx of immigrants. Primarily, it proposes the relocation of a portion of asylum seekers to alleviate pressure on the most affected states. Alternatively, Member States may assume responsibility for the repatriation of individuals who do not meet the requirements to remain in the EU. Additionally, operational support is envisaged, including the deployment of personnel and logistical resources for border control, as well as cooperation with countries of origin to limit the inflow of migrants. A crucial element of the Pact is also the financial support provided for the most burdened countries, proportionate to their capacities, measured by gross domestic product and population size. The next step envisioned by the Pact is attracting highly skilled migrants from third countries, aimed at addressing labour shortages in EU Member States and countering the effects of population aging in Europe. As part of these efforts, the finalisation of the reform of the EU Blue Card Directive, the creation of an EU Talent Pool, and changes to long-term residence regulations are planned to facilitate legal migration. Cooperation with third countries, based on a flexible approach, is also intended to support migration management by combating migrant smuggling, improving the readmission system, and establishing legal migration pathways. The so-called Talent Partnerships are of particular importance, aimed at better matching job opportunities with the skills of migrants, thus contributing to labour market strengthening and social integration.³¹

In summary, it is crucial to underscore the complexity of the challenges faced by the EU in managing migration and asylum, particularly in light of the increasing influx of migrants driven by conflicts, persecution, and economic disparities. A key feature of the new approach is the effort to strike a balance between effective border control and adherence to international legal obligations, such as the Geneva Convention and the ECHR. The new Pact on Migration and Asylum emphasises solidarity among Member States, proposing mechanisms for relocation and repatriation, as

30 European Parliament, 2024.

31 Pietrzak, 2021, pp. 137–151.

well as operational and financial support for the most burdened countries. These initiatives aim not only to address the immediate challenges posed by migration but also to facilitate the long-term attraction of skilled workers and the development of partnerships with third countries, which will strengthen the labour market and help counter the effects of population aging in Europe. The analysis highlights that continuous dialogue and legal updates are necessary to ensure effective, humane, and human rights-compliant migration management, taking into account both public interest and the individual needs of those seeking protection. It is also significant that every EU Member State is simultaneously a member of the CoE, presenting an additional challenge of ensuring regulatory balance and consistency between these two international legislative bodies. It appears that the EU, in its efforts on asylum and migration, is attempting to create a fair system that aligns with the standards established by the CoE, aiming for their practical application in the current circumstances in Europe. Only time will tell if the new Pact on Migration and Asylum can be seen as a genuine adaptation of CoE requirements and standards to the current situation within the EU.

4. Procedural Safeguards Relating to the Expulsion of Aliens

4.1. Article 1 of Protocol No. 7 of the ECHR

Article 1 of Protocol No. 7 to the ECHR constitutes a significant extension of the existing measures protecting the rights of foreign nationals, introducing procedural safeguards in cases of expulsion decisions from the territory of a CoE Member State. This provision was designed to complement the already binding provisions of the ECHR, such as the prohibition of inhuman and degrading treatment (Article 3 ECHR) and the right to respect for private and family life (Article 8 ECHR). Its primary purpose is to ensure minimum procedural standards aimed at protecting against arbitrary decisions by the authorities and safeguarding the fundamental rights of foreign nationals who may be at risk of unfair treatment.³²

Article 1 of Protocol No. 7 to the ECHR applies exclusively to foreign nationals lawfully residing in the territory of Member States. Importantly, individuals who are present illegally cannot benefit from its safeguards unless their legal status is regularised in accordance with national regulations. This provision introduces three key procedural protections in the event of an expulsion decision. First, the foreign national has the right to present arguments against expulsion, allowing for individual consideration of circumstances such as the risk of persecution or threat to life in the destination country. Second, the expulsion decision must be reviewed by an independent authority, ensuring impartiality and fairness in the proceedings, thereby minimising the risk of abuse. Third, the foreign national has the right to legal

32 Karlsson, 2021.

representation, including the option to be assisted by a lawyer. Legal support enables an effective defence, increasing the likelihood of a fair assessment of the case.³³

The provision in question constitutes a vital element in the protection of the rights of foreign nationals lawfully residing in the territory of Member States. It introduces significant procedural guarantees aimed at preventing arbitrary expulsion decisions and ensuring a fair process. The provision mandates that any expulsion decision must be preceded by an opportunity for the foreign national to present their arguments; a thorough examination of the case by an independent authority; and the assurance of the right to representation and defence, including legal assistance.³⁴

While Article 1 of Protocol No. 7 provides essential procedural safeguards, it also includes exceptions that may apply in extraordinary circumstances. According to para. 2, states may decide to expel a foreign national without first allowing them to exercise their rights if required by national security or public order. However, such decisions must comply with the principle of proportionality and be based on a specific risk assessment, and the expelled individual should still have the opportunity to appeal the decision, even after leaving the state's territory. The introduction of Article 1 of Protocol No. 7 strengthens the system of protection for the rights of foreign nationals in Europe, promoting state accountability and raising the standards of procedural justice. This provision emphasises the individual examination of each case, aiming to prevent arbitrary and disproportionate actions by authorities. It serves as an important complement to other ECHR provisions, such as the prohibition of inhuman treatment (Article 3 ECHR) and the right to respect for private and family life (Article 8 ECHR).³⁵

The conclusions drawn from this provision indicate that in cases of expulsion of foreign nationals, states must adhere to fundamental principles of procedural fairness. This article establishes clear legal standards obliging states to ensure transparency and accountability in deportation proceedings. In doing so, it contributes to building trust in the European human rights protection system and strengthens the protection of individual rights, particularly in the context of migration.

4.2. Rights of Aliens Under Expulsion Orders

Deportation decisions concerning foreign nationals often carry the risk of violating their fundamental rights, particularly if made without appropriate procedural safeguards. In this context, the ECHR and other international legal instruments impose an obligation on states to uphold minimum standards for the protection of the rights of individuals facing expulsion.³⁶

Foreign nationals subject to expulsion orders have the right to a fair procedure and access to effective remedies. Under Article 13 of the ECHR, everyone whose rights

33 Wojnowska-Radzinska, 2017, p. 59.

34 Jabłoński, Węgrzyn and Rzucidło, 2011.

35 Goold, Lazarus and Swiney, 2007; Anastasopoulos, 2023, pp. 1–55.

36 Nafziger, 1983, pp. 804–847; Molnár, 2017, p. 40.

protected by the ECHR have been violated is entitled to an effective legal remedy before a competent national authority. In practice, this means that foreign nationals should have the opportunity to appeal against a deportation decision, and their case must be reviewed by an independent and impartial body. These procedures are essential to ensure that expulsion decisions are not arbitrary but instead take into account the individual's personal circumstances, based on a thorough and comprehensive assessment of their situation.³⁷

In the context of expulsion decisions involving foreign nationals, the right to respect for private and family life, as guaranteed by Article 8 of the ECHR, plays a significant role. The ECtHR has repeatedly emphasised that when making deportation decisions, authorities must consider the impact of such actions on the family life of the foreign national, particularly if they have strong ties to the host country, such as the presence of family, a partner, or children attending school. In cases where the foreign national is well integrated into the host country's community, an expulsion order may violate their right to family life. Failure to take into account substantial personal and social ties, as well as the possibility of the foreign national's integration, may result in a disproportionate interference with their family life, constituting a breach of the human rights protections provided by the ECHR.³⁸

The previously discussed prohibition of collective expulsion, set out in Article 4 of Protocol No. 4 to the ECHR, serves as a crucial pillar in the protection of the rights of foreign nationals, requiring that each case be assessed individually, without the use of simplified group procedures. This provision aims to prevent situations where expulsion decisions are made *en masse*, without consideration of the specific circumstances of each individual. Equally important is the principle of *non-refoulement*, recognised as a cornerstone of international law, which prohibits the return of individuals to countries where they may face torture or inhuman or degrading treatment. States are obliged to conduct a thorough risk assessment before making deportation decisions to avoid violations of fundamental human rights and ensure effective protection from persecution. The protection of the rights of foreign nationals at risk of expulsion is grounded in the commitment of CoE Member States to adhere to international human rights standards. Deportation decisions must be made in accordance with the applicable law, respecting the principle of proportionality and the full observance of individual rights. Failure to meet these requirements can lead to serious legal consequences, including state liability before the ECtHR, which has repeatedly underscored the necessity of upholding fundamental rights and procedural guarantees in deportation proceedings.³⁹

In summary, adherence to the principles of procedural fairness and human rights in expulsion processes not only contributes to the creation of a more balanced

37 Guild and Lesieur, 1998, pp. 313–318; Cuenca, 2012, pp. 449–466; Morawska, 2019, pp. 159–185.

38 Thym, 2008, pp. 87–112; Burbergs, 2013, pp. 315–329; Thym, 2014, pp. 106–144.

39 Lauterpacht and Bethlehem, 2003, pp. 87–177; Goodwin-Gill, 2017, pp. 187–208; Grześkowiak, 2018, pp. 199–217.

migration system but also reinforces trust in European standards of individual rights protection, forming the bedrock of a democratic legal order.

4.3. Case Law Review

In its analysis of cases involving the expulsion of foreign nationals, the ECtHR has placed particular emphasis on the need to adhere to international standards of individual rights protection and provide appropriate procedural safeguards. Cases such as *Jabari v. Turkey* and *Sisojeva and Others v. Latvia* highlight the importance of an individualised approach to each case and the necessity of a comprehensive risk assessment before considering expulsion.

The case *Jabari v. Turkey* involved an Iranian national who sought asylum in Turkey, fearing persecution and the threat of the death penalty for adultery.⁴⁰ Her application was rejected by the Turkish authorities due to late submission, without conducting a thorough examination of the arguments she presented and without granting her the opportunity to appeal the decision. Jabari argued that her expulsion to Iran would expose her to the risk of torture, inhuman treatment, or even execution. The ECtHR ruled that Turkey had violated Article 3 of the ECHR, which prohibits inhuman and degrading treatment, as well as Article 13, which guarantees the right to an effective remedy. The Court emphasised that the Turkish authorities had failed to conduct an adequate risk assessment regarding the potential consequences of her expulsion to Iran, thus breaching the principle of non-refoulement. This judgment serves as a significant reminder of the need to protect asylum seekers from deportation to countries where they may face serious human rights violations. The ECtHR clearly highlighted that states are obliged to ensure procedures that comply with international standards of individual rights protection, particularly by providing a thorough assessment of each case and the availability of effective remedies.

In the case *Sisojeva and Others v. Latvia*, the ECtHR examined issues related to the expulsion of a group of individuals who had resided in Latvia for many years but lacked formal legal status.⁴¹ The applicants, members of the Sisojev family, had arrived in Latvia during the Soviet era and remained there following the dissolution of the Soviet Union. Despite their long-term residence in the country, the Latvian authorities denied them the right to legal residency, which put them at risk of deportation. The applicants argued that the expulsion decision violated their right to respect for private and family life, as protected by Article 8 of the ECHR.

The ECtHR ruled that the actions of the Latvian authorities constituted a violation of Article 8 of the ECHR, as they failed to sufficiently consider the strong social and familial ties that the applicants had established during their extended stay in Latvia. The Court emphasised that expulsion decisions must be based on an individual assessment of each case, taking into account factors such as social integration, length of residence, and existing personal ties. In the case at hand, the deportation

40 *Jabari v. Turkey*, Application no. 40035/98, Judgment 11 July 2000.

41 *Sisojeva and Others v. Latvia* [GC], Application no. 60654/00, Judgment 15 January 2007.

order was deemed a disproportionate interference with the applicants' family life, leading to a breach of their fundamental rights. The ECtHR's judgment in *Sisojeva and Others v. Latvia* sets an important standard for the protection of the rights of foreign nationals who have resided in the host country for a long period. The Court reiterated that deportation decisions must respect the principle of proportionality and take into account the specific circumstances of the individual, including their social integration and family ties. This ruling underscores that arbitrary expulsion decisions, which do not fully consider the personal and social context, may result in serious human rights violations.

The analysis of the abovementioned cases demonstrates the importance of respecting international human rights standards in the context of expulsion decisions concerning foreign nationals. The ECtHR has made it clear that these proceedings must take into account the individual circumstances of each person and be based on a thorough risk assessment. The Court emphasised the need to apply the principles of non-refoulement and proportionality, particularly when deportation decisions may result in serious violations of individual rights. The ECtHR also set standards for the protection of private and family life, reminding states that arbitrary expulsions, which disregard long-standing social and familial ties, are incompatible with the ECHR. The conclusions drawn from these cases highlight that Member States are obligated to ensure procedures that are in line with their international commitments, providing effective legal protection and upholding the fundamental rights of foreign nationals.

5. Intersection With the Non-Refoulement Principle

5.1. Non-Refoulement Under the ECHR

The principle of non-refoulement is one of the cornerstones of the ECHR, offering protection to individuals who, if returned to their country of origin, may face serious human rights violations, such as torture or inhuman or degrading treatment. The foundation of this principle lies in Article 3 of the ECHR, which unequivocally prohibits any form of torture or cruel treatment. The ECtHR has consistently emphasised that this prohibition is absolute, meaning that no exceptions are permitted, even in cases where the expulsion of a foreign national is motivated by national security concerns. While the Court consistently treats Article 3 of the ECHR as absolute (non-derogable under Article 15), contemporary scholarship nuances its operation by focusing on scope and jurisdiction rather than balancing. Thus, debates concern extraterritorial application, the procedural intensity of risk assessment, and state practices of cooperative deterrence designed to avoid jurisdictional contact. Recent analyses have mapped how non-entrée measures challenge the effectiveness of non-refoulement without clear accountability chains, with a recommendation to reinforce access to territory and remedies. At the same time, the Court's Article 3 Guide reiterates the absolute character of the prohibition while refining evidentiary thresholds for risk. The principle of

non-refoulement is of particular importance for safeguarding individuals from deportation to countries where their life, health, or dignity may be at risk, thereby reinforcing the humanitarian dimension of international human rights protection. states have a duty to conduct a careful and comprehensive assessment of each case before making a decision on expulsion, to avoid the risk of violating fundamental rights.⁴²

This obligation requires states to thoroughly examine the circumstances of the individual facing deportation, taking into account the political and social contexts, as well as the risk of persecution in the destination country. An individualised assessment of each case is crucial to prevent expulsions that could lead to serious human rights violations. States must conduct a reliable risk assessment, guided by the precautionary principle, and consider up-to-date information about the situation in the country to which the person is to be returned. Failure to conduct such an analysis may result in disproportionate decisions that do not comply with international standards. Moreover, the principle of non-refoulement under the ECHR is closely linked to the right to an effective remedy, as guaranteed by Article 13 of the ECHR. Individuals at risk of expulsion must have a genuine opportunity to appeal the decision and present their arguments before an independent and impartial body. The appeal process must be transparent and fair to ensure protection against erroneous decisions and guarantee that each case is assessed thoroughly and in accordance with the principles of procedural fairness.⁴³

In practice, the principle of non-refoulement plays a fundamental role in the human rights protection system, obliging states to refrain from deporting individuals who may face serious danger in the destination country. The absolute nature of this prohibition means that states must comply with international human rights standards, regardless of national security considerations. This principle reflects the ethical and humanitarian commitment of the international community to ensure that no person is returned to a place where their life or health may be at risk, forming a crucial pillar of the global human rights system.

5.2. Case Law Review

The ECtHR has frequently had the opportunity to interpret and develop the principle of non-refoulement in its judgments, defining the limits that State Parties to the ECHR must not exceed when making expulsion decisions concerning foreign nationals. Cases such as *Soering v. the United Kingdom* and *Saadi v. Italy* have set standards for protection against expulsion in situations where there is a real risk of torture or inhuman or degrading treatment. The analysis of these cases helps clarify how the principle of non-refoulement has been reinforced under the ECHR framework and how it influences state actions, even in the context of national security concerns.

42 Allain, 2001, pp. 533–558; Arai-Yokoi, 2003, pp. 385–421; Palmer, 2006, pp. 438–452; Smet, 2013; Mavronicola, 2021, p. 224.

43 Cuenca, 2012, pp. 449–466; Lee, 2015, pp. 33–4.

The case *Soering v. the United Kingdom* concerned a German national, Jens Soering, who was accused of murder in the United States, where he faced the threat of the death penalty.⁴⁴ The British authorities agreed to extradite Soering to the United States; however, Soering lodged a complaint with the ECtHR, arguing that his extradition to a country where he could face the death penalty would violate Article 3 of the ECHR, which prohibits inhuman or degrading treatment. Soering contended that the prolonged psychological suffering caused by awaiting execution, known as the ‘death row phenomenon’, would amount to inhuman treatment due to the mental anguish associated with prolonged uncertainty. The ECtHR held that Soering’s extradition to the United States under these circumstances would indeed violate Article 3 of the ECHR, recognising that the death penalty and conditions accompanying it could lead to inhuman and degrading treatment. The Court emphasised that State Parties to the ECHR have an obligation to consider the potential risk of human rights violations before deciding on extradition. This judgment set an important precedent by extending protection against refoulement to cases where extradition could expose an individual to serious human rights violations, even when involving countries with well-developed legal systems.

Continuing the analysis of judgments related to the principle of non-refoulement, the case *Saadi v. Italy* is particularly noteworthy, as it deepened the discussion on the limitations imposed on states concerning the expulsion of foreign nationals in the context of national security threats.⁴⁵ The case *Saadi v. Italy* involved Nassim Saadi, a Tunisian national who had been convicted in Italy for involvement in terrorist activities and was subsequently subject to an expulsion order to Tunisia. Saadi argued that his deportation would expose him to the risk of torture and inhuman treatment in his country of origin, which would violate Article 3 of the ECHR. The ECtHR faced the challenging task of balancing the need to protect national security against the absolute prohibition of torture. The ECtHR ruled that the prohibition of inhuman and degrading treatment under Article 3 of the ECHR is absolute and admits no exceptions, even in cases involving individuals deemed a threat to national security. The Court held that concerns related to terrorism cannot justify deportation to a country where there is a real risk of torture. The judgment in *Saadi v. Italy* reinforced the protection standards under the principle of non-refoulement, highlighting the unconditional nature of Article 3 of the ECHR. The ECtHR emphasised that states must conduct a detailed assessment of the risk of human rights violations before expelling an individual, regardless of their criminal background or the potential threat they may pose. This case solidified the view that the right to protection from torture takes precedence over political or security considerations, establishing clear guidelines for states to follow to avoid human rights violations in the context of expulsions. Together with *Soering v. the United Kingdom*, the judgment in *Saadi v. Italy* establishes a clear boundary that states must not cross, even in the face of national security threats. Both

44 *Soering v. The United Kingdom*, Application no. 14038/88, Judgment 7 July 1989.

45 *Saadi v. Italy*, Application no. 37201/06, Judgment 28 February 2008.

cases underscore the importance of the principle of non-refoulement as a cornerstone of international human rights protection, reminding states of their responsibility to safeguard individuals from serious human rights violations, irrespective of the circumstances.

5.3. Meaning of Non-Refoulement Today

The significance of the principle of non-refoulement extends beyond the scope of the 1951 Geneva Convention relating to the Status of Refugees. Its reach encompasses a range of international legal instruments, such as the ICCPR⁴⁶ and the ECHR. The contemporary understanding of this principle confers upon it the status of a peremptory norm of international law (*ius cogens*). This means that adherence to non-refoulement is mandatory for all states, regardless of exceptional circumstances, such as a state of emergency or armed conflict, permitting no exceptions or derogations.⁴⁷

The contemporary understanding of the principle of non-refoulement has expanded significantly beyond the traditional protection of refugees, now also encompassing individuals who do not meet the formal criteria for refugee status but may face serious human rights violations in the country to which they are to be expelled. Interpretations of this principle, particularly as developed through international jurisprudence, including the ECtHR, recognise protection against deportation even for individuals at risk of torture or inhuman or degrading treatment. This approach underscores the humanitarian dimension of the principle of non-refoulement, highlighting its primary role as a guarantor of fundamental rights and freedoms, regardless of an individual's migration status.

One of the most significant challenges to the effective implementation of the principle of non-refoulement is the dilemma between the need to protect human rights and the imperative of ensuring national security. States often justify expulsion decisions by citing threats of terrorism or other serious risks to public order. Despite such arguments, the ECtHR consistently reiterates that the prohibition of torture and inhuman or degrading treatment is an absolute norm, which cannot be overridden by any considerations, including national security interests. In this context, the principle of non-refoulement serves as a crucial benchmark, reminding states that the protection of an individual's life and dignity takes precedence over political and security calculations, and that the obligation to uphold this norm remains inviolable. The principle of non-refoulement occupies a central place in the international human rights protection system, especially in light of contemporary migration challenges. It serves as a safeguard against expulsion to countries where there is a risk of serious human rights violations, making it a cornerstone of humanitarian migration policy. The development of international jurisprudence and the ongoing reinterpretation of this principle have significantly elevated its status, establishing it as one of the pillars

46 International Covenant on Civil and Political Rights, adopted on 16 December 1966 by General Assembly resolution 2200A (XXI).

47 Takács, 2022, pp. 75–93.

of international humanitarian law. It serves as a reminder to states of their absolute duty to protect asylum seekers, regardless of the political context or security-related concerns, underscoring the primacy of human rights over national interests.⁴⁸

In summary, the principle of non-refoulement extends beyond merely prohibiting the expulsion of individuals to countries where they may face serious danger; it also serves as a fundamental pillar of the human rights protection system. It is a mechanism that promotes fairness, justice, and respect for individual rights within migration procedures. Adherence to this principle is essential for building a coherent international framework for the protection of refugees and migrants, serving as an effective safeguard against arbitrary state decisions and ensuring that all deportation measures comply with the highest standards of international law.

6. Conclusion

The analysis presented above has yielded conclusions related to the issue of balancing state sovereignty with the scope of international obligations. These conclusions appear more appropriate than a traditional summary, which would merely reiterate the points made earlier. The issue of sovereignty versus international law in the field of human rights protection is a significant and pressing problem in the context of human rights implementation. In times of heightened mass obligations under international human rights law, many states invoke their sovereign prerogatives to either refuse or limit compliance with these obligations.

First, for most international obligations, invoking national security or public interest should suffice as a justified reason for derogation. Only a few human rights are considered non-derogable, and their scope should be subject to strict oversight by the international community. However, as revealed by this analysis, with each significant ECtHR judgment in this area, the Court has interpreted new positive or negative obligations for the states involved. While it is not claimed that these obligations are unjustified or purely creative, there is a concern whether the ECtHR takes into account the practical limits of each state in meeting increasingly stringent human rights standards within the CoE framework. Regarding derogable international obligations, it is important to note that while derogation is possible, it is contingent upon the existence of justifying conditions. Invoking national security or public interest in this context is an expression of state sovereignty, avoiding the need for more extreme measures.

Second, it is indeed true that some human rights obligations, as previously noted, are non-derogable. These obligations are generally absolute, and even the outbreak of an armed conflict, which typically suspends the human rights protection system and enforces international humanitarian law, does not affect their applicability. An example of such a legal norm is Article 15 of the ECHR, which lists Article 3 (the prohibition of torture) as a non-derogable obligation. Here, the reconciliation with state

48 Allain, 2001, pp. 533–558.

sovereignty becomes fundamentally complex. The act of binding oneself to a non-derogable international obligation is an expression of sovereignty. Should a state wish to disregard such a commitment, it essentially has three options: (1) withdrawal from the international obligation in accordance with international law norms; (2) deliberate non-compliance with the obligation, facing the consequences of such actions; or (3) attempting to influence the international interpretation of the legal norm and exerting pressure for possible legal changes. Given that the first and second options may lead to international isolation, the third option remains the most realistic.

Third, it is undeniable that committing to international human rights norms results in a reduction of state sovereignty. However, in the modern world, scarred by the horrors of wars – especially the First and Second World Wars – such a reduction was deemed necessary. The current challenge does not lie in the legal provisions themselves but in their interpretations, which often overlook the practical limits faced by individual states. This discrepancy fuels discussions about the feasibility of implementing these norms, leading to an erosion of the envisioned framework. This erosion is most evident when large numbers of people, invoking their rights enshrined in numerous European documents, arrive at the borders of Europe, and states find themselves unable to bear the burden. Consequently, mechanisms are introduced that result in the denial of these rights for various reasons – sometimes justified, sometimes less so, or not at all. Human rights and their application, enforcement, and realisation represent a significant step forward in civilisation, aimed at providing a specific set of rights to every individual simply by virtue of being human. In this sense, international human rights law can be viewed as a constraint on national sovereignty, but this constraint is not negative; it is grounded in humanitarian and human considerations. Nation-states voluntarily and in good faith agree to participate actively in the global human rights protection system. Furthermore, this limitation on sovereignty is stringent only in the case of non-derogable obligations, where national security or public interest cannot be invoked as grounds for exemption.

Nevertheless, this does not mean that there are no problems. The issue lies in the overly expansive interpretation of international obligations by the authorised bodies. The analysis presented here has effectively demonstrated how many additional obligations, not explicitly stated in the ECHR, have been identified by the ECtHR in its jurisprudence, adding further layers of burden to the human rights protection framework. This framework now appears heavily strained, and it would be reasonable to seek legal means of alleviation, consistent with international law and human rights. One example of such an approach could be to focus on the requirements that individuals requesting or demanding their rights within the ECHR's jurisdiction must meet. Emphasising individual responsibilities, rather than solely focusing on state obligations, could significantly alleviate challenges to the system in times of crisis. However, such interpretations fall under the jurisdiction of the ECtHR, which should consider this as a desirable direction for legal interpretation. Nonetheless, it must be clearly stated that the potential application of the principle of reciprocity – known in international law – would neither be possible nor desirable in the context of human

rights protection, as it would effectively undermine the entire human rights protection framework.

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Concluding Reflections on the Central and Eastern European Region and the European Court of Human Rights

Enikő KRAJNYÁK

ABSTRACT

This chapter offers concluding reflections on the evolving relationship between Central and Eastern European (CEE) states and the European Court of Human Rights (ECtHR). Drawing on the jurisprudence of the Strasbourg Court, it examines this relationship by exploring how cases originating from the region have influenced the development of the ECtHR's jurisprudence, introducing new thematic concerns and doctrinal refinements. Through a synthesis of the jurisprudence of the Strasbourg Court, the chapter aims to identify common patterns and possible divergences in this mutual interaction and reflects the ECtHR's dual role as both a transformative force in post-transition societies and a forum responsive to the region's specific legal and social challenges.

KEYWORDS

European Court of Human Rights, Central and Eastern Europe, human rights, margin of appreciation.

1. Introduction

The collapse of the communist regimes in Central and Eastern European states in the late 1980s and early 1990s marked not only a profound political and economic transformation at the domestic level but also a pivotal moment for the development of the European human rights regime at the international level. With the accession of post-socialist countries to the Council of Europe in the 1990s and 2000s, the Convention for the Protection of Human Rights and Fundamental Freedoms – also known as the European Convention on Human Rights (ECHR)¹ – evolved from a legal instrument once limited to a handful of Western European states into a continent-wide framework for human rights protection. This expansion also raised the need for the

| 1 Council of Europe, 1950. |

| Enikő Krajnyák (2026) 'Concluding Reflections on the Central and Eastern European Region and the European Court of Human Rights' in Paczolay, P. (ed.) *The European Convention on Human Rights A Central and Eastern European Perspective*. Miskolc–Budapest: Central European Academic Publishing, pp. 727–755. https://doi.org/10.71009/2026.pp.tecohrr_22 |

redefinition and reinterpretation of the role of the European Court of Human Rights (ECtHR), as the guardian of human rights in a pan-European context, leading to major reforms in the Convention system and the functioning of the ECtHR.

This chapter offers concluding reflections on the evolving relationship between Central and Eastern European (CEE) states and the ECtHR.² It examines, first, the impact of the enlargement of the Council of Europe with the former socialist countries on the structure and jurisprudence of the ECtHR, introducing new themes and doctrinal refinements in its case law, and second, how the Strasbourg Court's evolving case law shaped the interpretation of human rights across Central and Eastern Europe through relevant pilot judgment procedures and a country-by-country analysis. The examination of the key jurisprudential patterns of cases originating from the CEE region contributes to deepening the understanding of region-specific human rights challenges as well as the role of the examined countries in the development of the ECtHR's case law and their implications for the Court's broader jurisprudence.

2. The CEE Region and the ECtHR in a Historical Context

As noted above, the 1990s and 2000s witnessed the enlargement of the Council of Europe with former socialist countries. The democratic transition, which took place in the majority of CEE states in the 1990s, marked the region's departure from decades of authoritarian rule and its reintegration into the European political and legal space. Accession to the Council of Europe was both a symbolic and strategic milestone in the democratic consolidation of CEE states, as membership required adherence to the principles of the rule of law and the enjoyment by all persons within the state's jurisdiction of human rights and fundamental freedoms.³ In addition, members are required to collaborate sincerely and effectively in the realisation of the aim of the Council, which is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles that are their common heritage and facilitating economic and social progress.⁴ Importantly, the ratification of the ECHR and the recognition of the compulsory jurisdiction of the ECtHR became essential components of this process.

The accession of CEE states to the ECHR was not the result of a single, unified enlargement but rather a gradual process reflecting the diverse political and legal trajectories of the states concerned. Remarkably, Hungary was the first state to sign the Convention among the examined countries in 1990, followed by the Czech Republic, Poland, and the Slovak Republic in 1991, and Bulgaria in 1992. Romania and Slovenia signed the ECHR in 1993. Although the Baltic countries do not fall under the scope of

2 The international law perspectives of the Central European region were addressed in Raisz, 2022; and the role of the ECHR in the region was analysed in Paczolay, 2022.

3 Statute of the Council of Europe, 1949, Art. 3.

4 Statute of the Council of Europe, 1949, Art. 1.

the present research, it is worth mentioning that Estonia and Lithuania also joined the Convention this year, followed by Latvia in 1995. Albania, the Republic of Moldova, North Macedonia, and Ukraine signed the Convention in the same year, followed by Croatia and the Russian Federation in 1996, the latter denouncing the treaty in 2022.⁵ Georgia's signature dates back to 1999, followed by that of Armenia and Azerbaijan in 2001, Bosnia and Herzegovina in 2002, Montenegro and Serbia in 2003.⁶

Thus, the successive accessions of CEE states in the 1990s and early 2000s were not merely incremental; they fundamentally reshaped the composition of the Council of Europe. Taken together, these states account for nearly half of the organisation's current forty-six member states, underscoring the scale of the post-communist enlargement and its enduring significance for the ECHR system as a whole.

The importance of the enlargement process was marked by the first-ever meeting of the heads of state of Council of Europe Member States in 1993 in Vienna since its founding in 1949. The Vienna Declaration, adopted at the summit, provided that

‘[t]he end of the division of Europe offers an historic opportunity to consolidate peace and stability on the continent. All our countries are committed to pluralist and parliamentary democracy, the indivisibility and universality of human rights, the rule of law and a common cultural heritage enriched by its diversity, Europe can thus become a vast area of democratic security’.⁷

The document further recognised that the Council of Europe has a pre-eminent role in assisting ‘the democracies of Europe freed from communist oppression’ in the democratic transition, and reaffirmed the accession criteria of the Council of Europe, which entails that the applicant state has brought its institutions and legal system in line with the basic principles of democracy, the rule of law, and respect for human rights; guarantees of free and fair elections based on universal suffrage, freedom of expression, protection of national minorities and observance of the principles of international law, and the signature of the ECHR and the acceptance of its supervisory mechanism in its entirety.⁸

The enlargement of the Council of Europe was, at its core, a political process, also marked by scepticism about the pace and depth of the democratic transition in the newly acceding countries. Remarkably, Peter Leuprecht, Deputy Secretary-General of the Council of Europe, resigned from this position in 1997, based on the dilution of the standards of accession.⁹ Leuprecht argued that the Council of Europe had lowered its standards for admission as part of an opportunistic policy of admitting new Member

5 For a detailed overview of the troubled relationship between the Council of Europe and the Russian Federation, see: Bates et al., 2025.

6 See: Council of Europe, 2025.

7 Vienna Declaration, 1993, Preamble, Recital 2.

8 Vienna Declaration, 1993, Recital 7.

9 Li-Jing, 2003, p. 24.

States that did not comply with these criteria.¹⁰ Nonetheless, the enlargement certainly strengthened the legitimacy of the Convention system, as it reinforced its status as the primary human rights instrument on the continent by extending membership to CEE countries.¹¹

While the arguments in favour of the enlargement process ultimately prevailed, the organisation entered a new phase of its institutional development, one that required significant structural and procedural reforms. The most emblematic of these challenges was the adoption of Protocol 11 (1998) to the ECHR, which fundamentally transformed the monitoring system by establishing a permanent Court, abolishing the European Commission on Human Rights, and granting individuals direct access to the complaint mechanism, thereby strengthening judicial capacity in the face of the increasing caseload.¹² The reform of the control mechanism of the Convention was also envisaged in the above-mentioned Vienna Declaration, noting that

‘[s]ince the Convention entered into force in 1953 the number of Contracting States has almost tripled and more countries will accede after becoming members of the Council of Europe. We are of the opinion that it has become urgently necessary to adapt the present control mechanism to this development in order to be able to maintain in the future effective international protection for human rights. The purpose of this reform is to enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection’.¹³

Similarly, the Preamble of Protocol 11 also explained its adoption by the ‘urgent need to restructure the control machinery [...] mainly in view of the increase in the number of applications and the growing membership of the Council of Europe’.¹⁴

Therefore, it can be concluded that the enlargement of the Council of Europe with CEE countries was a decisive factor in the major institutional reform of the control mechanism of the ECHR. The admission of these states in the 1990s and early 2000s marked a turning point in the organisation’s history, transforming it from a Western European community to a pan-European one. Similarly, the position of the ECHR, the major human rights convention adopted under the organisation’s framework, was also solidified as the primary human rights instrument in Europe. The adoption of Protocol 11 to the Convention was both a response and a consequence of this enlargement, as it replaced the former dual system of the Commission and the Court by a single European Court of Human Rights, and expanded individual access, thus marking a new era in the Court’s history.

10 Leuprecht, 1998, p. 329.

11 For an overview on the accession process, see: Bates, 2010, pp. 449–463.

12 Paczolay, 2025, pp. 32–33. See also: Drzemczewski, 1999.

13 Vienna Declaration, 1993, Appendix I.

14 Protocol No. 11, 1998, Preamble.

However, it should also be emphasised that the enlargement of the Council of Europe was not the only driver of these institutional changes. The two-tier control mechanism of the Convention had been subject to debates among the Contracting States even before the regime change; the successive accessions of the 1990s intensified the discussions on the future of the Convention system.¹⁵ The enlargement, therefore, was a catalyst for such institutional changes, strengthening the role of the Court as a ‘quasi-constitutional court’, as noted by Judge Rolv Ryssdal, former President of the ECtHR.¹⁶

3. The Development of the ECtHR’s Jurisprudence through CEE Cases

3.1. CEE Cases in the Pilot Judgment Procedure

The accession of CEE states to the Convention not only prompted major institutional reforms, notably through the mentioned Protocol, but also had a profound impact on shaping the Court’s jurisprudence, introducing new legal questions, themes, and challenges that became central to the Strasbourg Court’s case law.¹⁷ Therefore, the next paragraphs are dedicated to a brief overview of the key case patterns the Court faced after the accession of the examined CEE countries.

On several occasions, pilot judgments have been particularly important in addressing structural problems that affect a large number of applicants from a given country. Although the pilot judgment procedure was formally not introduced in response to cases from CEE countries,¹⁸ it quickly proved to be highly relevant for the region, as the Court faced a surge of repetitive applications arising from systemic problems in the given states. The pilot judgment procedure, as established in Rule 61 of the Rules of the Court,¹⁹ allows the Court to initiate a pilot judgment procedure of its own motion or at the request of the parties in cases where the facts of the application reveal the existence of a structural or systemic problem which has given rise or may give rise to similar applications.²⁰

The first pilot judgment case, *Broniowski v. Poland*, originated from the CEE region, highlighting the relevance of the procedure for addressing systemic challenges

15 Seymour, 1993, pp. 252–259.

16 Ryssdal, 1996, p. 29. In addition, the Court also refers to the Convention as a ‘constitutional instrument of European public order’. Although the ECtHR has an outstanding role in safeguarding human rights across Europe, it does not have formal constitutional powers. See: *Loizidou v. Turkey*, Application no. 15318/89, Judgment of 23 March 1995, para. 75. See also: Ulfstein, 2021; Greer and Wildhaber, 2013.

17 On this matter, see: Baka, 2018.

18 Nonetheless, some scholars establish a clear link between the enlargement of the Council of Europe, the increasing caseload of the Court, and the application of the pilot Judgment procedure. See, for instance, Fynys, 2011, pp. 1231–1233; Sadurski, 2009, p. 397. See also: Haider, 2013. On the role of the pilot Judgment procedure in the Court’s jurisprudence, see: Buyse, 2016.

19 Rules of the Court, 2025.

20 See: Rules of the Court, 2025, Rule 61. See also: Degener, 2020.

emerging in the region. In this case, the structural problem originated from the deficiencies of the compensation system for Polish citizens who had been repatriated after the border adjustments in the aftermath of World War II. The deficiency affected nearly 80,000 people who did not receive a compensatory property for the properties they were forced to abandon on the territory of current Ukraine, Belarus, and Lithuania.²¹ In conclusion, the Court found that the applicant's entitlement to obtain compensatory property constituted 'possessions' for the purposes of Article 1 of Protocol 1, and established a violation of the mentioned right. In addition, the Court ordered the respondent state to adopt general measures to remedy the systemic defect that established the Court's finding of a violation.²²

Regarding the right to property, the Court received a high number of applications addressing the restitution of the properties nationalised during the communist regime. During the post-communist transition, restitution of previously nationalised property played a significant role in the privatisation or reprivatisation of the economies of CEE countries. As Emőd Veress points out, unlike its predecessors in legal history, Soviet-style nationalisation entailed expropriation that eschews well-established fundamental principles, such as the principle of just and preliminary compensation; in short, it could be explained as illegal mass expropriation.²³ The Court received a significant amount of complaints under Article 1 of Protocol 1 (the right to property); however, the temporal scope of the ECHR was a decisive factor, as the Court may not deal with applications addressing human rights violations that occurred before the respondent state was party to the Convention. Nonetheless, the Court found a violation of the right to property in cases concerning failure to respect the *res judicata* effect of a final judgment, resulting in the annulment of the applicant's property title without compensation. This was the case, for instance, in *Parvanov and Others v. Bulgaria*, in which the Court addressed protection from arbitrariness.²⁴ Furthermore, in the specific context of the restitution of nationalised properties in Romania, the Court found a violation of Article 6 (the right to a fair trial) for the lack of legislative coherence and the conflicting case law at the domestic level on the interpretation of certain aspects of the restitution laws in *Tudor Tudor v. Romania*.²⁵

Nonetheless, the Court identified the ineffectiveness of the system of compensation or restitution as a structural problem in Romania, in cases where applicants complained of the delays in the domestic authorities' decisions on restitution or compensation for property nationalised or confiscated by the state before 1989. In the pilot judgment of *Maria Atanasiu and Others v. Romania*, the Court established the violation of the right to property, and ruled that the state had the obligation to adopt general

21 See: Szemesi, 2014, pp. 246–248.

22 *Broniowski v. Poland*, Application no. 31443/96, Judgment of 22 June 2004, para. 193.

23 Veress, 2025, p. 478.

24 *Parvanov and Others v. Bulgaria*, Application no. 74787/01, Judgment of 7 January 2010, paras. 44 and 50.

25 *Tudor Tudor v. Romania*, Application no. 21911/03, Judgment of 24 March 2009, para. 27.

measures in order to secure effective and rapid protection of the right to restitution.²⁶ In accordance with the pilot judgment, the Romanian Parliament adopted a law on the finalisation of the process of restitution or compensation in respect of immovable property that wrongly passed into state ownership during the communist regime, which the Court found to offer an accessible and effective framework of redress for the alleged violations in a follow-up judgment, *Preda and Others v. Romania*.²⁷ However, in *Valeanu and Others v. Romania*, the Court found that the restitution mechanism had fallen short of being comprehensively effective and convincingly consistent, and thus found a violation of the right to property.²⁸ These cases highlight the critical role of the Strasbourg Court in addressing structural flaws within the transitional period. Although serious violations persisted in the follow-up judgments as well, the Romanian pilot judgment case nonetheless proved instrumental in addressing a systemic problem to ensure the effective protection of property rights.²⁹

Similar to the Romanian restitution cases, the Court also initiated a pilot judgment procedure in connection with the structural problems in the compensation system in Albania. In *Manushaqe Puto and Others v. Albania*, the applicants complained of the state's systemic failure to enforce property restitution and compensation for properties confiscated under the communist regime, violating the right to a fair trial under Article 6, the right to an effective remedy under Article 13 of the ECHR, and the protection of the property under Article 1 of Protocol 1. The Court ordered the state to take general measures to effectively secure the right to compensation within eighteen months from the date on which the judgment became final, and, as a matter of priority, to apply other alternative forms of compensation, instead of financial compensation.³⁰ The adequacy of the scheme introduced by Albania to address the systemic deficiency was subsequently confirmed by the Court in *Beshiri v. Albania* in 2020.³¹

Furthermore, a specific set of cases emerged from the systemic problems in the repayment scheme for foreign currency deposited before the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). The first pilot judgment procedure was initiated in *Suljagic v. Bosnia and Herzegovina*, in which the applicant complained of the failure to issue state bonds deposited in Bosnian banks after emergency measures introduced by the state following a monetary crisis in the 1980s. The restrictions

26 *Maria Atanasiu and Others v. Romania*, Application no. 30767/05, Judgment of 12 October 2010, paras. 178–194. See also: Verga, 2020, pp. 42–43.

27 *Preda and Others v. Romania*, Application no. 9584/03, Judgment of 29 April 2014, paras. 114–118.

28 *Valeanu and Others v. Romania*, Application no. 21701/16, Judgment of 8 November 2022, para. 262.

29 See also: Györgyjakab, 2025.

30 *Manushaqe Puto and Others v. Albania*, Application no. 604/07, Judgment of 31 July 2012, paras. 109–121.

31 *Beshiri and Others v. Albania*, Application no. 7352/15, Decision of 17 March 2020, para. 215. on the challenges and developments regarding the compensation scheme in Albania, see: Ollashi and Hoxha, 2023, pp. 79–82.

remained in force after the dissolution of the SFRY and the declaration of independence of Bosnia and Herzegovina, the outbreak of the Bosnian War, and the subsequent economic reforms. Considering that this case was similar to more than 1,350 applications pending at the time, the Court instituted a pilot judgment procedure and ordered the state to ensure that the government bonds were issued, outstanding instalments were paid, and that, in case of late payment, default interest was also paid.³² Based on the adequacy of the subsequent measures, the Court considered the matter to be resolved and closed the pilot judgment procedure in *Zadric v. Bosnia and Herzegovina*.³³

The *Suljagic* judgment was also remarkable for establishing that the ‘old’ foreign-currency savings constituted ‘possessions’ under Article 1 of Protocol 1, considering that the state had a legal duty to repay such savings in locally based commercial banks, and that the applicant had a claim amounting to a ‘possession’ under the mentioned provision.³⁴ This conclusion was confirmed in the subsequent pilot judgment of *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and ‘the Former Yugoslav Republic of Macedonia’*, in which the applicants complained of the failure of the Serbian and Slovenian governments to include them in their schemes for the repayment of ‘old’ foreign-currency savings, similar to the *Suljagic* case. The Court considered the application of the pilot judgment procedure appropriate in this case as well, taking into account that more than 1,850 applications were pending before it, based on a similar factual background.³⁵ The general measures requested by the Court in the pilot judgment were found to meet the criteria in both states in the subsequent cases of *Muratovic v. Serbia*³⁶ and *Hodzic v. Slovenia*.³⁷

The abovementioned cases demonstrate that the pilot judgment procedure became a crucial tool in addressing structural problems regarding restitution and compensation inherited from the period of democratic transition from communist regimes. Beyond the landmark case *Maria Atanasiu and Others v. Romania*, similar issues emerged in countries undergoing post-communist transitions, where unresolved restitution claims and compensation schemes generated thousands of repetitive applications. In addition, pilot judgments were made concerning ‘old’ foreign currency savings from the former SFRY, such as the *Suljagic* and *Ališić* cases. These judgments and the follow-up procedures demonstrated the Court’s capacity to manage systemic human rights violations affecting thousands of applicants, incentivising domestic reforms. The abovementioned cases form a distinct category in the Court’s

32 *Suljagic v. Bosnia and Herzegovina*, Application no. 27912/02, Judgment of 3 November 2009, paras. 63–65.

33 *Zadric v. Bosnia and Herzegovina*, Application no. 18804/04, Decision of 16 November 2010.

34 *Suljagic v. Bosnia and Herzegovina*, Application no. 27912/02, Judgment of 3 November 2009, paras. 34–36.

35 *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and ‘the Former Yugoslav Republic of Macedonia’*, Application no. 60642/08, 16 July 2014, paras. 62–64; paras. 96–101. See also: Petrov and Plavšić, 2025, p. 469.

36 *Muratovic v. Serbia*, Application no. 41620/07, Decision of 21 March 2017, paras. 17–20.

37 *Hodzic v. Slovenia*, Application no. 3461/08, Decision of 4 April 2017, paras. 20–23.

jurisprudence: while other pilot judgments have addressed issues affecting a wider range of states, as presented below, also including Western European states, property restitution and currency deposit disputes were specific to the post-communist transition of CEE countries.

Other sets of pilot judgments relevant for the region concerned inhuman or degrading conditions of detention, and the excessive length of proceedings and the lack of a domestic remedy. Therefore, the following paragraphs will be dedicated to a short overview of the key pilot judgments affecting CEE countries.

The inhuman or degrading conditions of detention have been subject to several pilot judgment cases, starting with *Ananyev and Others v. Russia* in 2012. Systemic problems were further identified with the Bulgarian, Hungarian, Romanian, and Ukrainian prison systems, particularly with the conditions of detention. In the pilot judgment of *Neshkov and Others v. Bulgaria*, the complaint specifically concerned the remedies for those prisoners who wished to challenge their detention conditions.³⁸ However, as of September 2025, the Court had not closed the follow-up procedure.³⁹ Furthermore, in *Varga and Others v. Hungary*, the applicants complained of inadequate prison conditions, such as the lack of personal space, restrictions on access to shower facilities and outdoor activities, and a lack of privacy when using sanitary facilities. The Court considered that such breaches originated in a widespread problem regarding the safeguards of the Hungarian prison system, supported by approximately 450 similar applications filed to the Court at that time.⁴⁰ Regarding the general measures ordered by the Court to address the situation, the Hungarian Parliament adopted a new law and further action plans, which the Court considered satisfactory to provide redress for the violations of the prohibition of inhuman or degrading treatment originating in prison overcrowding and other unsuitable detention conditions in Hungary.⁴¹

Furthermore, overcrowding and the material conditions of the detention were addressed in *Rezmives and Others v. Romania*.⁴² The ECtHR issued a pilot judgment to address these systemic problems and required Romania to implement general measures to improve detention conditions, which were later addressed in *Polgar v. Romania*⁴³ and *Vlad v. Romania*.⁴⁴ In addition, the conditions of pre-trial detention were challenged in *Sukachov v. Ukraine*; however, the Court has not found the situation to be resolved.⁴⁵ The human rights guarantees of the conditions of detention have been subject to an extensive case law in the Strasbourg Court's jurisprudence,

38 *Neshkov and Others v. Bulgaria*, Application no. 36925/10, Judgment of 27 January 2015, paras. 9–70.

39 Pilot Judgments, 2023, p. 14.

40 *Varga and Others v. Hungary*, Application no. 14097/12, Judgment of 10 March 2015, paras. 114–116.

41 See: *Domján v. Hungary*, Application no. 5433/17, Decision of 14 November 2017, paras. 19–30.

42 *Rezmives v. Romania*, Application no. 61467/12, Judgment of 25 April 2017.

43 *Polgar v. Romania*, Application no. 39412/19, Judgment of 20 July 2021.

44 *Vlad v. Romania*, Application no. 40752/15, Judgment of 5 July 2022.

45 Pilot Judgments, 2023, p. 18.

as a key challenge under Article 3 of the Convention.⁴⁶ However, as noted above, this challenge is not region-specific, as the Court also identified it as a structural and systemic problem in *Torreggiani and Others v. Italy*⁴⁷ and *W.D. v. Belgium*.⁴⁸ In addition, other pilot judgment cases, such as *Kurić and Others v. Slovenia*, *Wałęsa v. Poland*, *Olaru and Others v. the Republic of Moldova*, and *Yuriy Nikolayevich Ivanov v. Ukraine* illustrate human rights issues specific to the given country, thus they will be discussed in the section on the country-by-country analysis.

Similarly, the excessive length of proceedings and the lack of domestic remedies can also be considered as an enduring issue affecting the right to a fair trial and the right to an effective remedy. The pilot judgments from the CEE region included *Dimitrov and Hamanov v. Bulgaria and Finger v. Bulgaria*,⁴⁹ *Rutkowski and Others v. Poland*,⁵⁰ and *Gazsó v. Hungary*.⁵¹ Systemic deficiencies regarding the length of judicial proceedings were also pointed out in connection with Germany, Greece, or Turkey.⁵² Additionally, the systemic problems regarding the right to a fair trial are also shown in the statistics of the Court, in particular, by the fact that most violations are found under Article 6 of the Convention.⁵³

Taken together, these examples demonstrate that pilot judgments concerning detention conditions and the excessive length of proceedings addressed structural deficiencies common across Europe, and do not necessarily represent region-specific human rights challenges. Nonetheless, based on the above analysis, it can be concluded that the ECtHR's jurisprudence had a transformative impact on the domestic legislation in the Contracting States. Ultimately, the case law examples show that the pilot judgment procedure became not merely a procedural tool in the Court's control mechanism but a central element in its responses to systemic human rights challenges, within and beyond the CEE region.

3.2. Country-specific Cases in the ECtHR's Jurisprudence

Having examined the pilot judgments that have played a central role in the Court's engagement with structural human rights issues in the CEE region, the analysis now proceeds to complement this regional perspective with a country-specific approach.

46 Pasat, 2022, pp. 200–203.

47 *Torreggiani and Others v. Italy*, Application no. 43517/09, Judgment of 8 January 2013.

48 *W.D. v. Belgium*, Application no. 73548/13, Judgment of 6 September 2016.

49 *Dimitrov and Hamanov v. Bulgaria*, Application no. 48059/06, Judgment of 10 May 2011. and *Finger v. Bulgaria*, Application no. 37346/05, Judgment of 10 May 2011.

50 *Rutkowski and Others v. Poland*, Application no. 72287/10, Judgment of 7 July 2015.

51 *Gazsó v. Hungary*, Application no. 48322/12, Judgment of 16 July 2015.

52 The pilot Judgment procedure was adopted in cases addressing the excessive length of proceedings in *Rumpf v. Germany*, Application no. 46344/06, Judgment of 2 September 2010; *Athanasίου and Others v. Greece*, Application no. 50973/08, Judgment of 21 December 2010; *Ümmühan Kaplan v. Turkey*, Application no. 24240/07, Judgment of 20 March 2012; *Michelioudakis v. Greece*, Application no. 54331/10, Judgment of 3 April 2012; *Glykantzi v. Greece*, Application No. 40150/09, Judgment of 30 October 2012.

53 European Court of Human Rights, 2024, p. 110; 2025, p. 36.

To shed further light on the ECtHR's jurisprudence on the region, the following section turns to a country-by-country overview of the Court's case law. This perspective helps to identify typical human rights challenges that emerge in the examined countries and to reveal regional patterns and emerging trends within the Court's jurisprudence for Central and Eastern Europe. The country-by-country overview will follow the chronology of each state's accession to the Convention, reflecting the historical expansion of the Convention system across the region.

3.2.1. Hungary

As noted above, Hungary was the first CEE country to sign the Convention in 1990, which became effective in 1992.⁵⁴ The first judgment delivered by the ECtHR concerning the country was *Rekvenyi v. Hungary*, adopted in 1999. The case addressed freedom of expression (Article 9) and freedom of assembly (Article 10) in the context of a prohibition on members of the police forces from joining political parties. The Court considered the country's experience with a totalitarian regime that relied on the political commitment of the members of the police to the ruling party, and the significance of depoliticising the police as a guardian of democratic institutions as decisive factors in establishing that the restrictions pursued a legitimate aim, and thus did not find a violation of the Convention.⁵⁵

Furthermore, a judgment of major importance was *Ilias and Ahmed v. Hungary*, adopted in 2019 by the Grand Chamber. This judgment is notable for establishing general principles for cases involving the removal of asylum seekers to third countries, without the authorities of the removing states assessing the merits of the asylum claim. The Grand Chamber found a breach of the prohibition of torture, inhuman or degrading treatment (Article 3) on procedural grounds; however, it overruled the point in the Chamber judgment that found a violation of the right to liberty (Article 5) for the holding of asylum-seekers in the so-called 'transit zone' between Hungary and Serbia, concluding that the applicants had not been deprived of their liberty.⁵⁶

In addition, a recent Hungarian case of major importance for the ECtHR's case law is *Karsai v. Hungary*, adopted in 2024. The case concerned end-of-life decisions and the alleged violation of the right to respect for private and family life (Article 8) in the case of a terminally ill person seeking to be assisted in dying with dignity. The Court confirmed its earlier case law on assisted dying, as established in *Pretty v. the United Kingdom*,⁵⁷ and left a 'considerable margin of appreciation' in the matter, considering that it raises extremely sensitive moral and ethical questions, on which opinions may profoundly differ across European countries.⁵⁸ Although the Court's approach in cases involving Article 8 may significantly change over time, the *Karsai* case will

54 For an overview of Hungary's engagement with the ECHR, see: Szabó, 2025.

55 *Rekvenyi v. Hungary*, Application no. 25390/94, Judgment of 20 May 1999, paras. 44–50; 58–62.

56 *Ilias and Ahmed v. Hungary*, Application no. 47287/15, Judgment of 21 November 2019, paras. 231–250.

57 *Pretty v. the United Kingdom*, Application no. 2346/02, Judgment of 29 April 2002.

58 *Karsai v. Hungary*, Application no. 5380/07, Judgment of 1 December 2009, para. 144.

certainly be a starting point for subsequent deliberations on the limits of Article 8 in this context.

3.2.2. *The Czech Republic, Slovakia, and Poland*

The Czech Republic, Slovakia, and Poland signed the ECHR in 1991, and the Convention entered into force for each of them in 1993. The first two countries formed the Czech and Slovak Federal Republic at the time the Convention was signed, which was later dissolved and succeeded by the two independent countries.⁵⁹

One of the most notable cases concerning the Czech Republic was arguably *D.H. and Others*, adopted in 2007 by the Grand Chamber. The applicants in the case were Roma children, arguing that disproportionately placing them in ‘special schools’ amounted to a violation of the prohibition of discrimination (Article 14), in conjunction with the right to education (Article 2 of Protocol 1). The Grand Chamber reversed the Chamber’s ruling and found a breach of the mentioned provisions, considering that there had been an indirect form of discrimination.⁶⁰ The judgment is particularly relevant for the region, as it was a significant point of reference for further Roma segregation cases, such as *Oršuš and Others v. Croatia*,⁶¹ *Horváth and Kiss v. Hungary*,⁶² and more recently, *Szolcsán v. Hungary*,⁶³ recognising the specifically disadvantaged and vulnerable situation of the Roma minority in the historical context.

Furthermore, *Vavříčka and Others v. Czech Republic* is remarkable for being the first judgment in which the ECtHR ruled on the question of compulsory vaccination. Adopted in 2021 by the Grand Chamber, the case shed a different light on mandatory vaccination in the context of the COVID-19 pandemic, although the vaccination in question was related to other diseases, such as poliomyelitis, hepatitis B, and tetanus. The Court concluded that there is a general European consensus on the objective of attaining the highest possible degree of vaccine coverage on the continent, and found no violation of Article 8 for imposing a vaccination mandate on children.⁶⁴

Regarding Slovakia, a judgment of key importance is *Kontrová v. Slovakia*, adopted in 2007. The case represents one of the first occasions when the ECtHR acknowledged a violation of the right to life (Article 2) due to the state’s failure to protect individuals from domestic violence. The Court built on an earlier judgment on the matter, *Osman v. the United Kingdom*, which established a test for assessing whether the authorities ought to have known at the time the existence of a real and immediate risk to the life of an individual from a private party,⁶⁵ in which, however, the Court did not find a

59 For an overview of the Czech Republic’s engagement with the ECHR, see: Grygar, 2025. For an analysis regarding Slovakia’s engagement, see: Szinek-Csütörtöki, 2025.

60 *D.H. and Others v. the Czech Republic*, Application no. 57325/00, Judgment of 13 November 2007, paras. 205–210.

61 *Oršuš and Others v. Croatia*, Application no. 15766/03, Judgment of 16 March 2010.

62 *Horváth and Kiss v. Hungary*, Application no. 11146/11, Judgment of 29 January 2013.

63 *Szolcsán v. Hungary*, Application no. 24408/16, Judgment of 30 March 2023.

64 *Vavříčka and Others v. the Czech Republic*, Application no. 47621/13, Judgment of 8 April 2021.

65 *Osman v. the United Kingdom*, Application no. 23452/94, Judgment of 28 October 1998, para. 116.

violation. The Court significantly built on the *Kontrová* judgment in *Opuz v. Turkey*, a key judgment establishing gender-based discrimination in domestic violence.⁶⁶

The individual complaint mechanism of the Strasbourg Court has been extensively used in connection with the Polish legal system.⁶⁷ Cases, such as *Proszak v. Poland*, contest the ineffective justice system and the excessively lengthy court proceedings, problems largely inherited from the communist era.⁶⁸ The ECtHR also examined judicial appointments and the effective operation of judicial mechanisms after major reforms of the Constitutional Tribunal and the Supreme Court. In *Xero Flor w Polsce sp. z o.o. v. Poland*, the ECtHR assessed the constitutionality of the appointment of a constitutional judge, thus interpreting domestic constitutional norms under the right to a fair trial (Article 6).⁶⁹ Furthermore, in *Wałęsa v. Poland*, a pilot judgment adopted in 2023, the ECtHR found a violation of Article 6 concerning the right to an independent and impartial tribunal, *inter alia*, and pronounced the incompatibility of the extraordinary appeal procedure with the principle of legal certainty.⁷⁰ These judgments highlight the politically challenged rule-of-law discourse surrounding the interaction between Poland and supranational courts.

In addition to systemic issues relating to the judiciary, the Strasbourg Court had ruled on reproductive rights concerning Poland in the cases of *Tysiāc v. Poland*, *R.R. v. Poland*, and *P. and S. v. Poland*. *Tysiāc* was the first landmark abortion-related case against Poland before the ECtHR, holding that the lack of an effective domestic procedure for determining whether the legal conditions for an abortion were met amounted to a violation of Article 8. Notably, the Court did not rule on the existence of the right to have an abortion but addressed procedural guarantees in the case of a woman whose eyesight severely deteriorated as a result of pregnancy.⁷¹ Furthermore, in *R.R.*, the Court pronounced the violation of Article 3 and Article 8 for the lack of effective access to her right to have an abortion.⁷² Similarly, in *P. and S. v. Poland*, the applicant also complained of the inaccessibility of the right to have an abortion that she was entitled to, as the pregnancy was the result of rape. The judgment was groundbreaking for establishing the guarantees of sexual and reproductive rights of adolescents.⁷³ These judgments, taken together with *Xero Flor*, brought significant implications for the Court's further jurisprudence on reproductive rights, such as in case *M.L. v. Poland*⁷⁴ and *A.R. v. Poland*.⁷⁵

66 *Opuz v. Turkey*, Application no. 33401/02, Judgment of 9 June 2009.

67 For an overview of Poland's engagement with the ECHR, see: Tabaszewski, 2025.

68 *Proszak v. Poland*, 1997. See also: *Iłowiecki v. Poland*, Application no. 27504/95, Judgment of 4 October 2001; *Rutkowski and Others v. Poland*, Application no. 72287/10, Judgment of 7 July 2015.

69 *Xero Flor w Polsce sp. z o.o. v. Poland*, Application no. 4907/18, Judgment of 7 May 2021.

70 *Wałęsa v. Poland*, Application no. 50849/21, Judgment of 23 November 2023.

71 *Tysiāc v. Poland*, Application no. 5410/03, Judgment of 20 March 2007, para. 116.

72 *R.R. v. Poland*, Application no. 27617/04, Judgment of 26 May 2011.

73 *P. and S. v. Poland*, Application no. 57375/08, Judgment of 30 October 2012.

74 *M.L. v. Poland*, Application no. 40119/21, Judgment of 14 December 2023.

75 *A.R. v. Poland*, Application no. 43216/17, Judgment of 13 November 2025.

3.2.3. Bulgaria, Slovenia, and Romania

Bulgaria signed the ECHR in 1992, entering into force for the country in the same year,⁷⁶ followed by Slovenia⁷⁷ and Romania,⁷⁸ which signed in 1993, and saw the Convention enter into force in 1994.

The most prominent litigation concerns the group of cases brought by United Macedonian Organisation Ilinden and other associations, which sought official registration and recognition of Macedonian-minority associations. In the landmark cases *United Macedonian Organisation Ilinden and Others v. Bulgaria*,⁷⁹ the Court found a violation of the freedom of association (Article 11), ruling that Bulgaria's refusal to register the association, solely on the ground that it aimed to represent the interests of persons with Macedonian identity, constituted unjustified interference. Subsequent judgments similarly condemned repeated refusals to register Macedonian organisations as violating the Convention,⁸⁰ stemming from Bulgarian authorities' refusals to register associations seeking the recognition of the Macedonian minority in Bulgaria. Notwithstanding the longstanding judicial scrutiny, these cases continue to represent a highly sensitive and divisive issue in Bulgarian domestic politics, as authorities have yet to fully comply with the Court's rulings.

Regarding Slovenia, a structural problem was identified in *Kurić and Others v. Slovenia*, a pilot judgment adopted by the Grand Chamber in 2012. The group of applications related to compensation claims brought by the 'erased', individuals who had previously been nationals of the SFRY and lost their permanent resident status following Slovenia's independence in 1991, either because they failed to apply for Slovenian citizenship within the prescribed deadline or because their applications were rejected. The Court found a violation of the right to respect for private and family life (Article 8), the right to an effective remedy (Article 13), and the prohibition of discrimination (Article 14), and ordered Slovenia to set up a compensation scheme for the 'erased' within one year.⁸¹ The pilot judgment procedure was closed in 2016, considering that it was no longer justified following the adoption of the judgment of *Anastasov and Others v. Slovenia*.⁸²

76 For an overview of Bulgaria's engagement with the ECHR, see: Marcheva, 2025.

77 For an overview of Slovenia's engagement with the ECHR, see: Flander, 2025.

78 For an overview of Romania's engagement with the ECHR, see: Kovács, 2025.

79 *United Macedonian Organisation Ilinden and Others v. Bulgaria* (no. 2), Application no. 34961/04, Judgment of 18 October 2011; *United Macedonian Organisation Ilinden and Others v. Bulgaria* (no. 3), Application no. 59441/12, Judgment of 11 January 2018; *United Macedonian Organisation Ilinden and Others v. Bulgaria*, Application no. 59491/00, Judgment of 19 January 2006.

80 See, for instance, *Yordan Ivanov and Others v. Bulgaria*, Application no. 70502/13, Judgment of 11 January 2018.; *Vasilev and Society of the Repressed Macedonians in Bulgaria Victims of the Communist Terror v. Bulgaria*, Application no. 23702/15, Judgment of 28 May 2020; *Macedonian Club for Ethnic Tolerance in Bulgaria and Radonov v. Bulgaria*, Application no. 67139/13, Judgment of 28 May 2020.

81 *Kurić and Others v. Slovenia*, Application no. 26828/06, Judgment of 26 June 2012.

82 *Anastasov and Others v. Slovenia*, Application no. 65020/13, Decision of 18 October 2016.

Romania has also been involved in two pilot judgment cases involving property restitution and the conditions of detention. The significance of the judgment in *Spasov v. Romania*, adopted in 2022, is profound for understanding the consideration of European Union (EU) law under the ECHR, particularly through the right to a fair trial. The case concerned a Bulgarian-flagged vessel whose captain and owner, the applicant, was convicted by Romanian courts of illegal fishing in Romania's Exclusive Economic Zone (EEZ) in the Black Sea. The national courts built their decision on Romanian domestic law, even though EU law was directly applicable and should have prevailed. The ECtHR held that the conviction of the applicant, despite the applicable EU law, constituted a 'manifest error of law', amounting to a denial of justice, and a violation of Article 6.⁸³ The judgment further strengthens the relationship between EU law and the ECHR, and opens the door for individuals to challenge the misapplication of EU law in national courts through human rights claims. This is particularly relevant for Contracting Parties that have joined the EU, where EU law forms part of the domestic legal order, illustrating that the ECtHR recognises the primacy and direct effect of EU law.

3.2.4. *Albania, the Republic of Moldova, North Macedonia, and Ukraine*

Albania and Moldova signed the ECHR in 1995, followed by North Macedonia and Ukraine later that year. The Convention entered into force in 1996 for Albania and in 1997 for the other three countries.

Concerning Albania, the ECtHR's case law is dominated by complaints regarding the right to a fair trial (Article 6) and the right to an effective remedy (Article 13), in addition to restitution cases analysed in the context of the pilot judgment procedure.⁸⁴ Further cases, such as *Marini v. Albania*⁸⁵ and *Meli and Swinkels Family Brewers N.V. v. Albania*,⁸⁶ addressed access to the constitutional court, while *Xhoxhaj v. Albania*⁸⁷ and *Besnik Cani v. Albania*⁸⁸ focused on the human rights aspects – particularly under Articles 6 and 8 – of the vetting process of judges and prosecutors, raised by those who have been removed from their positions.

So far, there has been one pilot judgment procedure against Moldova, in *Olaru and Others v. the Republic of Moldova*. The case concerned structural problems stemming from the non-enforcement of social housing privileges due to the chronic lack of funds available to local governments.⁸⁹ Following the pilot judgment, Moldova reformed its legislation by introducing a new domestic remedy against the non-enforcement of final domestic judgments and the unreasonable length of proceedings. In addition, a

83 *Spasov v. Romania*, Application no. 10629/14, Judgment of 6 December 2022, para. 97.

84 For an overview of Albania's engagement with the ECHR, see: Alimehmeti, 2025.

85 *Marini v. Albania*, Application no. 3738/02, Judgment of 18 December 2007.

86 *Meli and Swinkels Family Brewers N.V. v. Albania*, Application no. 23050/15, Judgment of 16 July 2024.

87 *Xhoxhaj v. Albania*, Application no. 15227/19, Judgment of 9 February 2021.

88 *Besnik Cani v. Albania*, Application no. 37474/20, Judgment of 4 October 2022.

89 *Olaru and Others v. the Republic of Moldova*, Application no. 476/07, Judgment of 28 July 2009.

further category of cases arises from the actions attributable to the self-proclaimed authorities operating in the Transnistrian region, including *Ilaşcu and Others*,⁹⁰ *Catan and Others*,⁹¹ and *Mozer v. Moldova and Russia*.⁹² The judgments adopted in these cases establish that the Republic of Moldova does not exercise effective control over a part of its territory, and find the responsibility of the Russian Federation for the violations of several rights, including the right to life (Article 2), the protection of property (Article 1 of Protocol 1), and the right to education (Article 2 of Protocol 1).⁹³

Furthermore, the ECtHR also received applications against Macedonia on the denationalisation of properties, the right to a fair trial and the right to an effective remedy.⁹⁴ Among the ECtHR's case law on the country, *El-Masri v. 'the Former Yugoslav Republic of Macedonia'* stands out as one of the most influential rulings on forced disappearance. The applicant was apprehended by the Macedonian authorities on alleged terrorism grounds, held incommunicado and interrogated, before being transferred into the custody of agents of the United States' Central Intelligence Agency (CIA) within the framework of its extraordinary rendition programme. He was subsequently flown to Afghanistan, where he was subjected to secret detention and ill-treatment over several months, and ultimately released without any formal charges. The Court found that these facts engaged the respondent state's responsibility for multiple violations of the Convention, including the prohibition of torture and inhuman or degrading treatment (Article 3), the right to liberty and security (Article 5), the right to respect for private and family life (Article 8), and the right of an effective remedy (Article 13).⁹⁵ The judgment stands as a landmark in the Court's case law for its affirmation that participation in secret detention and rendition operations engages state responsibility under the Convention, establishing that states must ensure effective safeguards against torture, forced disappearance, and unlawful transfers, even in the context of the fight against organised crime and terrorism.

In addition, the ECtHR has also encountered racially motivated human rights violations in cases brought against Macedonia. For instance, in *Elmazova and Others v. North Macedonia*, the Court found a violation of Article 14 for the discrimination of Roma pupils on account of their segregation in state-run primary schools attended predominantly by Roma children.⁹⁶ A certain parallel can be drawn with the above-mentioned *D.H. v. the Czech Republic*, *Oršuš and Others v. Croatia*, *Horváth and Kiss v.*

90 *Ilaşcu and Others v. Moldova and Russia*, Application no. 48787/99, Judgment of 8 July 2004.

91 *Catan and Others v. Moldova and Russia*, Application no. 43370/04, Judgment of 19 October 2012.

92 *Mozer v. Moldova and Russia*, Application no. 11138/10, Judgment of 23 February 2016.

93 For an overview of Moldova's engagement with the ECHR, see: Dorul, 2025.

94 For an overview of Macedonia's engagement with the ECHR, see: Karakamisheva-Jovanovska, 2025.

95 *El-Masri v. 'the Former Yugoslav Republic of Macedonia'*, Application no. 39630/09, Judgment of 13 December 2012.

96 *Elmazova and Others v. North Macedonia*, Application no. 11811/20, Judgment of 13 December 2022.

Hungary, and *Szolcsán v. Hungary* cases, which demonstrate a broader regional pattern of systemic challenges related to Roma rights across the CEE region.

Regarding the ECtHR's key cases against Ukraine,⁹⁷ a comparison can be drawn between the pilot judgment case *Yuriy Nikolayevich Ivanov v. Ukraine* and *Olaru and Others v. the Republic of Moldova* adopted in the same year, as both cases addressed the structural problem of the prolonged non-enforcement of court decisions and the lack of domestic remedies. In *Yuriy Nikolayevich Ivanov*, the ECtHR addressed the recurring practice in which Ukraine failed to honour judgment debts, a question that had been raised in thousands of applications against Ukraine. The Court, similar to the pilot judgment of Moldova, found a violation of Article 6 of the ECHR and Article 1 of Protocol 1, in addition to Article 13.⁹⁸ Other systemic human rights challenges have been brought before the Court concerning torture and ill-treatment, the inadequate conditions of detention, and safeguarding Convention rights guarantees in criminal proceedings.⁹⁹ The resulting judgments have prompted legislative and institutional reforms aimed at strengthening compliance with human-rights standards.¹⁰⁰ Similar to other CEE countries, serious concerns have been raised in Ukraine regarding the human rights situation of Roma people, as underlined by the judgment in *Fedorchenko and Lozenko v. Ukraine*, adopted in 2012. In this case, the Court found that Ukraine violated its procedural and substantive obligations under Article 2 by failing to carry out an effective investigation into an arson attack that killed five Roma family members, and that the state's failure to investigate possible racist motives breached Article 14.¹⁰¹

In addition to individual applications, Ukraine has also been involved in several inter-state cases brought against the Russian Federation since 2014. The first judgment was adopted by the Grand Chamber in 2024 in the case *Ukraine v. Russia (re Crimea)*, finding Russia's responsibility for the violation of multiple Convention rights, including the right to life, the prohibition of torture, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of religion, freedom of expression, freedom of assembly, the protection of property, the right to education, freedom of movement, and the prohibition of discrimination following the occupation of Crimea.¹⁰² The judgment was followed by *Ukraine and the Netherlands v. Russia*, adopted by the Grand Chamber in 2025, which addressed the human rights violations after the 2022 invasion in areas of Eastern Ukraine under separatist control

97 For an overview of Ukraine's engagement with the ECHR, see: Metelskiy, 2025.

98 *Yuriy Nikolayevich Ivanov v. Ukraine*, Application no. 40450/04, Judgment of 15 October 2009.

99 See, for instance, *Merit v. Ukraine*, Application no. 66561/01, Judgment of 30 March 2004.; *Nevmerzhytskyi v. Ukraine*, Application no. 54825/00, Judgment of 5 April 2005.; *Yaremenko v. Ukraine*, Application no. 31504/03, Judgment of 12 June 2008.; *Kaverzin v. Ukraine*, Application no. 23893/03, Judgment of 15 May 2012.; *Khaylo v. Ukraine*, Application no. 39964/02, Judgment of 13 November 2008.; *Ignatov v. Ukraine*, Application no. 40583/15, Judgment of 15 December 2016.; *Petukhov v. Ukraine (no. 2)*, Application no. 41216/13, Judgment of 12 March 2019.

100 See: Metelskiy, 2025.

101 *Fedorchenko and Lozenko v. Ukraine*, Application no. 387/03, Judgment of 20 September 2012.

102 *Ukraine v. Russia (re Crimea)*, Application no. 20958/14, Judgment of 25 June 2024.

and areas under the control of Russian armed forces.¹⁰³ These rulings are not only relevant for the ECtHR's jurisprudence on extraterritorial jurisdiction and systematic, large-scale human rights violations in wartime and occupation, but also for the development of the broader public international law, particularly for the interpretation of state responsibility. Furthermore, the ECtHR's judgment may also serve as a reference point for the International Criminal Court (ICC)¹⁰⁴ and the International Court of Justice (ICJ).¹⁰⁵

3.2.5. Croatia and Georgia

Croatia signed the ECHR in 1996, which entered into force in respect of the country in 1997.¹⁰⁶ Georgia subsequently joined the Convention system in 1999, with it entering into force for the country in the same year.¹⁰⁷

The broader regional patterns can be discerned from the ECtHR's case law concerning Croatia: key human rights challenges in the CEE context notably include the persistent structural discrimination faced by Roma communities, as illustrated by the abovementioned *Oršuš* judgment, and migration-related issues. One of the key cases from the Strasbourg Court's jurisprudence regarding the migration wave in the mid-2010s is *M.H. v. Croatia*, which concerned the violation of the rights to life, liberty and security, the prohibition of torture and the prohibition of collective expulsion.¹⁰⁸ The migration crisis specifically affected the CEE region, especially countries sharing external borders of the Schengen area, which has been subject to several applications to the ECtHR. However, it should be noted that the Court may only answer such challenges from a human rights perspective, and does not take into account other factors, such as the preparedness of the states for the massive influx of migrants, the quality of individual decisions, or the states' obligation to prevent illegal entry into the territory of the EU.¹⁰⁹

Perhaps the most significant cases involving Georgia were the inter-state applications instituted by the state against Russia regarding the conditions of arrest, detention and expulsion of Georgian nationals (*Georgia v. Russia (I)*),¹¹⁰ administrative practices of Russian authorities in Abkhazia and South Ossetia (*Georgia v. Russia II*),¹¹¹ and stemming from 'borderisation' (*Georgia v. Russia (IV)*).¹¹² The Court expressively built

103 *Ukraine and the Netherlands v. Russia*, Application no. 8019/16, Judgment of 9 July 2025.

104 The ICC opened investigations on the situation in Ukraine in March 2022. See: International Criminal Court, 2025. See also: Varga, 2023, pp. 584–585.

105 See, for instance, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*) pending before the ICJ at the time of the conclusion of the present paper.

106 For an overview of Croatia's engagement with the ECHR, see: *Vasiljević*, 2025.

107 For an overview of Georgia's engagement with the ECHR, see: *Takashvili*, 2025.

108 *M.H. and Others v. Croatia*, Application no. 15670/18, Judgment of 18 November 2021.

109 Raisz, 2024, pp. 539–540. See also: Fábíán, 2024, pp. 151–152.

110 *Georgia v. Russia (I)*, Application no. 13255/07, Judgment of 3 July 2014 (merits).

111 *Georgia v. Russia (II)*, Application no. 38263/08, Judgment of 21 January 2021 (merits).

112 *Georgia v. Russia (IV)*, Application no. 39537/21, Judgment of 9 April 2024 (merits).

on the findings of these judgments in the abovementioned inter-state cases between Ukraine and Russia. Furthermore, particularly *Georgia v. Russia (II)* is remarkable for elaborating the concept of effective control during and after hostilities, failing to find the responsibility of either of the states during the five days of hostilities, which remains one of the most controversial aspects of the judgment.¹¹³

3.2.6. *Bosnia and Herzegovina, Serbia, and Montenegro*

Bosnia and Herzegovina signed the ECHR in 2002, while Serbia and Montenegro – a single country at the time, which separated after the declaration of independence of the latter in 2006 – joined the treaty the following year. The Convention entered into force in 2003 for Bosnia and Herzegovina, in 2004 for Serbia, and in 2006 for Montenegro.

Regarding Bosnia and Herzegovina, a distinctive category of discrimination cases stems from the constitutional order of the state, which was established with the Dayton Peace Agreement.¹¹⁴ Namely, as presented first in *Sejdić and Finci v. Bosnia and Herzegovina*, the constitution recognises three ‘constituent peoples’, Bosniaks, Croats, and Serbs, who are eligible to stand for elections. This case was brought before the ECtHR by applicants of Roma and Jewish origin, alleging the violation of the protection of free elections (Article 3 of Protocol 1), and the prohibition of discrimination (Article 14 and Article 1 of Protocol 12), which the Court subsequently established.¹¹⁵ Similarly, the Court pronounced the breach of the mentioned Convention rights for an applicant who had not identified with any ethnic group for the candidacy in *Zornić v. Bosnia and Herzegovina*,¹¹⁶ and for an applicant who had identified as a Bosniak for the candidacy in Republika Srpska, where, according to the constitution, the candidate had to be a Serb, in *Pilav v. Bosnia and Herzegovina*.¹¹⁷ These judgments recognise the systemic human rights challenges, particularly regarding discriminatory practices in the country that stem from constitutional provisions. The Court acknowledged the role of the Peace Agreement in the closure of the brutal conflict that was marked by genocide and ethnic cleansing, however, it also considered that the time had come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for election without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.¹¹⁸

Serbia’s most characteristic cases demonstrate a strong influence of the inherited human rights challenges of the communist era.¹¹⁹ The case of *Kačapor and Others v.*

113 Dzehtsiarou, 2021, pp. 288–294.

114 For an overview of Bosnia and Herzegovina’s engagement with the ECHR, see: *Krešić*, 2025.

115 *Sejdić and Finci v. Bosnia and Herzegovina*, Application no. 27996/06, Judgment of 22 December 2009.

116 *Zornić v. Bosnia and Herzegovina*, Application no. 3681/06, Judgment of 15 July 2014.

117 *Pilav v. Bosnia and Herzegovina*, Application no. 41939/07, Judgment of 9 June 2016.

118 *Zornić v. Bosnia and Herzegovina*, Application no. 3681/06, Judgment of 15 July 2014, para. 43.

119 For an overview of Serbia’s engagement with the ECHR, see: *Plavšić*, 2025.

Serbia is remarkable for being the ECtHR's first ruling on the issue of non-enforcement or delayed enforcement of domestic judicial decisions rendered in the applicants' favour against socially or state-owned companies,¹²⁰ followed by several other judgments.¹²¹ In addition, the Court received a high number of applications for the state's refusal to pay allowances for military services performed by former Yugoslav army reservists in 1999. In this matter, a key case was *Vučković and Others v. Serbia*, adopted by the Grand Chamber in 2014, finding a violation of the prohibition of discrimination in conjunction with the protection of property.¹²²

Furthermore, perhaps the most delicate and complex human rights issue that was brought before the Court is raised in *Zorica Jovanović v. Serbia*. The case, along with a significant number of applications, contested the state's positive obligations under Article 8 regarding the disappearance of babies from state-run hospitals. In these cases, the parents were informed about the death of their newborn babies without receiving any information on the remains and the burial of the babies. In addition to finding a violation of the right to private and family life, the Court indicated that general measures were required,¹²³ which resulted in the establishment of a fast-track fact-finding system of providing individual redress to parents, and instituting investigations to establish the fate of the missing babies.

The first judgment concerning Montenegro was *Bijelić v. Montenegro and Serbia*, which concerned state succession and the validity of international human rights treaties in the situation of the peaceful division of a state, as well as succession.¹²⁴ In this judgment, the Court confirmed that the ECHR had been binding on Montenegro since Serbia and Montenegro ratified it.¹²⁵ The judgment is a characteristic example of the Court's engagement with the public international law and international human rights law framework on state succession, a relatively rare context within the Council of Europe system. *Bijelić*, therefore, not only exemplifies Montenegro's early systemic challenges with the enforcement of property rights but also contributes to the broader development of the Court's jurisprudence on state continuity and responsibility. This distinctive dimension sets it apart from the otherwise predominantly fair trial and property-related case law concerning Montenegro.

120 *Kačapor and Others v. Serbia*, Application no. 2269/06, Judgment of 15 January 2008.

121 See, for instance, *Vlahović v. Serbia*, Application no. 42619/04, Judgment of 16 December 2008; *Sekulić and Kučević v. Serbia*, Application no. 28666/08, Judgment of 24 April 2014; *Marinković v. Serbia*, Application no. 5353/11, Judgment of 22 October 2013.

122 *Vučković and Others v. Serbia*, Application no. 17153/11, Judgment of 25 March 2014.

123 *Zorica Jovanović v. Serbia*, Application no. 21794/08, Judgment of 26 March 2013.

124 For an overview of Montenegro's engagement with the ECHR, see: Vučinić and Grbović, 2025.

125 *Bijelić v. Montenegro and Serbia*, Application no. 11890/05, Judgment of 28 April 2009.

4. Conclusions

This chapter was dedicated to the relationship between certain Central and Eastern European states and the European Court of Human Rights, reflecting on the impact of the accession of these states to the European Convention on Human Rights on the evolution of the Court's institutional and jurisprudential framework. Instead of providing an in-depth analysis of the relevant jurisprudence – for which there are dedicated chapters in this volume – this contribution aimed to identify key patterns and broader tendencies characterising the dynamic relationship between the CEE region and the Strasbourg Court.

Based on the analysis presented in the chapter, the following conclusions can be drawn. First, the eastward expansion of the Council of Europe was a significant milestone in the creation of a truly European human rights system that integrates the majority of European states along the values of democracy, the rule of law, and respect for human rights. The enlargement also prompted long-awaited institutional reforms in the control mechanism of the Convention, established by Protocol 11 to the ECHR, which created a single court and granted individual access to it. Furthermore, in response to the increase in the caseload, the Court also established the so-called pilot judgment procedure, which allowed the ECtHR to address systemic human rights challenges in the given country. While this procedure was formally not explained by the enlargement, it can be seen that it proved to be an important tool in addressing structural problems, both in region-specific issues and general human rights challenges occurring across the continent. Ultimately, the analysis demonstrates that Central and Eastern European states have become an integral part of the Convention system, both by contributing to the evolution of its jurisprudence and human rights standards and by shaping their domestic legal frameworks in response to the Strasbourg Court's case law.

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