| Chapter 1 |

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

Péter Paczolay (2026) 'Introduction' in Paczolay, P. (ed.) *The European Convention on Human Rights A Central and Eastern European Perspective.* Miskolc–Budapest: Central European Academic Publishing, pp. 15–25. https://doi.org/10.71009/2026.pp.tecohr_1

BY NC ND

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. In 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 if 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 is it 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-refoulment, 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.