

Introduction to the European Convention on Human Rights

The rights guaranteed and the protection mechanism

Jean-François Renucci

Doctor,

Professeur, University of Nice Sophia-Antipolis (France)

Director, Centre d'études sur les droits de l'homme (CEDORE-IDPD)

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Introduction

[1] The European Convention on Human Rights: a major piece of legislation

Defending human rights is one of the Council of Europe's basic tasks. With this in view, the aim is to establish effective systems for supervising and protecting fundamental rights and freedoms, to identify new threats to human rights, to heighten public awareness of the importance of these rights and, lastly, to promote education and vocational training in fields relating to fundamental freedoms and human dignity. The Convention for the Protection of Human Rights and Fundamental Freedoms, supplemented by its additional protocols, is a major piece of legislation: for member states of the Council of Europe, this is one of their most important commitments, and this importance is not lessened by the fact that it may not be binding on all states in the same way¹ – on the contrary.

The European Convention on Human Rights, which was opened for signature in Rome on 4 November 1950 and entered into force on 3 September 1953, is the Council of Europe's crowning achievement. It lays down the rights and freedoms that member states undertake to secure to everyone within their jurisdiction. The Convention, supplemented by additional protocols, has also established an international system of protection through the European Court of Human Rights, whose effectiveness is universally recognised.

1. Not all additional protocols are binding on member states and reservations are always admitted, whether to the protocols or to the Convention itself (Article 57 ECHR).



[2] The originality of European protection

The originality of the European system springs mainly from the fact that it is the most advanced model in the field of international human rights protection: the European Convention guarantees rights and establishes specific judicial control.

The characteristics of the European system reveal not only the originality but also the effectiveness of this protection. Thus the rights guaranteed are of an objective character, which means that, as a matter of principle, they apply strictly to individual human beings. As a constitutional instrument for safeguarding public order in Europe² the European Convention creates subjective obligations collectively guaranteed and not subject to the principle of reciprocity. Moreover, the Convention is a “living instrument” which must be construed in the light of present-day conditions:³ its interpretation by the European judges is therefore dynamic and open-ended.

The principles enshrined by European human rights law reflect this constant concern for effective protection. Article 1 of the Convention thus specifies that the rights and freedoms that it enshrines shall be secured by states to everyone within their jurisdiction: the Convention’s applicability is broad but not unrestricted.⁴ The fact remains that its provisions are directly applicable and any individual can invoke them directly before domestic courts. The European judges themselves, the Convention’s official interpreters, have been led to establish certain principles: in particular, the principle of the effectiveness of the Convention, which is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective;⁵ the autonomy of the concepts in the Convention, enabling them to break loose from national definitions of certain concepts;⁶ and the principle of positive obligations by virtue of which a state

2. ECtHR, 23 March 1995, *Loizidou v. Turkey*, Series A No. 310, § 70.

3. ECtHR, 9 Oct. 1979, *Airey v. Ireland*, Series A No. 32, § 26.

4. ECtHR, 12 Dec. 2001, *Bankovic and Others v. Belgium and 16 Other Contracting States*, Reports 2001-XII.

5. ECtHR, 9 Oct. 1979, *Airey v. Ireland*, Series A No. 41, § 26; 13 May 1980, *Artico v. Italy*, Series A No. 37, § 33.



cannot merely adopt a passive attitude towards protecting fundamental rights.⁷ The principle of proportionality is particularly important,⁸ since the proportionality of the means employed in relation to the legitimate aim pursued is the corollary of a democratic society:⁹ this concept is especially important with regard to human rights derogations, whether the latter are temporary¹⁰ or permanent.¹¹

The European control system is subsidiary to national systems for safeguarding human rights:¹² the European Court can give judgment only in the last instance once the applicant has exhausted all domestic remedies.

[3] *The success of European protection*

The European system of human rights protection has been a considerable success, and this has actually created a problem for the system itself, which is in need of reform in order to be able to cope with the exponential growth in applications. Certainly, the accession of new states is not the only explanation: this enthusiasm for the European Convention can also be seen in “old” member states, since European human rights law is now relied on very frequently in all types of cases.

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6. ECtHR, 8 June 1976, *Engel and Others v. the Netherlands*, Series A No. 22, § 81; 28 June 1978, *König v. the Federal Republic of Germany*, Series A No. 27, §§ 80s.
 7. See in particular: ECtHR, 9 Oct. 1979, *Airey v. Ireland*, Series A No. 41, § 25; 26 March 1985, *X and Y v. the Netherlands*, Series A No. 91, § 27; 7 July. 1989, *Gaskin v. the United Kingdom*, Series A No. 160, § 38.
 8. ECtHR, 26 May 1993, *Brannigan and Mc Bride v. the United Kingdom*, Series A No. 258-B, § 32.
 9. ECtHR, 7 Dec. 1976, *Handyside v. the United Kingdom*, Series A No. 24 § 49.
 10. Article 15 (1) 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 the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are non inconsistent with its other obligations under international law.
 11. See Article 17 (theory of abuse of rights) and 18 (limitation on use of restrictions on rights) of the Convention. See principally the interference by a public authority, always possible under the conditions of being prescribed by law, pursuing a legitimate aim, and being necessary in a democratic society.
 12. ECtHR, 7 Dec. 1976, *Handyside v. the United Kingdom*, Series A No. 24, § 48.



Part One: The rights guaranteed

[4] The range of rights guaranteed

Taking into account the importance of human rights and their actual nature, the principle of their indivisibility has been established: of course, distinctions are possible, but the principle remains in any case.

The rights guaranteed by the European Convention on Human Rights and its additional protocols are various and a number of classifications have been suggested. The commonest consists in distinguishing first-generation human rights, which are civil and political rights, from second-generation human rights, which are social and economic rights.¹³ In our study we shall take this important classification as our reference, but we shall first consider general protection of individuals and then specific types of protection: this approach, which has the merit of being clear and instructive, ultimately makes it easier to grasp the new realities of European human rights law.

13. Third-generation human rights – solidarity rights – are now evoked; but, as things stand at present, this distinction remains rather widely theoretical, at least in the framework of the European Convention on Human Rights.



Chapter 1: General protection

[5] Requirements of protection

The drafters of the European Convention and its additional protocols wanted a protection that would be as effective as possible. This is why they opted for wide-ranging protection, taking a broad view of the idea of human rights by including not only civil and political rights but also social and economic rights.

I. Civil and political rights

[6] First-generation human rights

These are basic rights: civil and political rights certainly form the framework of the European Convention on Human Rights, if not the very reason for its existence, at least historically. Among these rights, the principle of indivisibility of fundamental rights notwithstanding, a distinction could be drawn between natural rights – such as the right to life and the prohibition of ill-treatment, slavery, servitude and discrimination – and all the other rights guaranteed, which are conditional rights where, by that very fact, state interference is possible in certain circumstances. But beyond all such possible distinctions, the fact nonetheless remains that all these civil and political rights are of considerable importance: it was undoubtedly the pressing need to ensure their protection that led the Europeans, battered and bruised by a civil war that had become a world war, to establish an international instrument of protection.

A. The right to life

[7] Affirmation of the right to life

The right to life is guaranteed by Article 2 of the European Convention on Human Rights and forms the supreme value in the hierarchy of human rights at international level.¹⁴ Its importance is therefore considerable. This is why states must not only refrain from taking life “intentionally” but also

14. ECtHR, 22 March 2001, *Streletz, Kessler and Krenz v. Germany*, Reports 2001-II.



take appropriate steps to safeguard life,¹⁵ whether this is a matter of public health¹⁶ or security.¹⁷ Furthermore, any use of lethal force by agents of the state must give rise to an effective, thorough and impartial investigation.¹⁸

More generally, these positive obligations of the state have brought about an extension of the scope of Article 2 not only to state activities that may endanger lives¹⁹ but also to interpersonal relationships.²⁰ In order to ensure the best possible protection the European judges have established a presumption of causation: the death of any person arrested or detained is held to be a violation of Article 2 if the state is unable to provide a plausible explanation.²¹ The lives of persons deprived of their liberty must be protected by the state authorities, including against their own will,²² although the state authorities must be aware that a risk to life exists.²³

[8] *The boundaries of the right to life*

Determining the beginning of the right to life is not easy: should it be birth or conception? Domestic and international legislation, including the Convention, is generally silent on this point. Yet this is no trivial matter, for the consequences of genetic engineering, human embryo experiments and medically assisted reproduction can be very serious, especially as this is, in fact, a question of respect for man's origins and human dignity. The former European Commission of Human Rights did not decide whether Article 2 covered the foetus or whether it was advisable to recognise a right to life with implied limitations,²⁴ although it had previously seemed

15. ECmHR, 10 Oct. 1986, *Naddaf v. the Federal Republic of Germany*, DR 50/259.

16. ECmHR, 12 July 1978, *Association X v. the United Kingdom*, DR 14/31; ECmHR, 4 Oct. 1976, DR 14/102.

17. ECmHR, 28 Feb. 1983, *W v. the United Kingdom*, DR 32/190.

18. ECtHR, 27 Sep. 1995, *McCann and Others v. the United Kingdom*, Series A No. 324.

19. ECtHR, 9 June 1998, *LCB v. the United Kingdom*, Reports 1998-III; ECtHR, 1 March 2001, *Berkday v. Turkey*, No. 22493/93, not published.

20. ECtHR, 28 Oct. 1998, *Osman v. the United Kingdom*, Reports 1998-VIII.

21. ECtHR, 27 June 2000, *Salman v. Turkey*, Reports 2000-VII; ECtHR, 18 May 2000, *Velikova v. Bulgaria*, Reports 2000-VI.

22. ECtHR, 16 Nov. 2000, *Tanribilir v. Turkey*, No. 21422/93, not published (suicide during police custody).

23. *Osman*, op. cit.



to want to give the foetus a “certain legal personality” separate from that of its mother.²⁵ The European Court has not answered the question directly, preferring to view cases in terms of freedom of expression²⁶ or from the procedural angle of the right of individual petition. The European judges recently decided that the point at which life begins was a matter that should be left to states’ discretion.²⁷

Determining the end of the right to life is equally delicate: it raises the question of the right to die in dignity, and laws in Europe adopt differing approaches to euthanasia. In the Court’s opinion, Article 2 does not therefore guarantee the right to choose whether to continue or to cease to live: the right to life does not imply, conversely, a right to die.²⁸

[9] *Restrictions on the right to life*

Despite the considerable importance of the right to life, a twofold restriction has been established by the drafters of the European Convention on Human Rights: besides Article 15, which permits deaths resulting from lawful acts of war, Article 2 itself establishes exceptions to the principle.

Article 2 lists exhaustively four cases²⁹ in which a state can interfere with the right to life, including execution of a court sentence following a conviction for a crime for which deprivation of life is the penalty provided by law.³⁰ In addition, deprivation of life is not regarded as inflicted in contravention of Article 2 when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence, in order to effect a lawful arrest or to prevent the escape of a per-

24. ECmHR, 13 May 1980, *X v. the United Kingdom*, DR 19/244.

25. ECmHR, 12 July 1977, *Brüggemann and Scheuten v. the Federal Republic of Germany*, DR 10/100.

26. ECtHR, 29 Oct. 1992, *Open Door and Others v. Ireland*, Series A No. 246-A, § 66.

27. ECtHR, 8 July 2004, *Vo v. France*, No. 53924/00, not published.

28. ECtHR, 29 April 2002, *Pretty v. the United Kingdom*, Reports 2002-III.

29. ECmHR, 10 July 1984, *Stewart v. the United Kingdom*, DR 39/162.

30. Protocol No. 6 abolishes the death penalty except in times of war, and Protocol No. 13 abolishes the death penalty in all circumstances. However, if a state which is not signatory of these protocols pronounces death penalty following a non-fair trial, there is a violation of Article 2 ECHR: ECtHR, 13 March 2003, *Öçalan v. Turkey*, No. 46221/99, not published.



son lawfully detained, and lastly in action lawfully taken for the purpose of quelling a riot or insurrection.

These exceptions to such an important principle as the right to life call for a narrow interpretation.³¹ The use of force must be rendered absolutely necessary, which implies that all other available methods have been exhausted, and the force used must be strictly proportionate to the achievement of the permitted purpose.³² This means that the use of arms to effect or anticipate an arrest must never arise from an intent to kill and death can only be an unintended outcome of their use. In short, proportionality is assessed mainly in terms of danger to human life and protection from physical injury in relation to the nature of the situation and the aim pursued.³³

B. Prohibition of ill-treatment

[10] Article 3 of the European Convention on Human Rights

Article 3 of the Convention specifies that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Held to be one of the fundamental values of any democratic society,³⁴ this safeguard is an inviolable right and inalienable attribute of every human being. States consequently have heavy obligations: they must naturally avoid using torture and practising inhuman or degrading treatment; in addition, they must protect everybody under their jurisdiction in all circumstances, and the fact that the danger may exist outside their jurisdiction is immaterial.³⁵

31. ECmHR, 13 Jan. 1993, *Kelly v. the United Kingdom*, DR. 74/139.

32. ECmHR, 10 July 1984, *Stewart v. the United Kingdom*, op. cit. See also: ECtHR, 14 Dec. 2000, *Gül v. Turkey*, No. 22676/93, not published.

33. ECmHR, 6 Oct. 1986, DR 49/213; 10 July 1984, DR 39/162; ECtHR, 27 Sep. 1995, *McCann and Others v. the United Kingdom*, Series A No. 324.

34. ECtHR, 7 July 1989, *Soering v. the United Kingdom*, Series A No. 161, § 88.

35. ECmHR, 12 March 1984, *Kirkwood v. the United Kingdom*, DR 37/158; *Soering*, op. cit.



1. The definition of ill-treatment

[11] The vagueness of Article 3

Ill-treatment is not precisely defined, and so the European judges have had to refine the concepts involved. The task has not been easy, especially as there are no watertight divisions between various types of ill-treatment, since distinctions are based on a difference in intensity rather than nature: any form of torture is also inhuman and degrading treatment, and any inhuman treatment is necessarily degrading.³⁶

[12] Degrading treatment

Degrading treatment is characterised by the fact that it constitutes gross humiliation before others of an individual who may also be driven to act against his will or conscience.³⁷ Thus bullying – especially harassment³⁸ and racist behaviour³⁹ – and discrimination may be considered degrading treatment. So too is corporal punishment in schools⁴⁰ and experimental medical treatment without the subject's consent if it is innovative and entails risk.⁴¹

[13] Inhuman treatment

Inhuman treatment is treatment intentionally occasioning mental or physical suffering of a particular intensity.⁴² This is the case for interrogations “in depth”,⁴³ involving organised use of violence and representing an “administrative practice” distinguished by repetition of acts in breach of the Convention and by tolerance on the part of the competent authorities. It is also the case for police brutality in the course of an arrest⁴⁴ or during

36. ECmHR, 16 May 1995, *Yagiz v. Turkey*, No. 19 092/91, not published, § 49.

37. ECtHR, 25 April 1978, *Tyrer v. the United Kingdom*, Series A No. 26; 16 Dec. 1997, *Raninen v. Finland*, Reports 1997-III.

38. ECmHR, 8 July 1993, *Hutardo v. Switzerland*, Rep. § 68 (person under arrest having been obliged to wear soiled clothes); 24 July 2001, *Valasinas v. Lithuania*, Reports 2001-VIII (body search of a detained person, obliged to strip naked in the presence of a woman prison officer).

39. ECmHR, 5 March 1976, *Hilton v. the United Kingdom*, DR 4/177.

40. ECtHR, 25 Feb. 1982, *Campbell and Cosans v. the United Kingdom*, Series A No. 48.

41. ECmHR, 2 March 1983, *X v. Denmark*, DR 32/282.

42. ECtHR, 25 April 1978, *Tyrer v. the United Kingdom*, Series A-26, § 29.

43. ECtHR, 18 Jan. 1978, *Ireland v. the United Kingdom*, Series A No. 25, §§ 67 and 159.



police custody.⁴⁵ The forced disappearance of a person constitutes inhuman treatment with respect to both this person and a close relative in certain circumstances.⁴⁶

[14] *Torture*

If deliberate inhuman treatment causes very serious and cruel suffering, it must be defined as torture.⁴⁷ The fact remains that the boundary between these two types of treatment is tenuous, especially as these concepts evolve and depend on what may be considered acceptable or unacceptable in a society at any given time. Thus the European Court recently brought these concepts up to date, defining as torture behaviour that in the past would doubtless have been held to be inhuman treatment.⁴⁸ the increasingly high standard required in the area of the protection of human rights correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.⁴⁹

2. *Applicability of Article 3*

[15] *The severity threshold*

To come within the ambit of Article 3, ill-treatment must attain a minimum level of severity: since the “Greek case”⁵⁰ made it clear that not all ill-treatment could fall within the scope of Article 3, the European judges have taken into account the intensity of suffering inflicted. The determination of this minimum level is relative, as the European judges must assess the specific situation in each particular case: it is on the basis of “all the cir-

44. ECtHR, 22 Sep. 1993, *Klaas v. Germany*, Series A No. 269.

45. ECtHR, 27 Aug. 1992, *Tomasi v. France*, Series A No. 241-A.

46. ECtHR, 25 May 1998, *Kurt v. Turkey*, Reports 1998-III; 13 June 2000, *Timurtas v. Turkey*, Reports 2000-VI.

47. ECtHR, 18 Jan. 1978, *Ireland v. the United Kingdom*, Series A No. 25; 18 Dec. 1996, *Aksoy v. Turkey*, Reports 1996-VI.

48. ECtHR, 28 July 1999, *Selmouni v. France*, Reports 1999-V.

49. *Selmouni*, op. cit., § 101. Prohibition of torture is an imperative standard of international law; ECtHR, 21 Nov. 2001, *Al-Adsani v. the United Kingdom*, Reports 2001-XI.

50. ECmHR, 18 Nov. 1969, No. 3321/67, not published, Rep. p. 118.



cumstances of the case” that they will decide, whilst endeavouring to reconcile the various interests involved.⁵¹

The Court has stated that the requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals;⁵² the absolute nature of an individual’s physical integrity has thus been established anew on the principle that use of force on a person deprived of liberty is unacceptable in a democratic society.⁵³ Recalling that ill-treatment must attain a minimum level of severity, the Court has pointed out that the assessment of this minimum is relative.⁵⁴ It would seem that any brutality towards a person deprived of liberty, whatever its severity, is *a priori* in breach of Article 3: there is thus a presumption of severity whenever physical force is used on a person deprived of liberty.

[16] *Origin of the danger*

Owing to the absolute nature of the prohibition of ill-treatment, the European Court has decided that Article 3 may apply even if the danger emanates from persons or groups of persons who are not public officials.⁵⁵ It would have been unfair to limit the scope of this article solely to ill-treatment from the state.

The origin of the danger is therefore immaterial: it matters little whether it comes from the public authorities, private individuals or groups of private individuals. Admittedly, the applicant must prove that the risk was real and the public authorities were unable to protect him satisfactorily, but the principle has been clearly asserted. The solution is not really new,⁵⁶ but it has been forcefully affirmed.

51. ECtHR, 27 Nov. 2003, *Henaf v. France*, Appl. No. 65436/01, not published: concerning prisoners, appraisal of the seriousness threshold can depend, *inter alia*, on the length of the treatment and its physical and mental effects, as well as, sometimes, sex, age, health condition of the victim.

52. ECtHR, 27 Aug. 1992, *Tomasi v. France*, Series A No. 241-A, § 115.

53. See also: ECtHR, 24 Sep. 1992, *Herczegfalvy v. Austria*, Series A No. 244.

54. ECtHR, 28 Oct. 1998, *Assenov and Others v. Bulgaria*, Reports 1998-VIII.

55. ECtHR, 29 April 1997, *H.L.R. v. France*, Reports 1997-III.



[17] Interpersonal relationships

Article 3 is now applicable to interpersonal relationships.⁵⁷ This change in judicial doctrine is very important inasmuch as it increases states' positive obligations. States must take all necessary steps to prevent individuals within their jurisdiction from being subjected to ill-treatment, even if this ill-treatment is administered by private individuals.⁵⁸ The European judges have thus conferred on Article 3 a "horizontal effect" whose impact could be considerable.

3. *Scope of Article 3**[18] Protection of persons deprived of liberty*

Prohibition of ill-treatment particularly concerns persons who have been arrested and detained.⁵⁹ Persons deprived of liberty must be protected by the state from physical injury: in particular, individuals injured during arrest or detention must receive proper medical treatment⁶⁰ without being subject to discrimination.⁶¹ It has been ruled that an intent to humiliate combined with material conditions of detention that are actually degrading is in breach of Article 3,⁶² as is racial harassment.⁶³ The conditions of detention must be compatible with human dignity: the manner and method of the execution of a prison sentence must not subject the prisoner to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.⁶⁴

Although certain situations are not *a priori* a violation of Article 3, this is not the case if the conditions of detention could ultimately destroy the personality⁶⁵ or result in a worsening of the prisoner's health,⁶⁶ especially if

56. See also: ECtHR, 17 Dec. 1996, *Amhed v. Austria*, Reports 1996-VI.

57. ECtHR (Gr. Ch.), 10 May 2001, *Z and Others v. the United Kingdom*, Reports 2001-V.

58. ECtHR, 23 Sep. 1998, *A v. the United Kingdom*, Reports 1998-VI, § 22.

59. ECtHR, 6 April 2000, *Labita v. Italy*, Reports 2000-IV.

60. ECtHR, 27 June 2000, *Ilhan v. Turkey*, Reports 2000-VII.

61. ECtHR (Gr.Ch.), 10 May 2001, *Cyprus v. Turkey*, Reports 2001-IV.

62. ECmHR, 15 May 1980, *Thomas McFeeley v. the United Kingdom*, DR 20/44; ECtHR, 19 April 2001, *Peers v. Greece*, Reports 2001-III.

63. ECmHR, 5 March 1976, *Arthur Hilton v. the United Kingdom*, DR 4/177.

64. ECtHR (Gr. Ch.), 26 Oct. 2000, *Kudla v. Poland*, Reports 2000-XI.



the prisoner is already elderly and ill.⁶⁷ However, the risk to health must be real and certain.⁶⁸

4. Proof of ill-treatment

[19] Difficulties of proof

By force of circumstances, proof of ill-treatment is very difficult to provide. The Court may carry out an investigation on the spot⁶⁹ or use any information gathered by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment, but the task is not an easy one. The importance of the issues involved and the difficulty of the task have led the European judges to use the criterion of “proof beyond reasonable doubt” whilst establishing a compulsory procedure.

[20] Proof beyond reasonable doubt

This criterion is vague, but the vagueness is necessary in view of the specific nature of the situation: it is difficult to be certain, as the acts usually occur safe from curious eyes, the only witnesses being the protagonists themselves. However, the best possible solution should be sought – hence the advantage of using a vague concept such as proof beyond reasonable doubt whilst referring to objective evidence such as medical certificates attesting physical violence or the co-existence of strong, clear and concordant inferences.

The Court nevertheless established a presumption of causation if the victim was vulnerable and in a position of inferiority, which is the case for any person deprived of liberty: this meant that the judges held the applicant’s allegations to be proven if the state concerned did not provide

65. Solitary confinement: ECmHR, 8 July 1976, *Ensslin, Baader and Raspe v. the Federal Republic of Germany*, DR 14/64; 16 Dec. 1982, *Kricher and Miller*, DR 34/25; 9 July 1991, *Treholt v. Norway*, DR 71/168.

66. ECmHR, 17 Dec. 1981, *Chartier v. Italy*, DR 33/41; 12 Jan. 1995, *Lukanov v. Bulgaria*, DR 80B/108; ECtHR, 27 June 2000, *Ilhan v. Turkey*, op. cit.; 3 April 2001, *Keenan v. the United Kingdom*, Reports 2001-III.

67. ECtHR, 7 June 2001, *Papon v. France*, Reports 2001-VI.

68. ECtHR, 6 Feb. 2001, *Bensaid v. the United Kingdom*, Reports 2001-I.

69. Article 19 and 42, Rules of Court.



proof to the contrary.⁷⁰ Later the Court qualified this position, which could lead to the “proof beyond reasonable doubt” criterion becoming excessively marginalised, and again emphasised the importance of this criterion,⁷¹ without however questioning the presumption of causation.⁷²

[21] *The compulsory procedure*

The European judges have laid down a compulsory procedure.⁷³ The force of this obligation is all the stronger in that failure to comply with it in itself constitutes a violation of Article 3 whether the substantive obligation has been breached or not.

Consequently, if an agent of a state is suspected of violating Article 3, that state must immediately carry out an official investigation with the object, on the one hand, of identifying and punishing those responsible and, on the other, of allowing the complainant effective access to the investigation.

C. *Prohibition of slavery and servitude*

[22] *Article 4 § 1 of the European Convention on Human Rights*

Article 4 § 1 of the European Convention states that no one shall be held in slavery or servitude. This prohibition is absolute.

Slavery may be defined as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.⁷⁴ Servitude is the status of a person completely dependent on another person: it is more specifically the obligation to live and work on another person’s property whilst providing certain services (paid or unpaid) to that person, without any possibility of altering one’s condition.⁷⁵

70. ECtHR, 27 Aug. 1992, *Tomasi v. France*, Series A No. 241-A; ECtHR, 4 Dec. 1995, *Ribitsch v. Austria*, Series A No. 336.

71. ECtHR, 25 Sep. 1997, *Aydin v. Turkey*, Reports 1997-VI; ECtHR, 18 Dec. 1996, *Aksoy v. Turkey*, Reports 1996-VI.

72. ECtHR, 28 Oct. 1998, *Assenov and Others v. Bulgaria*, Reports 1998-VIII; 28 July 1999, *Selmouni v. France*, Reports 1999-V; 27 June 2000, *Salman v. Turkey*, Reports 2000-VII.

73. *Assenov*, op. cit. § 102; *Selmouni*, op. cit., § 79.

74. Geneva Conv. 7 Sep. 1956 on the Abolition of Slavery.



D. *Prohibition of discrimination*

[23] *The principle of non-discrimination*

Prohibition of discrimination is a basic principle closely associated with the principle of equality. The principle of non-discrimination is asserted in Article 14 of the European Convention on Human Rights. However, this article enshrines only a limited prohibition, since it concerns only those rights guaranteed by the Convention itself. The prohibition laid down in Protocol No. 12 to the Convention, on the other hand, is general and applies to any situation of discrimination.

1. *Article 14 of the European Convention on Human Rights: a limited prohibition*

[24] *Affirmation of the principle*

Under Article 14 of the Convention, the enjoyment of the rights and freedoms set forth by it are 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. Use of the term “such as” confirms the non-exhaustive nature of this list.⁷⁶

All discrimination is prohibited, whatever the grounds upon which it is based.⁷⁷ But Article 14 does not prohibit all differences of treatment when rights and freedoms are being exercised. The prohibition concerns only arbitrary distinctions, which alone constitute discrimination: if the ground for a distinction is relevant, there is no discrimination. Equal treatment is infringed only if a distinction has no objective and reasonable justification: a distinction is legitimate if it pursues a legitimate aim and is characterised by a reasonable relationship of proportionality between the means employed and the aim sought to be realised;⁷⁸ such a distinction

75. ECmHR, 5 July 1979, *Van Droogenbroeck v. Belgium*, DR 17/67.

76. See for sexual orientation: ECtHR, 21 Dec. 1999, *Salgueiro Da Silva Mouta v. Portugal*, Reports 1999-IX.

77. ECtHR, 28 Nov. 1984, *Rasmussen v. Denmark*, A-87 § 34.



may even be imperative, for Article 14 is breached if, without an objective and reasonable justification, states fail to treat differently persons whose situations are different.⁷⁹ This clarification provided by the *Thlimmenos* judgment is important because it emphasises the two facets of the Article 14 prohibition, for, although discrimination has traditionally consisted in differing treatment of persons in analogous situations,⁸⁰ it is also characterised by identical treatment of persons whose situations are different unless there are objective reasons for this in either case.⁸¹

[25] *Implementation of the principle*

Article 14 of the Convention has no independent existence, discrimination being prohibited only in so far as it is practised in relation to a right or freedom enshrined in the Convention itself.⁸² This means that Article 14 must be combined with another article of the Convention guaranteeing a right: it cannot be relied upon on its own.

Use of Article 14 is quite frequent despite its lack of independence. Thus it has been found that a difference in tax treatment of residents and non-residents is *unreasonable*⁸³ whereas a difference in treatment is justified between adults and juveniles in the case of detention pending trial⁸⁴ or between trade unions in trade-union consultation⁸⁵ owing to the protective nature of the procedure applicable to juveniles and the need to take into account the representative character of trade unions in order to avoid any trouble. As for distinctions on the grounds of gender or birth out of wedlock, only *weighty reasons* can justify them. The fact remains

78. ECtHR, 28 July 1968, *Use of languages in education in Belgium*, Series A No. 6, § 34; 13 June 1979, *Marckx v. Belgium*, Series A No. 31; 28 May 1985, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Series A No. 94; 28 Oct. 1987, *Inze v. Austria*, Series A No. 126; 23 Oct. 1990, *Darby v. Sweden*, Series A No. 187; 29 Nov. 1991, *Vermeire v. Belgium*, Series A No. 214-C; 29 Nov. 1991, *Pine Valley Developments Ltd. and Others v. Ireland*, Series A No. 222.

79. ECtHR (Gr.Ch.), 6 April 2000, *Thlimmenos v. Greece*, Reports 2000-IV, § 44.

80. ECtHR, 28 Oct. 1987, *Inze v. Austria*, Series A No. 126, § 41.

81. *Thlimmenos*, op. cit., § 44.

82. See: ECtHR, 27 Oct. 1975, *National Union of Belgian Police*, Series A No. 19.

83. ECtHR, 23 Oct. 1990, *Darby v. Sweden*, Series A No. 187, § 33.

84. ECtHR, 29 Feb. 1988, *Bouamar v. Belgium*, Series A No. 129, § 67.

85. ECtHR, 27 Oct. 1975, *National Union of Belgian Police*, Series A No. 19, § 49.



that the principle of equality, especially relating to descent, has been firmly established,⁸⁶ and the *Mazurek* judgment⁸⁷ – finding France guilty of discrimination between a legitimate child and an child born outside marriage whose share in the estate was restricted – has tended to strengthen it. This principle has also been established in other fields, in particular equality of the sexes.⁸⁸

2. Protocol No. 12: a general prohibition

[26] General prohibition of discrimination

Under Article 1 of Protocol No. 12, the enjoyment of any right set forth by law is 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. In addition, no one shall be discriminated against by any public authority on any such grounds.

[27] The Protocol's substantive content and clarification from the Court

In its opinion on draft Protocol No. 12, the European Court of Human Rights stated that Protocol No. 12 referred to the notion of discrimination as consistently interpreted by the European judges. In this interpretation, a difference of treatment was discriminatory if it had no objective and reasonable justification, i.e. if it did not pursue a legitimate aim or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.⁸⁹

This means that distinctions were still possible, and the Court judges recalled their own case-law according to which the competent national authorities were frequently confronted with situations and problems which, on account of differences inherent therein, called for different legal

86. ECtHR, 28 Oct. 1987, *Inze v. Austria*, Series A No. 126, § 41; 29 Nov. 1991, *Vermeire v. Belgium*, Series A No. 214-C, § 25.

87. ECtHR, 1 Feb. 2000, *Mazurek v. France*, Reports 2000-II.

88. See in particular: ECtHR, 28 May 1985, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Series A No. 94, § 78.

89. ECtHR, 6 Dec. 1999, *Opinion on draft Protocol No. 12*, Plenary administrative meeting, pt 5.



solutions.⁹⁰ In the same opinion, the Court stressed that this was further reflected, consistently with the subsidiary character of the Convention system, in the margin of appreciation accorded to the national authorities in assessing whether and to what extent differences in otherwise similar situations justified a difference of treatment in law.⁹¹

In reality, the drafters of Protocol No. 12 wished to be pragmatic, being aware of the fact that most if not all member states of the Council of Europe provided for certain distinctions based on nationality, for example.⁹² Consequently, although the principle of a general prohibition of discrimination is thus established, it may nevertheless be supposed that this will not entail an appreciable increase in the Court's caseload.

E. Freedom of expression

[28] Article 10 of the Convention

Article 10 of the European Convention on Human Rights enshrines freedom of expression, whilst providing for certain limitations.

1. Affirmation of the principle of freedom

[29] A strong affirmation of freedom of expression

Article 10 § 1 firmly asserts that everyone has the right to freedom of expression. This freedom is the essential foundation of a democratic society and one of the basic conditions for its progress and the development of every human being.⁹³ Pluralism, tolerance and broad-mindedness are typical features of every democratic society: freedom of expression, which includes freedom of opinion and freedom of information, is applicable not only to ideas that are favourably received or regarded as a matter of indif-

90. ECtHR, 27 July 1968, *Use of languages in education in Belgium*, Series A No. 6, § 10.

91. Opinion, *op. cit.*, pt 5. See in particular: ECtHR, 23 Nov. 1984, *Rasmussen v. Denmark*, Series A No. 87, § 40; 3 Oct. 1997, *National and Provincial Building Society and Others. v. the United Kingdom*, Reports 1997-VII, § 80.

92. Explanatory Report to Protocol No. 12, pt 19.

93. ECtHR, 7 Dec. 1976, *Handyside v. the United Kingdom*, Series A No. 24, § 49.



ference but also to those that may offend or shock state authorities or any section of the population.⁹⁴

a) Freedom of opinion

[30] *A freedom enshrined in the European Convention*

Article 10 of the Convention secures to every individual the possibility of holding and expressing an opinion, even if it is a minority opinion or one that shocks. Freedom of opinion is particularly well protected, especially because it is guaranteed to everyone. In this connection problems have arisen concerning the duty of loyalty, but the European judges have found that excessive requirements in this respect are contrary to Article 10.⁹⁵ They have shown themselves very guarded in their opinions concerning restrictions on freedom of political expression for civil servants, since such a rule is not a necessary measure, other than in exceptional circumstances, in a democratic society.⁹⁶ These principles have been strongly asserted even if the European Court seems to be increasingly open to the argument for political neutrality of civil servants.⁹⁷

[31] *A freedom confirmed by the European Court*

The *Lehideux and Isorni* case is particularly revealing of a certain unconditionality of freedom of expression.⁹⁸ The starting point of the debate was the publication in the newspaper *Le Monde* of a one-page advertisement relating Marshal Pétain's life as a public figure: convicted of public defence of crimes of collaboration with the enemy by the domestic courts, the applicants invoked a breach of Article 10 before the European Court, which decided in their favour. This judgment aroused controversy

94. See *Handyside*, op. cit.

95. ECtHR, 28 Aug. 1986, *Glaserapp v. the Federal Republic of Germany*, Series A No. 104; 28 Aug. 1986, *Kosiek v. the Federal Republic of Germany*, Series A No. 105; 26 Sep. 1995, *Vogt v. Germany*, Series A No. 323; ECmHR, 6 Sep. 1989, *Rommelfanger v. the Federal Republic of Germany*, DR 62/151.

96. *Vogt*, op. cit.; ECmHR, 29 May 1997, *Ahmed and Others v. the United Kingdom*, No. 22954/93, not published.

97. ECtHR, 2 Sep. 1998, *Ahmed v. the United Kingdom*, Reports 1998-VI.

98. ECtHR, 23 Sep. 1998, *Lehideux and Isorni v. France*, Reports 1998-VII.



but followed in a line of Court decisions which were very liberal with regard to protection of freedom of expression, especially in the political field: the European judges have, moreover, ruled against states who have tried to protect “victims” of anti-democratic behaviour.⁹⁹

b) Freedom of information

[32] *Imparting information*

It must be possible to impart information freely. This freedom concerns all natural and legal persons, including newspaper firms, despite their being profit-making corporate bodies.¹⁰⁰ Selective restrictions are possible, but the principle of freedom has been established, which is quite understandable in so far as pluralism and diversity of ideas are features of democratic societies.¹⁰¹

The affirmation of such a principle entails abolition of all systems of prior authorisation or censorship.¹⁰² The content of the message must be free, and freedom of information must normally preclude interference by the public authorities. The pluralist and objective nature of information requires such a policy, whatever the information medium or the message content,¹⁰³ which may possibly offend certain convictions or beliefs.¹⁰⁴ The strength of freedom of information is such that it usually takes precedence when balanced against other rights protected by the Convention, such as the right to respect for private life¹⁰⁵ or the presumption of innocence.¹⁰⁶

Freedom of the press is of capital importance and implies protection of journalists, who cannot be dismissed for what they say,¹⁰⁷ and protec-

99. ECtHR, 23 Sep. 1994, *Jersild v. Denmark*, Series A No. 298.

100. ECtHR, 22 May 1990, *Autronic AG v. Switzerland*, Series A No. 178. See previously cited *Sunday Times v. the United Kingdom*, 26 April 1979, Series A No. 30.

101. See for relevant example: ECtHR, 25 June 2002, *Colombani v. France*, Reports 2002-V.

102. ECtHR, 17 July 2001, *Association Ekin v. France*, Reports 2001-VIII.

103. ECtHR, 28 March 1990, *Groppera Radio AG v. Switzerland*, Series A No. 173, § 54.

104. ECtHR, 29 Oct. 1992, *Open Door and Others v. Ireland*, Series A No. 246-A; 20 Nov. 1989, *Markt Intern Verlag*, Series A No. 165; 25 Nov. 1996, *Wingrove v. the United Kingdom*, Reports 1996-V.

105. ECtHR, 21 Jan. 1999, *Fressoz and Roire v. France*, Reports 1999-I.

106. ECtHR, 3 Oct. 2000, *Du Roy v. France*, Reports 2000-X.



tion of their sources. The Court has recalled that the latter protection is one of the basic conditions for press freedom, for, without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.¹⁰⁸ The ambit of freedom of information thus has a tendency to expand: this freedom is particularly important in political or philosophical discussion, given its role in helping to determine people's choices. This is why the European judges are very vigilant in this field, even if the limits of permissible criticism are broader for a public figure, such as a politician, than for a private individual;¹⁰⁹ however, a journalist's article cannot be protected under Article 10 if it may have a decisive influence on the outcome of criminal proceedings concerning a politician.¹¹⁰ The fact remains that the importance of freedom of the press in a democratic society is such that it may justify a certain questioning of the authority and impartiality of the judiciary in a polemical or even aggressive tone.¹¹¹

Freedom of expression for lawyers is not as great as for journalists: the European judges have held that this freedom must remain compatible with the contribution it is legitimate to expect lawyers to make to maintaining public confidence in the judicial authorities.¹¹²

Lastly, commercial advertising has raised a number of questions, even though the applicability of Article 10 to a publication defending private interests, such as economic interests, has long been accepted.¹¹³ However, although there have been hesitations about advertising,¹¹⁴ the response has ultimately been positive.¹¹⁵

107. ECtHR, 29 Feb. 2000, *Fuentes Bobo v. Spain*, No. 39293/98, not published.

108. ECtHR, 27 March 1996, *Goodwin v. the United Kingdom*, Reports 1996-II.

109. ECtHR, 1 July 1997, *Oberschlick v. Austria*, Reports 1997-IV.

110. ECtHR, 29 Aug. 1997, *Worm v. Austria*, Reports 1997-V.

111. ECtHR, 24 Feb. 1997, *De Haes and Gijssels v. Belgium*, Reports 1997-I.

112. ECtHR, 20 May 1998, *Schöpfer v. Switzerland*, Reports 1998-III.

113. ECtHR, 28 March 1990, *Groppera Radio AG and Others v. Switzerland*, Series A No. 173.

114. ECtHR, 25 March 1985, *Barthold v. Germany*, Series A No. 90, § 42.

115. See in particular: ECtHR, 24 May 1988, *Müller and Others v. Switzerland*, Series A No. 133, § 26.

See however: ECtHR, 17 Oct. 2002, *Stambuk v. Germany*, No. 37928/97, not published.



[33] *Receiving information*

There must be freedom to receive information. Everybody must be able to receive pluralist information, without which freedom to impart information would be meaningless: the right to broadcast under Article 10 includes the right not to have reception of broadcasts obstructed. A genuine right to information has thus been asserted¹¹⁶ even if at present the European Court has not wished to establish a general right of access to personal data.¹¹⁷

2. *Exceptions to the principle of freedom*

[34] *A conditional freedom*

Freedom of expression, despite its considerable importance, nevertheless remains a conditional freedom. This means that limitations on the principle of freedom are possible through licensing and, more generally, interference by the state.

a) State licensing

[35] *Last part of Article 10 § 1*

The last part of Article 10 § 1 of the European Convention specifies that states may require the licensing of broadcasting, television or cinema enterprises. However, the licensing clause is now subject to a more liberal interpretation, so that its impact is reduced:¹¹⁸ of course, states can control the way in which broadcasting is organised, but their licensing measures must comply with the requirements in the second paragraph of Article 10.

116. ECtHR, 26 April 1979, *Sunday Times v. the United Kingdom*, Series A No. 30, § 65; ECtHR, 8 July 1986, *Lingens v. Austria*, Series A No. 103 § 42.

117. ECtHR, 26 March 1987, *Leander v. Sweden*, Series A No. 116, § 74.

118. ECtHR, 28 March 1990, *Groppera radio AG v. Switzerland*, Series A No. 173, § 61



b) State interference

[36] Article 10 § 2 of the Convention

The second paragraph of Article 10 provides for limitations on the principle of freedom. It states that the exercise of these freedoms carries with it duties and responsibilities and that it 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.

In particular, freedom of the press, which is undoubtedly of cardinal importance in a democratic society, nevertheless cannot be unlimited. Firstly, certain conduct may render the person concerned civilly liable¹¹⁹ or even criminally liable in the case of defamation or insulting language. Secondly, preventive measures may be envisaged, but only in extreme cases and very limited circumstances.¹²⁰ Lastly, protecting the rights of others may result in freedom of expression being limited:¹²¹ thus when the protection of private life has to be balanced against freedom of expression, the deciding factor must be the contribution made by published photos or articles to a debate of general interest;¹²² the circumstances of a case are also important, so that a publication ban justified at a given moment may no longer be warranted subsequently.¹²³ In fact, over and above freedom of the press, freedom of expression as a whole is not without its limits, especially as the theory of abuse of rights under Article 17 of the Convention may also apply.¹²⁴

119. ECtHR, 29 March 2001, *Thoma v. Luxembourg*, Reports 2001-III.

120. ECtHR, 26 April 1979, *Sunday Times v. the United Kingdom*, Series A No. 30, § 51; ECtHR, 26 Nov. 1991, *Observer and Guardian v. the United Kingdom*, Series A No. 216, § 60.

121. ECtHR, 8 July 1986, *Lingens v. Austria*, Series A No. 103; 30 March 2004, *Radio-France v. France*, No. 53984/00, not published

122. ECtHR, 24 June 2004, *Von Hannover v. Germany*, No. 59320/00, not published.

123. ECtHR, 18 May 2004, *Sté Plon v. France*, No. 58148/00, not published.



F. Freedom of thought, conscience and religion

[37] Article 9 of the European Convention

Under paragraph 1 of Article 9, everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief, in worship, teaching, practice and observance. The second paragraph of the article states, however, that 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.

The safeguard provided by Article 9 of the European Convention applies to all personal, political, philosophical,¹²⁵ moral and, of course, religious convictions. Freedom of thought, conscience and religion is a basic freedom. Its importance has been emphasised, *inter alia*, by the European judges: regarded as one of the foundations of democratic society,¹²⁶ it is one of the vital elements that go to make up the identity of believers and their conception of life.¹²⁷

1. The absolute freedom to hold convictions and beliefs

[38] Persons protected

Natural persons are, as a matter of course, entitled to all the freedoms guaranteed by Article 9. The right to hold personal convictions and religious beliefs is universal and must be understood in the broad sense: it applies not only to believers but also to atheists, agnostics and the uncon-

124. See, in particular, ECtHR, 24 June 2003, *Garaudy v. France*, Reports 2003-IX (revisionism).

125. ECmHR, 12 Oct. 1978, *Arrowsmith v. the United Kingdom*, DR 19/5.

126. ECtHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31.

127. ECtHR, 20 Sep. 1994, *Otto Preminger Institute v. Austria*, Series A No. 295-A.



cerned.¹²⁸ Article 9 is a *precious asset*¹²⁹ since the pluralism indissociable from a democratic society depends on it.¹³⁰

It has become necessary to extend the protection of Article 9 to groups of individuals because of the collective aspect of some of the rights guaranteed. However, groups can cite only freedom of religion rather than all the freedoms of Article 9: freedom of conscience cannot be exercised by a collective body,¹³¹ and a profit-making collective body cannot exercise or rely on the rights defined in Article 9 § 1.¹³² While accepting that a church or its ecclesiastical body may, as such, exercise the rights guaranteed by Article 9 on behalf of its adherents, the Court and former Commission expressly refer to freedom of religion and freedom to manifest a religion.¹³³

a) Extent of protection

[39] *Rights protected*

Personal convictions are more than just opinions: they are ideas that have attained a certain degree of strength, seriousness, coherence and importance.¹³⁴ A conviction is different from a personal motivation (however strong) inasmuch as it must be possible to construe it as the expression of a coherent view of basic issues.¹³⁵

128. ECtHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31.

129. ECtHR, 18 Feb. 1999, *Buscarini and Others v. San Marino*, Reports 1999-I, § 34.

130. ECtHR, 13 Dec. 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, op. cit., § 114.

131. ECmHR, 12 Oct. 1998, *Kontakt-Information Therapie Hagen v. Austria*, DR 57/81; 15 April 1996, *Kustannus Oy Vapaa Ajattelijä AB and Sundström v. Finland*, DR 85/29.

132. ECtHR, 27 Feb. 1979, *X v. Switzerland*, D 16/85; 15 April 1996, *Kustannus Oy Vapaa Ajattelijä AB and Sundström v. Finland*, DR 85/29.

133. ECmHR, 3 Sep. 1996, et ECtHR, 16 Dec. 1997, *Canea Catholic Church v. Greece*, Reports 1997-VIII, §§ 39 and 31; (Gr. Ch.), 27 June 2000, *Cha'are Shalom Ve Tsedek v. France*, Reports 2000-VII, § 72. See also: ECtHR, 13 Dec. 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, op. cit., § 101.

134. ECtHR, 25 Feb. 1982, *Campbell and Cosans v. the United Kingdom*, Series A No. 48 § 34.

135. ECmHR, 1 Dec. 1981, *X v. the Federal Republic of Germany*, DR 24/137.



[40] Freedom of thought and conscience

We can learn a great deal from the case-law of the former Commission concerning freedom of thought and conscience. Thus an application from a person maintaining that his sentence for belonging to the Communist Party of Turkey was a violation of his freedom of thought was declared admissible¹³⁶. The choice of children's forenames by their parents also comes within the ambit of this freedom.¹³⁷ On the other hand, an obligation to become a member of a professional body does not infringe freedom of thought¹³⁸. A similar solution was adopted for an applicant sentenced to fines and imprisonment for contempt of court: this was not deemed to be interference with the right to respect for his freedom of thought¹³⁹. Lastly, the European Convention does not guarantee any right to conscientious objection:¹⁴⁰ if a state accepts conscientious objection, substituting civilian service for military service, conscientious objectors cannot allege an infringement of Article 4 of the Convention, which prohibits forced or compulsory labour.¹⁴¹ As matters stand, states are free not to recognise conscientious objection and to impose sanctions on those who refuse to accomplish their obligations.¹⁴²

The European Court has pointed out that mention of the consciousness of belonging to a minority and the preservation and development of a minority's culture cannot be said to constitute a threat to "democratic society".¹⁴³

136. ECmHR, 11 Oct. 1991, *Hazar and Others v. Turkey*, DR 72/200.

137. ECmHR, 2 July 1997, *Salonen v. Finland*, DR 90/60.

138. ECmHR, 8 Sep. 1989, *Revert and Legallais v. France*, DR 62/314.

139. ECmHR, 3 Dec. 1993, *Putz v. Austria*, DR 76/51.

140. ECmHR, 23 April 1965, *A. Grandrath v. the Federal Republic of Germany*, YB 1965 p. 507; 7 March 1977, *Group of Conscientious Objectors v. Denmark*, DR 9/117. – *Adde*: ECmHR, 9 May 1984, *A v. Switzerland*, DR 38/222; 7 March 1996, *Raninen v. Finland*, DR 84/17.

141. ECmHR, 5 July 1977, *X v. the Federal Republic of Germany*, DR 9/201.

142. ECmHR, 12 Dec. 1968, *Grandrath v. the Federal Republic of Germany*, op. cit.; 5 July 1977, *X v. the Federal Republic of Germany*, op. cit.; 9 May 1994, *A v. Switzerland*, op. cit.; 14 Oct. 1985, *Jorgen Johansen v. Norway*, DR 44/ 65.

143. ECtHR, 10 July 1998, *Sidiropoulos and Others v. Greece*, Reports 1998-IV, § 41.



[41] Freedom of religion

The Convention' institutions do not have the authority to define religion, but the latter must be considered in a non-restrictive sense: religious beliefs cannot be limited to the *main* religions, but the alleged religion must still be identifiable.¹⁴⁴ Cases involving major religions are relatively few, since their tenets are well-known and relations with the state have stabilised.¹⁴⁵ The question is more difficult, however, with minority religions and new religious bodies.

With respect to the French Law of 12 June 2001 to strengthen preventive and punitive action against sectarian movements infringing human rights and fundamental freedoms, in the case of the *Christian Federation of Jehovah's Witnesses in France* the Court found that the applicant association could not claim to be a victim within the meaning of the Convention and that impugning Parliament's motives in passing this legislation, when it was concerned to settle a burning social issue, did not amount to proof that the applicant association was likely to run any risk.¹⁴⁶ Moreover, it is not the Court's task to rule on legislation *in abstracto*: consequently, it cannot express a view as to the compatibility of a law with the Convention.¹⁴⁷

b) Strength of protection

[42] Affirmation of free choice

Every individual must have the freedom to choose and to change his mind, just as he must also be able to manifest his convictions freely, either alone or in community with others, in public or in private.¹⁴⁸ All indoctrina-

144. ECmHR, 4 Oct. 1977, *X v. the United Kingdom*, DR 11/55.

145. General, there are litigations relating to internal discipline and relations with employees (ECmHR, 8 Sep. 1988, *Jan Ake Karlsson v. Sweden*, DR 57/176), but, sometimes, the crisis can be more severe: ECtHR, 9 Dec. 1994, *The Holy Monasteries v. Greece*, Series A No. 301-A (transfer of property to state's advantage). See also litigation in the scholar sphere: ECmHR, 6 Jan. 1993, *Yanasik v. Turkey*, No. 16 278/90, not published.

146. ECtHR, 6 Nov. 2001, *Christian Federation of Jehovah's Witnesses in France v. France*, Reports 2001-XI.

147. ECtHR, 25 Feb. 1997, *Findlay v. the United Kingdom*, Reports 1997-I, § 67.

148. ECmHR, 5 March 1976, *X v. the United Kingdom*, DR 5/8; 12 March 1981, *X v. the United Kingdom*, DR 22/27, not published.



tion, especially at school, is prohibited,¹⁴⁹ because it constitutes an unacceptable infringement of freedom of consent. More generally, guaranteeing freedom of thought, conscience and religion implies neutrality of the state.¹⁵⁰ Respect for different convictions and beliefs is a basic obligation for a state, and the right to freedom of religion excludes any discretion on its part to determine whether religious beliefs or the means used to express such beliefs are legitimate.¹⁵¹

In the specific case of religion, freedom of choice is important. Admittedly, individuals do not choose their original religion, since this is generally the responsibility of their parents or legal guardians. Freedom to choose one's religion implies the idea of being able to change it – in other words, to be converted – although consent must still be given freely. Nevertheless, the European Court has acknowledged that religious freedom includes in principle the right to try to convince one's neighbour, without, however, legitimising proselytism.¹⁵² Furthermore, in accordance with the principle of free choice, it is not possible to compel a person to participate against his will in the activities of a religious community of which he is not actually a member.¹⁵³

[43] *Protection of religious feelings*

The question arises of whether a right to protection of religious feelings should be recognised as an element of religious freedom. The answer must be yes, although believers must tolerate and accept the denial by others of their religious beliefs and the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs are opposed or denied is a matter which may engage the responsibility of the state, notably its responsibility to ensure the peaceful enjoyment of the

149. ECtHR, 7 Dec. 1976, *Kjeldsen and Others v. Denmark*, Series A No. 23.

150. ECtHR, 23 June 1993, *Hoffmann v. Austria*, Series A No. 255-C, § 36. Thus, requiring to take the oath on the Gospels had been tantamount to requiring elected representatives of the people to swear allegiance to a particular religion, a requirement which was not compatible with Article 9: ECtHR (Gr.Ch.), 18 Feb. 1999, *Buscarini and Others v. San Marino*, Reports 1999-I, § 39.

151. ECtHR, 26 Sep. 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV, § 47.

152. About the particular case of proselytism, cf. *infra*, No. 50.

153. ECtHR, 23 Oct. 1990, *Darby v. Sweden*, Series A No. 187.



right guaranteed under Article 9 to the holders of those beliefs: in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.¹⁵⁴

The Court has held, in the context of Article 9, that a state may take measures to repress certain forms of conduct, including the imparting of information and ideas judged incompatible with respect for the freedom of thought, conscience and religion of others.¹⁵⁵ It has accepted that respect for the religious feelings of believers as guaranteed in Article 9 has been violated by provocative portrayals of objects of religious veneration, and these portrayals could be regarded as malicious violation of the spirit of tolerance which must also be a feature of democratic society.¹⁵⁶

2. Relative freedom to manifest convictions and beliefs

[44] A relative freedom

While religious freedom is primarily a matter of individual conscience, it also implies freedom to *manifest [one's] religion* within the circle of those whose faith one shares. Bearing witness in words and deeds is bound up with the existence of religious convictions. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion;¹⁵⁷ it further entails the right to be able to observe one's beliefs whatever the circumstances, including in prison¹⁵⁸ and at work.¹⁵⁹ These principles¹⁶⁰ apply not only to freedom of religion but also, more

154. ECtHR, 20 Sep. 1994, *Otto Preminger Institute v. Austria*, Series A No. 295-A, § 47.

155. ECtHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 48.

156. ECtHR, 20 Sep. 1994, *Otto Preminger Institute v. Austria*, op. cit., § 47.

157. ECtHR, 13 Dec. 2001, *Metropolitan Church of Bessarabia and Others v. Moldova v. Moldova*, Reports 2001-XII, § 114. See also: ECtHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31; (Gr. Ch.) 18 Feb. 1999, *Buscarini and Others v. San Marino*, Reports 1999-I, § 34.

158. ECmHR, 5 March 1976, *X v. the United Kingdom*, DR 5/8.

159. ECmHR, 12 March 1981, *X v. the United Kingdom*, DR 22/27

160. Article 9 ECHR can be the subject of a violation in conjunction with Article 14 which prohibits discrimination: ECtHR, 6 April 2000, *Thlimmenos v. Greece*, Reports 2000-IV (violation); 27 June 2000 (Gr. Ch.), *Cha'are Shalom ve Tsedek v. France*, Reports 2000-VII (non violation). Also Article 2 of Protocol No. 1 which specifies that the state shall respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions.



generally, to all convictions and beliefs. However, although this freedom to manifest one's convictions and beliefs is firmly established, it is not unlimited.

a) Enshrinement of the right to manifest one's convictions and beliefs

[45] *A basic freedom*

Freedom of religion cannot be restricted to individual conscience and entails the freedom to manifest one's religious beliefs. Participation in the life of the community is a manifestation of one's religion protected by Article 9, to which it should be added that, were the organisational life of the community not protected by this article, all other aspects of the individual's freedom of religion would become vulnerable.¹⁶¹

Article 9 § 1 of the Convention therefore recognises the right to manifest one's religion or beliefs, more specifically mentioning the freedom of every individual *either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance*. This implies a duty on the part of the authorities to remain neutral, since it is not their role to determine whether religious beliefs or the means used to express such beliefs are legitimate or to interfere with the leadership of a religious community:¹⁶² if this neutrality is necessary for the freedom to hold convictions,¹⁶³ it is also necessary, albeit in a lesser degree, for the freedom to manifest these convictions.

[46] *Clarification from the former Commission*

Although ordinary manifestations of religious belief such as worship and observance raise no serious difficulties,¹⁶⁴ others are more controversial, whether in the case of teaching or in the case of certain types of practice. The Commission has held that when the actions of individuals do not actually express the belief concerned, even when they are motivated or

161. ECtHR (Gr.Ch.), 26 Oct. 2000, *Hassan and Tchaouch v. Bulgaria*, Reports 2001-XI, § 62. See also: ECtHR, 16 Dec. 2003, *Palau-Martinez v. France*, No. 64927/01, not published.

162. ECtHR (Gr.Ch.), 26 Oct. 2000, *Hassan and Tchaouch v. Bulgaria*, op. cit.

163. Cf. *supra*, No. 42.

164. See however: ECmHR, 12 March 1981, *X v. the United Kingdom*, DR 22/27.



influenced by it, they cannot be protected by Article 9. An act must be a *direct* manifestation of a belief.¹⁶⁵

[47] *Clarification from the Court*

The Court outlined the relevant principles in the “Pichon and Sajous” case, in which pharmacists had refused to sell contraceptive pills because of their religious convictions.¹⁶⁶ 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. It also protects acts that are closely linked to these matters such as acts of worship or devotion forming part of the practice of a religion or a belief in a generally accepted form. The Court has also stated that Article 9 lists a number of forms which manifestation of one’s religion or belief may take, namely worship, teaching, practice and observance,¹⁶⁷ whilst making it clear that this article does not always guarantee the right to behave in public in a manner governed by a belief. Not all opinions or convictions constitute beliefs in the sense protected by Article 9, even if they are deep-seated beliefs.¹⁶⁸

b) Limitations on the right to manifest one’s convictions and beliefs

[48] *European pragmatism*

Human rights derogations are part and parcel of human rights and also affect not freedom of thought, conscience and religion – which can only be unconditional – but the freedom to manifest this freedom. In this particular case, it is the Court’s task to ascertain whether the measures taken at national level are justified in principle and proportionate. In order

165. ECmHR, 12 Oct. 1978, *Pat Arrowsmith*, DR 19/5 (pacifism); 6 July 1987, *Le Cour Grandmison and Fritz v. France*, DR 53/150 (pacifism); ECmHR, 15 Jan. 1998, *Boffa and Others v. San Marino*, DR 92/27; 20 Aug. 1993, *B.B. v. Switzerland*, DR 75/223 (vaccination); ECmHR, 5 May 1979, *X and Church of Scientology v. Sweden*, DR 16/68 (religious manifestations but with a commercial nature).

166. ECtHR, 2 Oct. 2001, *Pichon and Sajous v. France*, Reports 2001-X (decision on admissibility).

167. ECtHR, 1 July 1997, *Kalaç v. Turkey*, Reports 1999-IV, § 27. See also ECtHR (Gr. Ch.), 27 June 2000, *Cha’are Shalom Ve Tsedek v. France*, Reports 2000-VII, § 73.

168. ECtHR, 29 April 2002, *Pretty v. the United Kingdom*, Reports 2002-III, § 82.



to determine the scope of the margin of appreciation in each case the Court must take into account what is at stake, namely the need to maintain true religious pluralism, which is inherent in the concept of a democratic society.¹⁶⁹ Similarly, a good deal of weight must be given to that need when determining, as paragraph 2 of Article 9 requires, whether the restriction is proportionate to the legitimate aim pursued.¹⁷⁰ The restrictions imposed on the freedom to manifest religion call for very strict scrutiny by the Court.¹⁷¹ In exercising its supervisory jurisdiction, the Court must consider the interference complained of on the basis of the case as a whole.¹⁷²

[49] *State interference: general rules*

State interference must be prescribed by law. The *Metropolitan Church of Bessarabia* judgment¹⁷³ specifies that for domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention: in matters affecting fundamental rights it would be contrary to the rule of law – a fundamental principle – for a legal discretion granted to the executive to be expressed in terms of an unfettered power; consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.¹⁷⁴ Moreover, if the relevant law does not set forth any substantive criteria for registering religious denominations and changes of their leadership, interference with the internal organisation of the Muslim community and the applicants' freedom of religion is not *prescribed by law* in that it is arbitrary and is based on legal provisions which allow an unfettered discretion to the executive: in these

169. ECtHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31; 13 Dec. 2001, *Eglise métropolitaine de Bessarabie and Others v. Moldova*, Reports 2001-XII, § 119.

170. Cf. *mutatis mutandis* ECtHR, 25 Nov. 1996, *Wingrove v. the United Kingdom*, Reports 1996-V, § 53.

171. ECtHR, 26 Sep. 1996, *Manoussakis v. Greece*, Reports 1996-IV, § 44.

172. ECtHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 47.

173. ECtHR, 13 Dec. 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, Reports 2001-XII, § 109.

174. ECtHR, 26 Oct. 2000 *Hassan and Tchaouch v. Bulgaria*, Reports 2000-IX, § 84.



circumstances it does not meet the required standards of clarity and foreseeability.¹⁷⁵

Interference must have a legitimate aim. The legitimate aims of interference are specified in the second paragraph of Article 9 of the European Convention on Human Rights, which refers to public safety, the protection of public order, health and morals, and the protection of the rights and freedoms of others. In their *Metropolitan Church of Bessarabia* judgment, the European judges rightly stressed that the Court considered that states were entitled to verify whether a movement or association carried on, ostensibly in pursuit of religious aims, activities which were harmful to the population or to public safety.¹⁷⁶

Interference must be necessary in a democratic society. For interference to be *necessary* it must meet a pressing social need whilst remaining proportionate to the legitimate aim pursued:¹⁷⁷ this means that interference must be based on just reasons which are both relevant and sufficient.¹⁷⁸ The need must be determined with reference to the particular circumstances of the case. In the specific context of freedom of thought, conscience and religion, the European judges have stated that, in a democratic society in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.¹⁷⁹ However, the state has a duty to remain neutral and impartial here, since what is at stake is the preservation of pluralism and the proper functioning of democracy, which must resolve a country's problems through dialogue, without recourse to violence.¹⁸⁰ the

175. ECtHR, 26 Oct. 2000, *Hassan and Tchaouch v. Bulgaria*, op. cit., § 86.

176. ECtHR, 13 Dec. 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, op. cit., § 113; 26 Sep. 1996, *Manoussakis v. Greece*, op. cit., § 40; 2 Oct. 2001, *Stankov and Others v. Bulgaria*, Reports 2001-IX, § 84.

177. ECtHR, 26 March 1979, *Sunday Times v. the United Kingdom*, Series A No. 30, § 62; 24 Nov. 1986, *Gillow v. the United Kingdom*, Series A No. 109, § 55.

178. ECtHR, 22 Oct. 1981, *Dudgeon v. the United Kingdom*, Series A No. 45, § 51 s.

179. ECtHR, 13 Dec. 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, Reports 2001-XII, § 115; 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 33.

180. ECtHR, 30 Jan. 1998, *United Communist Party of Turkey and Others v. Turkey*, Reports 1998-I, p. 27, § 57.



role of the authorities is not to remove the cause of tension by eliminating pluralism but to ensure that the competing groups tolerate each other.¹⁸¹ The Court has further observed that state measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion.¹⁸²

[50] State interference: individual cases

Places of worship can raise specific problems, especially if prior authorisation from the state is required by domestic law. A conviction from the state for failure to comply with this formality has such a direct effect on applicants' freedom of religion that it may be considered a violation of Article 9¹⁸³ if it appears disproportionate to the legitimate aim pursued and unnecessary in a democratic society. However, a state's refusal to authorise construction of a prayer house is not necessarily a breach of Article 9: it has been found that, taking into account, amongst other things, the contracting states' margin of appreciation in matters of town and country planning,¹⁸⁴ such a refusal may be justified in principle and proportionate to the aim pursued. Article 9 was therefore not violated in the case in point.¹⁸⁵

The question of signs of religious affiliation, especially in educational establishments, is a delicate one. The European Court has held that a ban on wearing Islamic headscarves in a Turkish university was not contrary to Article 9 given the local context and the margin of appreciation that must be left to states.¹⁸⁶

Proselytising is prohibited, and although the freedom to propagate religious beliefs and attempt to persuade others is beyond dispute,

181. ECtHR, 13 Dec. 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, op. cit., § 116.

See also: ECtHR, 14 Dec. 1999, *Serif v. Greece*, Reports 1999-IX, § 53.

182. ECtHR, 13 Dec. 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, op. cit., § 117.

183. ECtHR, 26 Sep. 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV, §§ 51 à 53.

184. See: ECtHR, 25 Sep. 1996, *Buckley v. the United Kingdom*, Reports 1996-IV, §§ 74-75

185. ECtHR, 24 June 2004, *Vergos v. Greece*, No. 65501/01, not published, §§ 37-41.



“improper” manifestations of this freedom cannot be permitted, particularly when they are likely to interfere with the rights of others or undermine public order through dangerous and extremist messages. This cannot be compatible with respect for the freedom of thought, conscience and religion of others.¹⁸⁷ Article 9 does not, however, protect every act motivated or inspired by a religion or belief; in particular, it does not protect improper proselytism, such as the offering of material or social advantages or the application of improper pressure with a view to gaining new members for a Church;¹⁸⁸ consequently, if a state takes steps to protect vulnerable and disadvantaged people this is not in breach of Article 9.

G. Protection of privacy

[51] European protection of privacy

The right to privacy is mainly enshrined in the first paragraph of Article 8 of the European Convention, which protects private and family life as well as the home and correspondence. However, the second paragraph of this article provides for possible interference with this right by the public authorities: state interference is possible if it 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.

Because it also applies to family life, Article 8 needs to be considered in conjunction with the provisions of the Convention and its additional protocols concerning the right to marry.

186. ECtHR, 29 June 2004, *Leyla Sahin v. Turkey*, No. 44774/98, not published (the Grand Chamber has been seized). It should be noted that a similar case (a ban on the applicants wearing the Islamic headscarf in a Nursing College during practical training) was declared admissible: ECtHR, 2 July 2002, *Tekin v. Turkey*, No. 41556/98, not published. See also ECmHR, 3 May 1973, *Karaduman v. Turkey*, DR 74/93; ECtHR, 15 Feb. 2001, *Dahlab v. Switzerland*, Reports 2001-V.

187. ECtHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 48.

188. ECtHR, 24 Feb. 1998, *Larissis and Others v. Greece*, Reports 1998-I, § 45.



1. *The right to marry*

[52] *Article 12 of the Convention*

Under Article 12, 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. This right is not subject to any special limitations but is incorporated into domestic legislation: its exercise may thus be restricted provided that this does not impair its substance.

The former Commission tended to dissociate marriage and reproduction, enabling it to recognise the right of prisoners¹⁸⁹ and even transsexuals¹⁹⁰ to marry. The Court, having reiterated that the right established by Article 12 was not conceivable without the right to cohabit,¹⁹¹ adopted a position of principle affirming that this article did not guarantee the right of a transsexual to marry: Article 12 refers to traditional marriage between persons of opposite biological sex.¹⁹² But the European Convention is a *living instrument*: this means that social change must be taken into account, and the European judges now seem to accept the right of transsexuals to marry.¹⁹³

On the other hand, the European judges have rejected a broad interpretation of Article 12 encompassing its opposite aspect: the article safeguards the creation of marital relationships but not their dissolution.¹⁹⁴ The right to divorce is therefore not a right guaranteed by the Convention, but a divorced person, even if the party at fault, cannot be subject, even temporarily, to restrictions on remarrying.¹⁹⁵ Thus it is the right to marry that is protected.

189. ECmHR, 13 Dec. 1979, *Hamer v. the United Kingdom*, DR 24/5.

190. ECmHR, 9 May 1989, *Cossey v. the United Kingdom*, Series A No. 184, § 43 s. See however: ECmHR, 9 Nov. 1989, *Eriksson and Goldschmidt v. Sweden*, DR 63/213.

191. ECtHR, 28 May 1985, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Series A No. 94, § 62.

192. ECtHR, 17 Oct. 1986, *Rees v. the United Kingdom*, Series A No. 106, § 49; *Cossey*, op. cit., § 46.

193. ECtHR (Gr.Ch.), 11 July 2002, *Goodwin v. the United Kingdom*, Reports 2002-VI; (Gr. Ch.) 11 July 2002, *I v. the United Kingdom*, No. 25680/94, not published.

194. ECtHR, 18 Dec. 1986, *Johnston and Others v. Ireland*, Series A No. 112, § 52 s.

195. ECtHR, 18 Dec. 1987, *F. v. Switzerland*, Series A No. 128, § 38.



[53] Article 5 of Protocol No. 7

Under Article 5 of Protocol No. 7 spouses 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. The article concludes by stating that this shall not prevent states from taking such measures as are necessary in the interests of the children.

2. *The right to respect for private and family life*

[54] *The changing nature of concepts*

The European judges have gradually sanctioned change in the concepts of private and family life, favouring a broad interpretation. The scope of Article 8 was recently extended, with the right to respect for private and family life guaranteeing members of a national minority the right to have a traditional lifestyle.¹⁹⁶ Similarly, Article 8 is applicable in the field of environmental law: this right is not expressly recognised in the Convention, but if a person suffers directly and seriously from noise or other types of pollution, the question may be raised under this article.¹⁹⁷ More generally, the European judges have rejected a restrictive approach in favour of one embracing the social and community dimension of private life.¹⁹⁸

a) Protection of private life

[55] *The concept of private life*

Private life is a vague concept which the European Court construes broadly. It is usually considered to be the private sphere of personal relations and more specifically a person's physical and moral integrity,¹⁹⁹ together with his sexual life.²⁰⁰ However, private life has its limits, depend-

196. ECtHR (Gr.Ch.), 18 Jan. 2001, *Chapman v. the United Kingdom*, Reports 2001-I (tsiganes).

197. ECtHR, 21 Feb. 1990, *Powell and Rayner v. the United Kingdom*, Series A No. 172, § 40; 9 Dec. 1994, *Lopez Ostra v. Spain*, Series A No. 303-C, § 51; 19 Feb. 1998, *Guerra v. Italy*, Reports 1998-I; (Gr. Ch.) 8 July 2003, *Hatton v. the United Kingdom*, Reports 2003-VIII; 10 Nov. 2004, *Taskin and Others v. Spain*, No. 4143/02, not published.

198. ECtHR, 24 Feb. 1998, *Botta v. Italy*, Reports 1998-I.



ing on, amongst other things, the public nature of certain types of sexual behaviour, the practice of coercion and the existence of an actual danger to individuals.²⁰¹ The interests of others must be protected, especially where vulnerable people are concerned, and consequently prohibitions are always possible. Subject to these common-sense reservations, everyone has the right to lead the sexual life of his choice in accordance with his intrinsic identity.²⁰²

[56] *Sexual identity*

The issue of change of sexual identity gave rise to difficulties, and the Court eventually recognised such a change of identity by implication: having first found that there was no positive obligation on a state to establish a document proving a new sexual identity,²⁰³ it held that a transsexual who was unable to obtain rectification of her civil status found herself daily in a situation which was not compatible with the respect due to her private life.²⁰⁴

The European judges have held that states do not have a positive obligation to establish a type of documentation constituting proof of a change of sexual identity.²⁰⁵ However, they implicitly recognise the right to change sexual identity, thus allowing further developments.²⁰⁶

199. ECtHR, 26 March 1985, *X and Y v. the Netherlands*, Series A No. 91; 6 Feb. 2001, *Bensaid v. the United Kingdom*, Reports 2001-I.

200. ECtHR, 26 March 1985, *X and Y v. the Netherlands*, Series A No. 91, § 22. Concerning homosexuality, see: ECtHR, 22 Oct. 1981, *Dudgeon v. the United Kingdom*, Series A No. 45; 26 Oct. 1988, *Norris v. Ireland*, Series A No. 142; 22 April 1993, *Modinos v. Cyprus*, Series A No. 259; ECmHR, DR 10 Feb. 1990, *B. v. the United Kingdom*, DR 64/278. Adde ECtHR, 26 Feb. 2002, *X v. France*, No. 36515/97, not published.

201. ECtHR, 19 Feb. 1997, *Laskey, Jaggard and Brown v. the United Kingdom*, Reports 1997-I. (sado-masochist practices entailing corporal damages).

202. ECtHR, 27 Sep. 1999, *Smith and Others v. the United Kingdom*, Reports 1999-VI.

203. ECtHR, 17 Oct. 1986, *Rees v. the United Kingdom*, Series A No. 106 and 27 Sep. 1990, *Cossey v. the United Kingdom*, Series A No. 184, §§ 47 et 42.

204. ECtHR, 25 March 1992, *B. v. France*, Series A No. 232-C, § 63.

205. *Rees*, op. cit., § 37; *Cossey*, op. cit., § 37; ECtHR, 30 July 1998, *Sheffield and Horsham v. the United Kingdom*, Reports 1998-V.

206. *Rees*, op. cit., § 47, and *Cossey*, op. cit., § 42. Adde ECtHR, 25 March 1992, *B v. France*, Series A No. 232-C, § 44.



[57] *Personal data*

The confidentiality of personal data is a delicate question. In particular, disclosure of medical records as part of a procedure may sometimes be considered a violation of Article 8 of the Convention:²⁰⁷ the principle of confidentiality of medical information is necessary to protect patients' private lives and ensure that they do not lose confidence in the health service; consequently, any disclosure of medical records must be accompanied by adequate safeguards against any abuse.²⁰⁸ Generally speaking, the storing of personal data by a public authority constitutes an interference in the right to respect for private life.²⁰⁹ The Court guarantees effective protection, not hesitating to broaden the scope of Article 8 to include in private life public information held in the files of public authorities.²¹⁰

b) Protection of family life

[58] *Protection of family life: general rules*

Family life is distinguished by the existence of a sufficiently close relationship. But European protection of family life is very broad, especially as the concepts involved can evolve very rapidly.

Generally speaking, family life is taken to mean the ties between parents and children, but the ties between near relatives are included if they play a considerable part in family life²¹¹. Family life must be pre-existing and real,²¹² which means that it must be distinguished by genuine and close ties between its members and cannot be confined solely to marriage-based relationships.²¹³ The Court holds that family life is not tied to

207. ECtHR, 25 Feb. 1997, *Z v. Finland*, Reports 1997-I. Adde ECtHR, 27 Aug. 1997, *M.S. v. Sweden*, Reports 1997-IV.

208. ECtHR, 25 Feb. 1997, *Z v. Finland*, Reports 1997-I, § 96 s.

209. ECtHR, 26 March 1987, *Leander v. Sweden*, Series A No. 116.

210. ECtHR, 5 May 2000, *Rotaru v. Romania*, Reports 2000-V.

211. ECtHR, 13 June 1979, *Marckx v. Belgium*, Series A No. 31; 7 Aug. 1996, *Johansen v. Norway*, Reports 1996-III.

212. ECtHR, 26 May 1994, *Keegan v. Ireland*, Series A No. 290; 27 Oct. 1994, *Kroon and Others v. the Netherlands*, Series A No. 297.

213. ECtHR (Gr.Ch.), 13 July 2000, *Elsholz v. Germany*, Reports 2000-VIII.



marriage and can continue after a divorce²¹⁴ and that a blood relationship is not essential, since *de facto* ties can constitute family life.²¹⁵ Similarly, the actual existence of family life prevails over a relationship by descent: a court order authorising adoption of a child by the mother's husband without the consent of the natural father does not disproportionately interfere with the latter's family life.²¹⁶ In short, whether for legitimate families or natural families, states must act in a manner calculated to allow those concerned to lead a normal family life whilst developing affective relationships.²¹⁷

[59] Protection of family life: individual cases

Article 8 protects the family life of a prisoner. The principal question is that of visits; although any detention inevitably restricts family life, the prisoner must be able to maintain contact with his close family.²¹⁸ However, although the maintaining of contact with the family is essential, the demands of public interest cannot be forgotten: protection of public safety may entail restrictions on access.²¹⁹

Parental rights may give rise to certain problems. Thus the Court has held that there is no violation of Article 8 if a national authority refuses to register a female-to-male transsexual as the father of a child born to his female partner by artificial insemination.²²⁰ The procedure for educational measures ordered by the court must be fair and respect the parents' interests:²²¹ the positive obligation on states to protect the interests of the family requires that the information relied on by the authorities in taking the

214. ECmHR, 2 May 1978, *X. v. the Federal Republic of Germany*, DR 14/175.

215. ECtHR, 22 April 1997, *X, Y and Z v. the United Kingdom*, Reports 1997-II.

216. ECtHR, 28 Oct. 1998, *Söderbäck v. Sweden*, Reports 1998-VII. For the particular case of international adoptions, see: ECtHR, 25 Nov. 2003 (Admissibility Dec.) and 22 June 2004 (judgment on the merits), *Pini et Bertani v. Romania*, No. 78028/01 ..., not published.

217. See in particular: ECtHR, 18 Dec. 1986, *Johnston v. Ireland*, Series A No. 112; *Marckx v. Belgium*, op. cit., §§ 31 et 45.

218. ECmHR, 12 March 1990, *Ouinav v. France*, No. 13656/88, not published.

219. ECtHR, 28 Sep. 2000, *Messina v. Italy* (No. 2), Reports 2000-X. § 74.

220. ECtHR, 22 April 1997, *X, Y and Z v. the United Kingdom*, Reports 1997-II.

221. ECtHR, 16 Sep. 1999, *Buscemi v. Italy*, Reports 1999-VI; (Gr. Ch.) 8 July 2003, *Sahin v. Germany*, Reports 2003-VIII; 8 July 2003, *Sommerfeld v. Germany*, Reports 2003-VIII.



child into care be made available to the parent concerned, even in the absence of any request by that parent.²²²

The European judges interpret Article 8 broadly. This has led them to protect surnames, the attribution of which now comes within the ambit of the European Convention on Human Rights:²²³ such a rule is logical in so far as a name does affect family life, being not only a means of personal identification but also a link to a family; consequently, any refusal by national authorities to authorise a change of name is liable to European review, although the European Court allows states a considerable margin of appreciation.²²⁴ This judicial doctrine protecting surnames has also been extended to forenames.²²⁵ In addition, the European judges have decided that protection of working life comes within the ambit of Article 8: this article encompasses an individual's right to establish and develop relationships with other human beings, and the working environment plays an important role here.²²⁶ The fact remains that the Strasbourg judges, doubtless aware of the risks connected with too broad an interpretation of Article 8 and the uncertainty of its boundaries, have restricted its applicability without challenging its extension to working life.²²⁷ Similarly, the Court has not made the right to know one's origins a human right: after nevertheless stating that each individual must be able to collect information on his identity,²²⁸ it has not ruled against French law, which recognises the right to confidentiality regarding reproduction (giving birth anonymously).²²⁹

222. ECtHR (Gr.Ch.), 10 May 2001, *T.P. and K.M. v. the United Kingdom*, No. 28945/95, not published.

223. ECtHR, 22 Feb. 1994, *Burghartz v. Switzerland*, Series A No. 280-B.

224. ECtHR, 25 Nov. 1994, *Stjerna v. Finland*, Series A No. 299-B.

225. ECtHR, 24 Oct. 1996, *Guillot v. France*, Reports 1996-V.

226. ECtHR, 16 Dec. 1992, *Niemietz v. Germany*, Series A No. 251-B, § 29.

227. ECtHR, 24 Feb. 1998, *Botta v. Italy*, Reports 1998-I.

228. ECtHR, 7 Feb. 2002, *Mikulic v. Croatia*, Reports 2002-I.

229. ECtHR, 13 Feb. 2002, *Odièvre v. France*, Reports 2003-III.



3. *The right to respect for one's home and correspondence*

[60] *Protection of the home*

Protection of the home is a right which is pertinent to personal security and well-being.²³⁰ It is essential that the privacy of the premises where private life is carried on be protected. Here again, a broad interpretation of Article 8 prevails, since the European judges have extended protection to business premises.²³¹

[61] *Protection of correspondence*

Protection of correspondence gives rise to some problems, in particular regarding defendants²³² and especially prisoners.²³³ The European judges hold that some measure of control over correspondence is possible under the Convention, but the resulting interference must not exceed what is required by the legitimate aim pursued.²³⁴

Problems relating to telecommunications are more delicate, even though the Court accepts the principle of telephone-tapping if the interference is necessary in a democratic society in the interests of national security and the prevention of disorder or crime.²³⁵ The scope of and procedure for exercising the power conferred on the authorities must be clear and precise, since a lack of foreseeability constitutes a breach of Article 8:²³⁶ the individual concerned must be able to exercise effective control in order to restrict the interference in question to what is necessary in a dem-

230. ECtHR, 24 Nov. 1986, *Gillow v. the United Kingdom*, Series A No. 109, § 55; 30 March 1989, *Chappel v. the United Kingdom*, Series A No. 232-C (inviolability of the residence).

231. ECtHR, 16 Dec. 1992 *Niemietz v. Germany*, Series A No. 251-B (law office); ECtHR, 16 April 2002, *Colas Est Co. v. France*, Reports 2002-III (corporation). Also ECtHR, 25 Feb. 2003, *Roemens and Schmit v. Luxembourg*, Reports 2003-IV (search of a law office).

232. ECtHR, 20 June 1988, *Schönenberger and Durmaz v. Switzerland*, Series A No. 137.

233. ECtHR, 27 April 1988, *Boyle and Rice v. the United Kingdom*, Series A No. 13; 30 Aug. 1990, *McCullum v. the United Kingdom*, Series A No. 183; 25 Feb. 1992, *Pfeifer and Plankl v. Austria*, Series A No. 227; 24 Oct. 2002, *Messina v. Italy* (No. 3), No. 33993/96, not published.

234. *Pfeifer and Plankl*, op. cit.

235. ECtHR, 6 Sep. 1978, *Klass v. the Federal Republic of Germany*, Series A No. 28.

236. ECtHR, 2 Aug. 1984, *Malone v. the United Kingdom*, Series A No. 82; 24 April 1990, *Huvig and Krušlin v. France*, Series A No. 176-A and No. 176-B.



ocratic society.²³⁷ In addition, telephone-tapping may constitute interference with private life.²³⁸

As for the specific case of communication with lawyers, the Court draws no distinction between different categories of correspondence,²³⁹ thus providing comprehensive protection.²⁴⁰ With specific regard to telephone calls, the law must protect confidentiality of proceedings and legal professional privilege if phone-tapping intercepts communications between a lawyer and his client. Special attention is also paid to correspondence between lawyers and clients, with the protection of confidentiality being strengthened:²⁴¹ the public interest demands that any person who wishes to consult a lawyer should be free to do so under conditions allowing full and uninhibited discussion.²⁴²

H. Protection of social and political activity

[62] An essential protection

The freedom to engage in civic activities is an essential safeguard, be it freedom of assembly and association or the right to free elections.

1. Freedom of assembly and association

[63] A principle asserted by Article 11, paragraph 1, of the Convention

Under the first paragraph of Article 11 everyone has the right to freedom of peaceful assembly and to freedom of association with others.

Freedom of assembly applies to both public and private assemblies. When public marches are planned, authorisation by the public authorities is legitimate since, being responsible for the protection of public order,

237. ECtHR, 24 Aug. 1998, *Lambert v. France*, Series A No. 82.

238. ECtHR, 17 July 2003, *Craxi v. Italy*, No. 25337/94, not published.

239. ECtHR, 25 March 1992, *Campbell v. the United Kingdom*, Series A No. 233, § 48.

240. ECtHR, 28 Nov. 1991, *S. v. Switzerland*, op. cit., § 48.

241. ECtHR, 25 April 1983, *Silver and Others*, op. cit., § 99; 28 June 1984, *Campbell and Fell*, op. cit., § 110; 20 June 1988, *Schönenberger and Durmaz*, op. cit., § 28.

242. ECtHR, 25 March 1992, *Campbell v. the United Kingdom*, Series A No. 233, § 46. See also: ECtHR, 28 Nov. 1991, *S. v. Switzerland*, Series A No. 220, § 48.



they must take all necessary steps to guarantee the freedom of the assembly itself.²⁴³

Freedom of association generally implies that authorisation from state authorities is unnecessary. The right not to associate is recognised,²⁴⁴ but the European judges have held that the obligation to join a professional body is not in breach of the first paragraph of Article 11:²⁴⁵ admittedly, a professional body is not really an association and its purpose is to exercise public control over the practice of a profession. On the other hand, compulsory membership of a hunting association has been condemned by the European judges.²⁴⁶

[64] A principle qualified by Article 11, paragraph 2, of the Convention

The second paragraph of Article 11 states that no restrictions shall be placed on the exercise of these rights of assembly and association 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. These restrictions may be imposed by members of the armed forces, of the police or of the administration of the state.

Article 11 benefits the associations themselves, despite certain question marks. Thus the question of public officers belonging to the Freemasons has led the European judges to stress the importance and primacy of freedom of association: a law requiring candidates for public office to declare that they are not Freemasons is a breach of Article 11 § 2 of the Convention.²⁴⁷ Furthermore, the European judges have found that the

243. ECmHR, 17 Oct. 1985, *Plattform "Ärzte für das Leben"*, DR 44/71; ECtHR, 21 June 1998, *Plattform "Ärzte für das Leben"*, Series A No. 139.

244. ECmHR, 1 March 1983, *X v. the Netherlands*, DR 32/278; ECtHR, 30 June 1993, *Sigurjonsson v. Iceland*, Series A No. 264.

245. ECtHR, 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, Series A No. 43, § 65; 10 Feb. 1983, *Albert and Le Compte v. Belgium*, Series A No. 58.

246. ECtHR, 29 April 1999, *Chassagnou v. France*, Reports 1999-III.

247. ECtHR, 2 Aug. 2001, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, Reports 2001-VIII. For disciplinary sanctions imposed on a judge on account of his membership of the Freemasons, see: ECtHR, 17 Feb. 2004, *Maestri v. Italy*, No. 39748/98, not published.



provisions of Article 11 apply to political parties: this is a logical solution since they are a form of association essential to the proper functioning of democracy.²⁴⁸ The dissolution of a political party does not in itself constitute a breach of Article 11, especially if this party is pursuing an objective that is not compatible with the democratic ideal underlying the whole of the Convention.²⁴⁹ However, a dissolution may be disproportionate to the aim pursued, especially if the latter concerns public safety or territorial integrity.

2. Right to free elections

[65] The Convention's political clause

Under Article 3 of Protocol No. 1, contracting states 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. Despite its somewhat restrictive wording, this “political clause” is broad in scope, and the importance of this safeguard suggests that it is directly applicable, like the other substantive clauses in the Convention.²⁵⁰

The right to free elections is a political right of considerable importance. This right does not just concern the organisation of elections:²⁵¹ it entails recognition of universal suffrage²⁵² and encompasses both the right to vote and the right to stand for election.²⁵³ However, compulsory voting is not a breach of Article 3,²⁵⁴ which does not, moreover, guarantee any general right to a public vote such as a referendum.²⁵⁵ The expression

248. ECtHR, 25 May 1998, *Socialist Party v. Turkey*, Reports 1998-III; 30 Jan. 1998, *Communist Party v. Turkey*, Reports 1998-I.

249. ECtHR, 31 July 2001, *Refah Partisi and Others v. Turkey*, No. 41340/98..., not published; 13 Feb. 2003, *Refah Partisi and Others v. Turkey*, Reports 2003-II.

250. ECtHR, 2 March 1987, *Mathieu-Mohin and Clerfayt v. Belgium*, Series A No. 113; 1 July 1997, *Gitonas and Others v. Greece*, Reports 1997-IV; ECmHR, 5 Nov. 1969, *Denmark and Others v. Greece*, YB 12, p. 187.

251. ECmHR, 18 Sep. 1961, *X v. Belgium*, YB 4 p. 339.

252. ECmHR, 6 Oct. 1967, *X v. the Federal Republic of Germany*, YB 10 p. 339.

253. ECmHR, 12 July 1983, *Serge Moureaux and others v. Belgium*, DR 33/115.

254. ECmHR, 18 Dec. 1980, *X v. Austria*, YB 8 p. 168.



of the will of the people must be respected through free elections.²⁵⁶ The confidentiality of voters' choices must therefore be guaranteed when they vote, and elections must occur at reasonable intervals. In addition, the concept of *legislature* within the meaning of Article 3 of Protocol No. 1 must not be interpreted narrowly and cannot, for example, be confined solely to national parliaments.²⁵⁷ However, the criterion is the exercise of genuine legislative power: that is why Article 3 of Protocol No. 1 does not apply to the executive and in particular to the head of state.²⁵⁸

[66] *Limitations on the right*

The right to free elections is not absolute, and states may make the rights to vote and to stand for election subject to certain conditions.²⁵⁹ Although Article 3 of Protocol No. 1 guarantees, in principle, the right to vote and the right to stand for election, states may nevertheless impose certain restrictions on these rights.²⁶⁰ Admittedly, the European judges are always very anxious to avoid any arbitrary impediments to the free expression of the opinion of the people,²⁶¹ but state restrictions are possible²⁶² provided that they do not impair the very essence of this right.²⁶³

255. ECmHR, 10 July 1975, *X v. the Federal Republic of Germany*, DR 3/101; 10 July 1975, *X v. the United Kingdom*, DR 3/165.

256. ECtHR, 2 March 1987, *Mathieu-Mohin and Clerfayt v. Belgium*, Series A No. 113; 1 July 1997, *Gitonas and Others v. Greece*, Reports 1997-IV; 2 Sep. 1998, *Ahmed and Others v. the United Kingdom*, Reports 1998-VI.

257. Thus, the European Parliament is henceforth considered as a "legislature": ECtHR, 18 Feb. 1999, *Matthews v. the United Kingdom*, Reports 1999-I.

258. ECmHR, 14 Dec. 1989, *Habsbourg-Lothringen*, DR 64/210.

259. ECtHR, 2 March 1987, *Mathieu-Mohin and Clerfayt v. Belgium*, Series A No. 113, § 52; 1 July 1997, *Gitonas and Others v. Greece*, Reports 1997-IV.

260. ECmHR, 30 May 1975, *X v. Belgium*, DR 2/114.

261. ECmHR, 19 Dec. 1974, *X v. the Netherlands*, DR 1/88.

262. See in particular: ECmHR, 7 March 1984, *X v. the United Kingdom*, DR 37/129; 12 Dec. 1985, *Fryske Nasjonale Partij v. the Netherlands*, DR 45/240.

263. ECtHR, 1 July 1997, *Gitonas and Others v. Greece*, op. cit.; ECtHR, 2 March 1987, *Mathieu-Mohin and Clerfayt v. Belgium*, op. cit.



II. Social and economic rights

[67] *Second-generation human rights*

The European Convention on Human Rights enshrines only a few social and economic rights, as most of the safeguards concern civil and political rights: nevertheless, their importance should not be overlooked, especially as the European judges are becoming increasingly sensitive to these concerns.

A. *Economic rights*

[68] *The right to peaceful enjoyment of possessions*

Economic rights are enshrined in a way that may seem marginal, but they are not ignored for all that – if only because they are often an extension of civil and political rights: thus Article 1 of Protocol No. 1 states that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that 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; however, these provisions do not 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. In short, the right to peaceful enjoyment of possessions is strongly asserted, even if certain restrictions are possible.

1. *Assertion of the right to peaceful enjoyment of possessions*

[69] *Article 1 of Protocol No. 1*

Article 1 of Protocol No. 1, which concerns the right to peaceful enjoyment of possessions, guarantees the right of property *in substance*,²⁶⁴ intangible property also being covered by this protection.²⁶⁵ The concept of *property*, which is independent in scope, is interpreted broadly and

264. ECtHR, 13 June 1979, *Marckx v. Belgium*, Series A No. 31, § 63; 24 Oct. 1986, *Agosi v. the United Kingdom*, Series A No. 108, § 48; 28 Oct. 1987, *Inze v. Austria*, Series A No. 126, § 38; (Gr. Ch.) 25 March 1999, *Iatridis v. Greece*, Reports 1999-II



denotes all property constituting assets:²⁶⁶ any economic interest constituting an asset is a possession for the purposes of the First Protocol.²⁶⁷ However, a mere expectation fostered by the domestic authorities regarding a building project is not a legitimate expectation and therefore not a possession within the meaning of the First Protocol.²⁶⁸

[70] *Vertical and horizontal effects of the right to property*

Traditionally it is the vertical effect of the right to property that receives attention under the Convention and its protocols: the issue arises above all in relations between private individuals and the state, which is why our study will be focusing principally on this point. However, the right to property may also be considered in terms of relations between private individuals, especially in the housing field.²⁶⁹

2. *Limitations on peaceful enjoyment of possessions*

[71] *A dual limitation*

The principle of peaceful enjoyment of possessions is of a general nature and any limitations should be construed in this light,²⁷⁰ whether they entail actual loss of enjoyment or are merely restrictions. In any case, states must be cautious when they take measures affecting the economic interests of private individuals.²⁷¹ Admittedly, a degree of interference is

265. ECtHR, 26 June 1986, *Van Marle and Others v. the Netherlands*, Series A No. 101; 8 July 1987, *Baraona v. Portugal*, Series A No. 122.

266. ECmHR, 8 Feb. 1978, *Wiggins v. the United Kingdom*, DR 13/40 (movable or immovable property, corporeal or incorporeal movables); ECtHR, 9 Dec. 1994, *Stran Greek Refineries and Stratis Andreadis v. Greece*, Series A No. 301-B; 20 Nov. 1995, *Pressos Compania Naviera SA and Others v. Belgium*, Series A No. 332 (debts); ECmHR, 11 Dec. 1986, *S and T v. Sweden*, DR 30/155 (shares in a partnership); ECtHR, 26 June 1986, *Van Marle*, op. cit., § 41 (right to use a professional title, and importance of goodwill attached to it); ECmHR, 12 Oct. 1982, *Bramelied and Malmström v. Sweden*, DR 29/76 (shares in a company).

267. ECtHR, 7 July 1989, *Tre Traktörer AB v. Sweden*, Series A No. 159, § 53.

268. ECtHR, 9 March 2003, *Mirailles v. France*, No. 63156/00, not published.

269. Indeed, the Court concluded that there had been no violation of Article 1 of Protocol No. 1, but it admitted the applicability of this provision: ECtHR, 19 Dec. 1989, *Mellacher and Others v. Austria*, Series A No. 169, § 44. *Adde* ECtHR, 21 Feb. 1986, *James and Others*, Series A No. 98, § 47; 21 Nov. 1995, *Velosa Barreto v. Portugal*, Series A No. 334.

270. *James and Others*, op. cit.; ECtHR, 8 July 1986, *Lithgow and Others v. the United Kingdom*, A-102 § 106.



always possible, but it must respect a fair balance between public-interest requirements and the need to protect the fundamental rights of others.²⁷²

a) Deprivation of possessions

[72] *The concept of deprivation of possessions*

Deprivation of possessions is understood to mean total and final dis-possession, arising for example from nationalisation, expropriation or con-fiscation. However, the European judges look behind the appearances: this means that the actual effect of the action will take precedence over its legal classification, and *de facto* expropriation will be considered on an equal footing with formal expropriation.²⁷³ However, dispossessions that are final may, for all that, sometimes not be subject to Article 1 of Protocol No. 1.²⁷⁴

[73] *The conditions for deprivation of possessions*

Article 1 of the Protocol refers to three requirements: complying with the conditions provided for by domestic law, observing the general princi-ples of international law and being in the public interest. Being in the pub-lic interest is an important condition which may raise problems because of its varying nature. However, although domestic authorities may be best placed to judge the situation,²⁷⁵ the Court will endeavour to ascertain whether there is a reasonable relationship of proportionality between the means employed and the aim pursued.²⁷⁶

The right of persons deprived of their possessions to compensation is a condition added by the European judges; it must be prompt²⁷⁷ and effective.²⁷⁸ Payment of compensation for deprivation of possessions has

271. ECtHR, 23 Sep. 1982, *Sporrong and Lönnroth v. Sweden*, Series A No. 52.

272. ECtHR, 20 Feb. 2003, *Forrer-Niedenthal v. Germany*, No. 46316/99, not published.

273. ECtHR, 23 Sep. 1982, *Sporrong and Lönnroth v. Sweden*, Series A No. 52, § 63. See also: ECtHR, 19 Dec. 1989, *Mellacher and Others v. Austria*, Series A No. 169, § 44.

274. ECmHR, 12 Oct. 1982, *Bramelied and Malmström v. Sweden*, DR 29/64.

275. ECtHR, 7 Dec. 1976, *Handyside v. the United Kingdom*, Series A No. 24, § 39.

276. ECtHR, 2 July 2002, *Motais de Narbonne v. France*, Appl. No. 48161/99, not published.

277. ECtHR, 9 July 1997, *Akkus v. Turkey*, Reports 1997-IV.

278. ECtHR, 7 Aug. 1996, *Zubani v. Italy*, Reports 1996-IV.



now become the general rule, with the sole reservation of exceptional circumstances:²⁷⁹ this solution is logical inasmuch as the protection of the right of property afforded by Article 1 would be largely illusory and ineffective in the absence of any right to compensation.²⁸⁰ However, illegal deprivation of possessions cannot be remedied by the granting of compensation,²⁸¹ the simple act of offering compensation is a necessary but not a sufficient condition, since the sum offered must be reasonable²⁸² and appropriate.²⁸³ Moreover, the interval between the expropriation and final determination of the compensation must not be too long.²⁸⁴

b) Restrictions on property

[74] Article 1, paragraph 2, of Protocol No. 1

The second paragraph of Article 1 of the First Protocol specifies that peaceful enjoyment of one's possessions does not prevent states from enforcing 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.

[75] Control of the use of property

The distinction between genuine dispossession and simply controlling the use of property is not always easy to make²⁸⁵ even if in the latter case, unlike the former, the right to property is not rendered nugatory. Ultimately, the treatment of this provision is the same, in substance, as that of the provision contained in the first paragraph of Article 1.²⁸⁶

279. This has been the case since *Sporrong and Lönnroth*, op. cit.

280. See *James and Others*, op. cit.

281. ECmHR, 7 May 1987, *Chater v. the United Kingdom*, DR 52/250. See however: ECtHR, 21 Feb. 1997, *Guillemin v. France*, Reports 1997-I.

282. ECmHR, 17 Dec. 1987, *Scotts of Greenock Ltd. and Lithgow*, op. cit., § 90. See also: ECtHR, 22 June 2004, *Broniowski v. Poland*, No. 31443/96, not published.

283. ECtHR, 14 Nov. 2000, *Piron v. France*, JCP 2001

284. ECtHR, 11 Dec. 2003, *Fraschino v. Italy*, No. 35227, not published; 29 July 2004, *Scordino v. Italy*, No. 36813/97, not published.

285. See in particular: ECtHR, 24 Nov. 1986, *Gillow v. the United Kingdom*, Series A No. 109.

286. ECtHR, 29 Nov. 1991, *Pine Valley Developments and Others v. Ireland*, Series A No. 222, § 57 s.



There has been a revival of interest in the problem of controlling the use of property in view of the confiscation of assets of certain offenders as a criminal penalty²⁸⁷ and with the sometimes uneasy co-existence of hunters and small landowners.²⁸⁸

[76] Taxes, other contributions and penalties

The principle of peaceful enjoyment of possessions cannot prevent states from exercising their power of taxation. However, the Court ensures that the principle of a fair balance is respected and review the proportionality of the amount of tax to the financial standing of the person concerned: there is interference with peaceful enjoyment of possessions if the taxation constitutes an excessive burden for the person concerned or drastically compromises his financial position.²⁸⁹

B. Social rights

[77] Prohibition of forced or compulsory labour

Article 4 § 2 prohibits forced and compulsory labour. Forced labour may be defined as work imposed on a person against his will, which is unjust or oppressive in nature, and constitutes an unavoidable hardship.²⁹⁰ It should be added that these conditions would seem to be alternatives. The third paragraph of this same article specifies cases in which labour cannot be regarded as forced or compulsory: they include any work required to be done in the ordinary course of detention, any service of a military character or substitute civilian service for conscientious objectors, any service exacted in case of an emergency or calamity threatening the life or well-being of the community, and lastly any work or service which forms part of normal civic obligations.

287. ECtHR, 5 May 1995, *Air Canada v. the United Kingdom*, Series A No. 316-A. See also: ECtHR, 24 Oct. 1986, *Agosi v. the United Kingdom*, Series A No. 108; 9 Feb. 1995, *Welch v. the United Kingdom*, Series A No. 307-A.

288. ECtHR (Gr. Ch.), 29 April 1999, *Chassagnou and Others v. France*, Reports 1999-III.

289. ECmHR, 2 Dec. 1985, DR 45/235; 11 Dec. 1986, *S and T v. Sweden*, DR 50/156 s.

290. ECmHR, 13 Dec. 1979, *X v. the Federal Republic of Germany*, DR 18/216.



Thus the obligation on members of certain liberal professions to work under imposed conditions, especially for lawyers in connection with official assignment, does not constitute forced or compulsory labour: this work must nevertheless be reasonably remunerated so that the officially assigned lawyer does not suffer financial loss,²⁹¹ but this lawyer's consent is of little importance in so far as he must have been aware of this constraint when he entered the profession.²⁹²

[78] *Trade-union freedom*

Since Article 11 generally recognises freedom of association, which is a civil and political right, it also applies more specifically to trade-union freedom. The article thus guarantees the right to form a trade union and join a trade union of one's choice:²⁹³ this right includes the right of trade unions to draw up their own rules, to administer their own affairs and to establish and join trade-union federations.²⁹⁴

A closed shop raises problems with regard to Article 11 of the Convention, which it may be found to breach.²⁹⁵ However, the European Court has not ruled clearly on the system itself, but on its repercussions for applicants. Yet the risk of losing one's job is undoubtedly a form of compulsion that strikes at the very substance of Article 11.²⁹⁶ In short, it is the principle of freedom not to associate that arises, since failure to respect it would seem to attack the very substance of the right guaranteed.²⁹⁷

291. ECtHR, 23 Nov. 1983, *Van der Müsselse*, Series A No. 70, § 37.

292. *Idem* for the obligation of notaries to ask for reduced payment when they do acts for non-profit making organisations: ECmHR, 13 Dec. 1979, *X v. the Federal Republic of Germany*, DR 18/216.

293. ECtHR, 27 Oct. 1975, *National Union of Belgian Police*, Series A No. 19, § 38; 6 Feb. 1976, *Schmidt and Dahlström*, Series A No. 21; 6 Feb. 1976, *Sweedish Engine Drivers' Union v. Sweden*, Series A No. 20.

294. ECmHR, 13 May 1985, *Cheall v. the United Kingdom*, DR 42/178.

295. ECmHR, 14 Dec. 1979, *Young, James and Webster v. the United Kingdom*, B vol. 39 p. 47.

296. ECtHR, 13 Aug. 1981, *Young, James and Webster v. the United Kingdom*, Series A No. 44.

297. ECtHR, 30 June 1993, *Sigurjonsson v. Iceland*, Series A No. 264 (negative aspect of freedom of association).



[79] *The right to education*

Under Article 2 of Protocol No. 1 no person may be denied the right to education: this is a fundamental right.²⁹⁸ In the exercise of any functions which it assumes in relation to education and to teaching, the state must respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Chapter 2: Specific protection

[80] *Specific protection for parties to court proceedings and for aliens*

Protection of parties to court proceedings and of aliens deserves special attention, for while this question is important in theory it is equally so in practice.

I. Protection of parties to court proceedings

[81] *The right to justice, an essential right*

The right to have justice done satisfactorily is an essential right. The demands of justice are of paramount importance in a democratic society. However, in this particular context, a fair trial is a necessary but not a sufficient condition: this is why additional precautions must be taken in the name of the rule of law. The right to a fair trial thus goes hand in hand with the right to liberty and security.

A. *The right to liberty and security*

[82] *Article 5 of the Convention*

Article 5 of the Convention enshrines the right to liberty and security. This article aims to protect people's physical liberty²⁹⁹ against arbitrary or wrongful arrest or detention: no one can be arbitrarily deprived of his liberty.³⁰⁰ However, in certain cases relating more specifically to the protection of public order, deprivation of liberty is allowed: it must then occur in

298. ECtHR, 7 Dec. 1976, *Kjeldsen and Others v. Denmark*, Series A No. 23, § 50.

299. ECtHR, 8 June 1976, *Engel and Others v. the Netherlands*, Series A No. 22.



accordance with a procedure prescribed by law and be lawful, which presupposes that the measure complies with domestic law,³⁰¹ which must of course be in conformity with the Convention;³⁰² the measure is open to review at European level,³⁰³ and deprivation of liberty must meet a pressing social need whilst remaining proportionate to the legitimate aim pursued.³⁰⁴ Paragraph 1 of Article 5 gives an exhaustive list of cases in which deprivation of liberty is possible,³⁰⁵ while paragraphs 2 to 5 lay down important safeguards.

1. *Authorised cases of deprivation of liberty*

[83] *Detention after conviction*

Detention after conviction relates to persons detained lawfully following conviction by a court. Conviction signifies not only a finding of guilt after it has been legally established that there has been an offence but also the imposition of a penalty or other measure involving deprivation of liberty.³⁰⁶ On the other hand, a preventive or security measure, because it is merely protecting society from a potential danger,³⁰⁷ does not fall within this framework.

300. ECtHR, 1 July 1961, *Lawless v. Ireland*, Series A No. 3, § 14; 24 Oct. 1979, *Winterwerp v. the Netherlands*, Series A No. 33, § 37; 4 Dec. 1979, *Schiesser v. Switzerland*, Series A No. 34, § 30; 6 Nov. 1980, *Guzzardi v. Italy*, Series A No. 39, § 92.

301. ECtHR, 24 Oct. 1979, *Winterwerp v. the Netherlands*, Series A No. 33, § 6s.; *Engel and Others*, op. cit. § 68s. Adde ECtHR, 21 Feb. 1990, *Van der Leer v. the Netherlands*, Series A No. 170, § 23; 27 Sep. 1990, *Wassink v. the Netherlands*, Series A No. 185-A, § 24; 23 Sep. 1998, *Steel and Others v. the United Kingdom*, Reports 1998-VII.

302. *Winterwerp*, op. cit. § 45. Adde ECtHR, 28 May 1985, *Ashingdane v. the United Kingdom*, Series A No. 93.

303. Especially since *Bozano* case: ECtHR, 18 Dec. 1986, *Bozano v. France*, Series A No. 111; 25 June 1996, *Amuur v. France*, Reports 1996-III.

304. ECmHR, 6 Oct. 1976, *Lynas v. Switzerland*, DR 6/155.

305. The enumeration is to be interpreted strictly: ECtHR, 8 June 1976, *Engel and Others v. the Netherlands*, op. cit. §§ 57 and 69; 24 Oct. 1979, *Winterwerp v. the Netherlands*, op. cit., § 7; 6 Nov. 1980, *Guzzardi v. Italy*, Series A No. 39, § 96; 18 Jan. 1978, *Ireland v. the United Kingdom*, Series A No. 25, § 194; 29 Feb. 1988, *Bouamar v. Belgium*, Series A No. 129, § 43; 22 Feb. 1989, *Ciulla v. Italy*, Series A No. 148, § 41.

306. ECtHR, 24 June 1982, *Van Droogenbroeck v. Belgium*, Series A No. 50, § 35.

307. ECtHR, 6 Nov. 1980, *Guzzardi v. Italy*, Series A No. 39, § 100.



The detention must have occurred pursuant to the decision of a court and *consequent upon* it,³⁰⁸ but the arrangements for implementing it matter little.³⁰⁹ However, a detention that is lawful at the outset could turn into arbitrary deprivation of liberty if the causal link is eventually broken: here again, everything depends on the circumstances.³¹⁰

[84] *Arrest or detention arising out of a court order or a legal obligation*

Arrest or detention arising out of a court order or a legal obligation refers to the lawful arrest or detention of persons for non-compliance with the lawful order of a court or an obligation prescribed by law. The European judges have specified that this concerns only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy.³¹¹ This type of deprivation of liberty has not really given rise to particular difficulties.

[85] *Pre-trial custody*

Pre-trial custody is also permitted. Deprivation of liberty is allowed if it is for the purpose of bringing the person concerned before the competent legal authority: three non-cumulative conditions³¹² are specified, since there must be reasonable suspicion that the person has committed an offence³¹³ or it must be reasonably considered necessary to prevent his committing an offence or to prevent his absconding after having done so. The measure must be taken in connection with criminal cases, and the outcome of the proceedings is immaterial: the evidence obtained may eventually turn out to be insufficient, although the arrest or detention

308. ECtHR, 18 Dec. 1986, *Bozano v. France*, Series A No. 111, § 53; 2 March 1987, *Monnell and Morris v. the United Kingdom*, Series A No. 115, § 40; 27 May 1997, *Eriksen v. Norway*, Reports 1997-III.

309. ECtHR, 15 Nov. 1996, *Bizzotto v. Greece*, Reports 1996-5; 2 March 1987, *Weeks v. the United Kingdom*, Series A No. 114 § 50.

310. ECtHR, 20 March 1997, *Loukanov v. Bulgaria*, Reports 1997-II.

311. *Engel and Others*, op. cit., § 69; *Guzzardi*, op. cit., § 101. See also: ECtHR, 22 Feb. 1989, *Ciulla v. Italy*, Series A No. 148, § 36.

312. *Lawless*, op. cit., § 13 s.; *Ireland v. the United Kingdom*, op. cit., § 196.

313. About the plausible character of suspicions, see ECtHR, 30 Aug. 1990, *Fox, Campbell and Hartley v. the United Kingdom*, Series A No. 182 §§ 1 and 34.



may have legitimately been required given the circumstances of the case.³¹⁴

The lawfulness of detentions is subject to strict review, since the Court accepts that the Convention has been breached if there is no reasonable suspicion that the person concerned has committed an offence.³¹⁵ Even if the facts which raise suspicion are not of the same level as those necessary to justify a conviction or even the bringing of a charge,³¹⁶ they must nevertheless be well-founded. Such precautions are necessary because of what is at stake; it is the freedom of individuals that is involved. This is also the reason why, if release is ordered, it must occur immediately,³¹⁷ otherwise the detention becomes arbitrary.

[86] *Detention of minors*

Detention of minors is possible but only under certain circumstances. In particular, the detention must be for the purpose of educational supervision or their lawful detention for the purpose of bringing them before the competent legal authority.

The European judges have specified that Article 5 does not preclude an interim measure for custody in a remand prison being used as a preliminary to a regime of supervised education, without itself involving any supervised education:³¹⁸ however, the imprisonment must be speedily followed by actual application of such a regime in a setting designed and with sufficient resources for the purpose.

[87] *Detention of certain sick or marginal persons*

The detention of certain sick or marginal persons is a deprivation of liberty which concerns in particular persons who may spread infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants.

314. ECtHR, 29 Nov. 1988, *Brogan and Others v. the United Kingdom*, Series A No. 145-B, § 53.

315. ECtHR, 20 March 1997, *Loukanov v. Bulgaria*, Reports 1997-II. Adde ECtHR, 9 Nov. 1999, *Debboub alias Hussein Ali v. France*, No. 37786/97, not published.

316. ECtHR, 20 June 2002, *Erdogan v. Turkey*, No. 26337/95, not published; ECtHR, 28 Oct. 1994, *Murray v. the United Kingdom*, Series A No. 300-A, § 55.

317. ECtHR, 22 March 1995, *Quinn v. France*, Series A No. 311.

318. ECtHR, 29 Feb. 1988, *Bouamar v. Belgium*, Series A No. 129, § 50.



This provision has not given rise to many cases, since the only point likely to create any genuine problems is the situation of persons of unsound mind.

The European Court has pointed out that it is forbidden to detain a person simply because his views or behaviour deviate from the norms prevailing in a particular society.³¹⁹ The issue is all the more delicate in that the very concept of a *person of unsound mind* is continually evolving as progress in medical research and changing attitudes constantly alter its boundaries. In any case, an individual must have reliably been shown to be of unsound mind, except in urgent cases: a true mental disorder has to be established before the competent national authority, with evidence in the form of an objective medical expert report.³²⁰ The mental disorder must be of a degree warranting compulsory confinement, and the validity of continued confinement depends upon the persistence of such a disorder. It should be noted that although the European Court can review decisions, it is up to the domestic authorities to judge these conditions.³²¹

[88] Detention of aliens

Detention of aliens is possible, deprivation of liberty being authorised for the purposes of refusal of entry, deportation or extradition: this refers to 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 deprivation of liberty must be lawful and have occurred in accordance with a procedure prescribed by law.³²²

319. *Winterwerp*, op. cit. § 37.

320. ECtHR, 5 Oct. 2000, *Varbanov v. Bulgaria*, Reports 2000-X.

321. *Winterwerp*, op. cit. *Adde* ECtHR, 5 Nov. 1981, *X v. the United Kingdom*, Series A No. 46, § 41; 23 Feb. 1984, *Luberti v. Italy*, Series A No. 75, § 28; 27 Sep. 1990, *Wassink v. the Netherlands*, Series A No. 185-A, § 25; 30 July 1998, *Aerts v. Belgium* Reports 1998-V.

322. See in particular: ECtHR, 18 Dec. 1986, *Bozano v. France*, op. cit.; 24 Sep. 1992, *Kolompar v. Belgium*, Series A No. 235-C.



2. Safeguards for persons deprived of their liberty

[89] *The right to be informed*

Under Article 5 § 2 of the Convention, 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. This provision is broad in scope since it concerns various forms of arrest³²³ and detention.³²⁴

The importance of the right to be informed is considerable. It is essential that a person deprived of his liberty be informed promptly and precisely of the reasons for this. The person concerned must be given this information in detail: the authorities must explain the essential legal and factual grounds for his arrest.³²⁵ In addition, the language used must be understood by the person deprived of liberty: this means not only that the assistance of an interpreter is necessary if an alien is concerned³²⁶ but also that the language used must be simple and non-technical, such that the person can understand.³²⁷ Lastly, the information must be provided promptly.³²⁸

[90] *The right to be brought promptly before a judge or other officer*

Under the third paragraph of Article 5 everyone arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power or shall be entitled to release pending trial.³²⁹

The adverb *promptly* entails a duty of promptness, and states must automatically bring anyone deprived of liberty before a judge.³³⁰ The fact

323. ECtHR, 18 Jan. 1978, *Ireland v. the United Kingdom*, op. cit., § 198 s.

324. ECmHR, 10 Dec. 1991, *Margaret Murray and Family v. the United Kingdom*, No. 14310/88, not published; ECtHR, 30 Aug. 1990, *Fox, Campbell and Hartley v. the United Kingdom*, Series A No. 182.

325. *Fox, Campbell and Hartley*, op. cit.

326. ECmHR, 3 July 1991, *Kuij v. Greece*, No. 14986/89, not published.

327. *Fox, Campbell and Hartley*, op. cit., § 40.

328. ECtHR, 25 Oct. 1990, *Keus v. the Netherlands*, Series A No. 185-C; *Fox, Campbell and Hartley*, op. cit.

329. *In fine*, Article 5 § 3 specifies that release may be conditioned by guarantees to appear for trial.

330. ECtHR, 26 Oct. 1984, *McGoff v. Sweden*, Series A No. 83, § 84.



remains that the European Court judges each case with reference to the particular circumstances,³³¹ and although appearance before a judge must be prompt, it does not have to follow deprivation of liberty immediately: the circumstances of the case are of cardinal importance here.³³² European case-law has nevertheless provided clarification,³³³ with the result that a time-limit of approximately four days for difficult cases of an exceptional nature seems to be acceptable.

The appearance must be before a judge or *other officer*. While the concept of a judge does not raise any special difficulties, since this is a member of the judiciary, that of the *other officer* is more ambiguous: the question arises of whether a prosecutor can be taken to be this *other officer* within the meaning of Article 5 of the Convention. The reply is in the affirmative provided that he is independent of the executive and the parties, that he can hear the individual brought before him in person and that he can review whether or not the detention is justified and, if it is not, order the detainee's release.³³⁴ The European Court has further stated that by the very fact of being able to institute proceedings, a prosecutor may find his impartiality open to question,³³⁵ since this mere possibility is sufficient to cast doubt on his independence and impartiality.

[91] *The right to be tried within a reasonable time or released*

The question of the length of pre-trial detention is a difficult one. Such detention is not open to criticism in itself, since the protection of public order entails constraints: however, precautions are necessary when a per-

331. ECtHR, 22 May 1984, *De Jong, Baljet and Van den Brink v. the Netherlands*, Series A No. 77, § 52.

332. See in particular: ECmHR, 6 Dec. 1984, *Dobbertin v. France*, DR 39/93.

333. ECtHR, 29 Nov. 1988, *Brogan and Others v. the United Kingdom*, Series A No. 145-B. Also ECtHR, 26 Nov. 1997, *Sakik and Others v. Turkey*, Reports 1997-VII.

334. ECtHR, 4 Dec. 1979, *Schiesser v. Switzerland*, Series A No. 34; 28 Oct. 1998, *Assenov and Others v. Bulgaria*, Reports 1998-VIII.

335. ECtHR, 23 Oct. 1990, *Huber v. Switzerland*, Series A No. 188, § 42 s. – Previously cited ECtHR, 22 May 1984, *De Jong, Baljet and Van den Brink v. the Netherlands*, Series A No. 77; 22 May 1984, *Van der Sluijds, Zuiderveld and Klappe v. the Netherlands*, Series A No. 78; 22 May 1984, *Duinhof and Duijf v. the Netherlands*, Series A No. 79. Also ECtHR, 26 Nov. 1992, *Brincat v. Italy*, Series A No. 249-A; 4 July 2000, *Niedbala v. Poland*, No. 27915/95, not published; 3 June 2003, *Pantéa v. Romania*, Reports 2003-VI.



son presumed to be innocent suffers deprivation of liberty; in particular, the latter cannot be too long, and release must be ordered as soon as continued detention ceases to be reasonable. The “reasonable time” requirement of Article 5 § 3 is certainly not to be confused with that of Article 6 § 3, even if there are similarities: Article 6 § 1 applies to all parties to court proceedings and its aim is to avoid excessive judicial delays whilst providing the accused with prompt information as to their fate; Article 5 § 3 applies only to remand prisoners, is designed to prevent an individual being arbitrarily deprived of his liberty, and therefore means that there must be special diligence in the conduct of proceedings.³³⁶

Excessive length of pre-trial detention has given rise to numerous rulings against states.³³⁷ The period to be taken into consideration does not really raise any problems. The starting point is the day of the arrest or the issue of the detention order. The end of the period of detention is not the day on which a conviction becomes final but that on which the charge is determined.³³⁸ Reasonable time must be determined with reference to the particular case: judges must take into account the circumstances of the case and ascertain that detention is necessary in terms of the genuine demands of public interest.³³⁹ Continued pre-trial detention must be justified on the basis of clear and specific evidence, and any standard or stereotyped grounds must be rejected.³⁴⁰ The disturbance to public order must be real and proven: continued detention is legitimate only in so far as the threat continues over time.³⁴¹ More generally, the judicial authorities must act with the necessary speed, for after a certain lapse of time the detention ceases to be based on relevant and sufficient grounds.³⁴² Further-

336. ECtHR, 10 Nov. 1969, *Stögmüller v. Austria*, Series A No. 9, § 5.

337. ECtHR, 26 June 1991, *Letellier*, Series A No. 207; 18 Dec. 1996, *Scott v. Spain*, Reports 1996-VI.

338. ECtHR, 27 June 1968, *Wemhoff v. Germany*, Series A No. 7, § 9; 28 March 1990, *B. v. Austria*, Series A No. 175, § 38 s.

339. ECtHR, 27 June 1968, *Neumeister v. Austria*, Series A No. 8 § 5; 9 Nov. 1999, *Debboud alias Hussein Ali v. France*, No. 37786/97, not published.

340. ECtHR, 26 June 1991, *Letellier v. France*, op. cit.

341. ECtHR, 27 June 1968, *Neumeister v. Austria*, op. cit.

342. ECtHR, 17 March 1997, *Muller v. France*, Reports 1997-II.



more, if there is no risk, particularly of escape, the detention lacks a legal basis.³⁴³

[92] *The right to take proceedings*

Paragraph 4 of Article 5 states that everyone who is deprived of his liberty by arrest or detention is entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court³⁴⁴ and his release ordered if the detention is not lawful.

It must be possible to take the proceedings before a “court”; that is, an independent and impartial decision-making body,³⁴⁵ which must be able to decide on the lawfulness of the measure and order release if the detention is not lawful. The court must be able to provide basic safeguards concerning deprivation of liberty,³⁴⁶ especially regarding inter partes proceedings and due process. The right to take proceedings must be real and effective, i.e. it must exist with an adequate degree of certainty.³⁴⁷ Lastly, the court must monitor compliance with the procedural requirements essential to “lawfulness” within the meaning of the Convention.³⁴⁸

[93] *The right to compensation*

Under Article 5 § 5 of the Convention everyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 §§ 1-4 has an enforceable right to compensation. This right to compensation applies both to arbitrary detention not covered by Article 5 and to unlawful detention covered by the article without its requirements having been observed. The European judges have nevertheless emphasised that there must be moral harm or material loss arising directly out of the established breach.³⁴⁹

343. ECtHR, 16 Dec. 1997, *Raninen v. Finland*, Reports 1997-VIII.

344. ECtHR, 21 Oct. 1986, *Sanchez-Reisse v. Switzerland*, Series A No.107 § 55; 25 Oct. 1989, *Bezicheri v. Italy*, Series A No. 164.

345. ECtHR, 4 July 2000, *Niedbala v. Poland*, No. 27915/95, not published; 29 March 2001, *D. N. v. Switzerland*, Reports 2001-III.

346. ECtHR, 26 Sep. 1997, *RMD v. Switzerland*, Reports 1997-VI; see also: *Niebdela*, op. cit.

347. ECtHR, 24 Aug. 1998, *Soumare v. France*, Reports 1998-V; 29 April 1999, *Aquilina v. Malta*, Reports 1999-III.

348. ECtHR, 25 March 1999, *Nikolova v. Bulgaria*, Reports 1999-II.



The right to compensation under Article 5 § 5, should not be confused with just satisfaction under Article 41, since any violation of the Convention, including breaches of Article 5, justifies an application for just satisfaction.³⁵⁰

B. “*Nulla poena sine lege*”

[94] *Article 7 of the Convention*

The first paragraph of Article 7 states that 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. The second paragraph of Article 7 provides for an exception to this rule since it makes it possible to try and punish behaviour which at the time when it was committed was criminal according to the general principles of law recognised by civilised nations: its scope is nevertheless limited.

A priori, only criminal cases are concerned by Article 7,³⁵¹ and its scope also appears to be limited: it does not apply to measures that do not, strictly speaking, constitute a punishment, nor is it applicable to the conditions of enforcement of a sentence,³⁵² to pre-trial detention³⁵³ or to disciplinary action.³⁵⁴ Nevertheless, a broad interpretation of this article is imperative, if only because it is an essential element of the rule of law and it bolsters the principle of legal certainty, which applies beyond criminal cases.³⁵⁵ For criminal law a liberal interpretation also prevails: the Court

349. ECtHR, 7 May 1974, *Neumeister v. Austria*, Series A No. 17, § 40. Also ECtHR, 29 May 1997, *Tsirlis and Kouloumpas v. Greece*, Reports 1997-III.

350. *Neumeister*, op. cit. 50.

351. ECtHR, 7 July 1989, *Tre Traktörer Aktiebolag v. Sweden*, Series A No. 159, § 46; ECmHR, 10 March 1981, *X v. Belgium*, DR 24/200. Moreover, a condemnation is needed as Article 7 cannot be invoked if there is an acquittal: ECmHR, 10 March 1989, *Tomasi v. France*, No. 13 853/88, not published.

352. ECmHR, 6 May 1986, *B v. the United Kingdom*, No. 11 616/85, not published.

353. ECtHR, 1 July 1961, *Lawless v. Ireland*, Series A No. 3, § 19.

354. See in particular: ECmHR, 13 March 1986, *P v. the United Kingdom*, DR 37/134.

355. ECtHR, 22 Nov. 1995, *SW v. the United Kingdom*, Series A No. 335-B.



has stated that Article 7 § 1, is not confined to prohibiting retrospective application of criminal law but also, more generally, embodies the principle that only the law can define a crime and prescribe a penalty and that criminal law must be narrowly construed.³⁵⁶

[95] The principle that criminal offences and punishments must be strictly defined by law

The principle that criminal offences and punishments must be strictly defined by law is enshrined in Article 7: the act or omission must constitute an offence under national or international law. The offence must be clearly specified and it must be possible to determine, on the basis of the relevant legal provisions, the acts or omissions prohibited.³⁵⁷ The law, which alone defines and punishes offences, is taken to cover both statute and unwritten law, but it must be foreseeable and accessible.³⁵⁸

The punishment, which is an autonomous concept,³⁵⁹ must satisfy precise criteria: it must be ordered following a conviction for a criminal offence, and it is also distinguished by its characterisation under domestic law, its nature, its purpose, the rules governing it, and its severity. The law must be clear and precise for the penalty as well, although interpretation by the courts may provide this quality.³⁶⁰

[96] The principle of non-retroactivity in criminal law

Under the principle of non-retroactivity an act cannot be designated as criminal by the courts if it has not been punishable previously, and the definition of existing criminal offences cannot be extended to acts which have not previously constituted offences.³⁶¹ However, this does not pre-

356. ECtHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 52.

357. *Kokkinakis*, op. cit., § 46.

358. ECtHR, 26 April 1979, *Sunday Times v. the United Kingdom*, Series A No. 30, § 47.

359. ECtHR, 27 Sep. 1995, *X v. France*, Series A No. 325-B; 8 June 1995, *Jamil v. France*, Series A No. 317-B, § 30, (imprisonment in default considered as a penalty); 9 Feb. 1995, *Welch v. the United Kingdom*, Series A No. 307-A (confiscation of the proceeds of the crime).

360. ECtHR, 15 Nov. 1996, *Cantoni v. France*, Reports 1996-V.; *Kokkinakis*, op. cit.; ECtHR, 22 Nov. 1995, *SW v. the United Kingdom*, Series A No. 335-B.

361. See in particular: ECmHR, 4 March 1985, *Enkelmann v. Switzerland*, DR 41/181.



vent changes in judicial interpretation designed to bring the law into line with social realities, as in the case of rape within marriage.³⁶²

The problem of the non-retroactivity of criminal law arose in a very specific context deriving from the fall of the Berlin Wall. In two cases concerning an alleged violation of Article 7 by the German courts which had convicted the applicants, some of whom had drafted and others enforced the East German regulations that permitted firing on persons who were attempting to cross the Wall illegally, the Court found that Article 7 had not been breached even if at the time of the events the acts concerned did not constitute offences in the former GDR.³⁶³

[97] The principle of strict construction of criminal law

Strict construction of criminal law is in fact the corollary of the principle that criminal offences and punishments must be strictly defined by law: if the law must be clear, it is precisely to prevent a broad, or even arbitrary, construction by the courts. The Court has ruled to this effect,³⁶⁴ at least when an interpretation by analogy would be unfavourable to the person concerned.³⁶⁵ The fact remains that, within these limits, judicial interpretation is possible and even desirable, since the court must be able to adapt the elements of an offence to new realities which can reasonably be brought under the original concept of the offence.³⁶⁶

C. The right of access to the courts

[98] Access to the judicial system

The right of access to the courts is of considerable importance in so far as it is a direct consequence of the rule of law: if this right were not enshrined, it would be illusory to speak of fair trials and proper administra-

362. ECtHR, 22 Nov. 1995, *SW v. the United Kingdom*, op. cit.

363. ECtHR (Gr.Ch.), 22 March 2001, *Streletz, Kessler and Krenz v. Germany*, Reports 2000-II; 22 March 2001, *K.-H. W. v. Germany*, Reports 2001-II.

364. ECtHR, 25 May 1993, *Kokkinakis*, op. cit., § 52.

365. ECmHR, 22 April 1965, *X v. Austria*, YB. 8, p. 199; 24 Sep. 1963, *X v. the Federal Republic of Germany*, YB. 6, p. 587.

366. ECmHR, 7 May 1982, *X Ltd v. the United Kingdom*, DR 28/87.



tion of justice. This means that access to the judicial system must be facilitated and, in particular, the public must not be deterred for material reasons: states must therefore establish legal aid systems,³⁶⁷ and while restrictions are possible these must not, however, be excessive;³⁶⁸ the material situation of those concerned must be taken into account, and the uncertainty of some situations must not impair the right to court access.³⁶⁹ It is a constant concern of the European Court to give practical effect to the right to court access, and states' positive obligations tend to grow with individual cases.³⁷⁰

The right of access to the courts is firmly enshrined in the Convention³⁷¹ and also in the case-law relating to Article 6, since it is very true that the idea of a fair trial is meaningful only if the trial actually takes place.³⁷² This development in judicial doctrine could have the effect of marginalising Article 13 of the Convention, which expressly establishes the right to an effective remedy before a national authority, although European case-law now draws a clear distinction between Article 6 and Article 13.³⁷³ The relevance of Article 13 is indisputable, its purpose being to guarantee an effective remedy before a national authority to anyone claiming that his rights and freedoms under the Convention have been violated.³⁷⁴

Yet, despite its importance, the right of access to the courts may be restricted for better administration of justice, provided, however, that the

367. ECtHR, 9 Oct. 1979, *Airey v. Ireland*, Series A No. 32.

368. See in the same sense: ECtHR, 20 July 1998, *Aerts v. Belgium*, Reports 1998-V; 19 Sep. 2000, *Gnahore v. France*, Reports 2000-IX.

369. ECtHR, 15 Feb. 2000, *Garcia Manibarado v. Spain*, Reports 2000-II; 19 June 2001, *Kreuz v. Poland*, Reports 2001-VI (excessive procedure costs); 28 Oct. 1998, *Ait-Mouhoub v. France*, Reports 1998-VIII (excessive amount of security of costs, depriving the applicant of his right of access to a tribunal).

370. ECtHR, 30 July 1998, *Aerts v. Belgium*, op. cit.; 28 Oct. 1998, *Perez de Rada Cavanilles v. Spain*, Reports 1998-VIII.

371. Article 5 § 4 and 13 ECHR.

372. ECtHR, 21 Feb. 1975, *Golder v. the United Kingdom*, Series A No. 18; *Airey*, op. cit. § 26. Also ECtHR, 4 Dec. 1995, *Bellet v. France*, Series A No. 333-B.

373. ECtHR (Gr.Ch.), 26 Aug. 2000, *Kudla v. Poland*, Reports 2000-XI.

374. ECtHR, 6 Sep. 1978, *Klass v. the Federal Republic of Germany*, Series A No. 28, § 25; ECtHR, 26 Aug. 2000, *Kudla v. Poland*, op. cit.; 9 July 2002, *Nouhaud v. France*, No. 33424/96, not published.



actual essence of the right is not called into question:³⁷⁵ the right of access to the courts is not absolute and may be subject to limitations, since states have a margin of appreciation.³⁷⁶

[99] *The special case of appeals on points of law*

In relation to European principles, French rules on appeals on points of law have led to rulings against France and subsequently to changes in the law. Thus the European Court has found that the act of prohibiting a convicted person who has not complied with a warrant for his arrest from acting through a representative in order to lodge an appeal on points of law is contrary to the requirements of a fair trial: where an appeal on points of law is declared inadmissible solely because the appellant has not surrendered to custody pursuant to the judicial decision challenged in the appeal, this ruling compels the appellant to subject himself in advance to the deprivation of liberty resulting from the impugned decision; yet, in any case, this decision is not yet final, thus impairing the very essence of the right of appeal.³⁷⁷ Similarly, the Court has held that the obligation to surrender to custody the day before the hearing in the Court of Cassation is in breach of Article 6 of the Convention.³⁷⁸

In civil proceedings, the imposition of compliance with a decision on pain of having the case removed from the list has been found to be in breach of the requirements regarding the right to a fair trial.³⁷⁹

375. ECtHR, 28 May 1985, *Ashingdane v. the United Kingdom*, Series A No. 93.

376. ECtHR, 23 Oct. 1997, *National & Provincial Building Society and Others v. the United Kingdom*, Reports 1997-VII.

377. ECtHR, 23 Nov. 1993, *Poitrimol v. France*, Series A No. 277-A; ECtHR, 29 July 1998, *Omar v. France*, Reports 1998-V; 29 July 1998, *Guérin v. France*, Reports 1998-V.

378. ECtHR, 14 Dec. 1999, *Khalfaoui v. France*, Reports 1999-IX; 25 July 2002, *Papon v. France*, Reports 2002-VII. See however for the opposition: ECtHR, 16 May 2002, *Karatas and Sari v. France*, No. 38396/97, not published.

379. ECtHR, 14 Nov. 2000, *Annoni di Gussola and Others v. France*, Reports 2000-XI; 25 Sep. 2003, *Bayle v. France*, No. 45840/99, not published.



D. The right to a fair trial

[100] The right to a fair trial

The importance of the right to a fair trial is considerable, both quantitatively and qualitatively. It is a right that holds a prominent position in a democratic society³⁸⁰ and which has given rise to an abundance of cases. The continual growth in the number of these cases is explained by the wealth of Article 6, which has, moreover, been interpreted broadly: this liberal interpretation covers not only the numerous requirements associated with a fair trial but also the outer boundaries of Article 6, which applies both *before*³⁸¹ and *after* the trial proper since it is now accepted that it also covers execution of the judgment.³⁸²

The person on trial may nevertheless waive the safeguards of Article 6:³⁸³ the European Court allows such a waiver provided that it is unconstrained and unequivocal, for the circumstances must prove that the person on trial definitely meant to forego the safeguards of Article 6 and did not act under coercion.³⁸⁴

1. Applicability of Article 6

[101] Scope of Article 6

The scope of Article 6 *ratione personae* does not raise any particular problems, since it reflects the interpretation of Article 1 of the Convention, which refers to *everyone*, whether a natural or legal person. Any person may rely on Article 6, and the possible unfitness of that person cannot be used to deprive him of his right to a fair trial.³⁸⁵

380. ECtHR, 9 Oct. 1979, *Airey v. Ireland*, Series A No. 32, § 24. Also 13 May 1980, *Artico v. Italy*, Series A No. 37, § 33.

381. Cf. *infra*, No. 113, about the presumption of innocence.

382. ECtHR, 19 March 1997, *Hornsby v. Greece*, Reports 1997-II; 21 April 1998, *Estima Jorge v. Portugal*, Reports 1998-II; 28 Sep. 1995, *Scollo v. Italy*, Series A No. 315-C; 28 July 1999, *Immobiliare Saffi v. Italy*, Reports 1999-V; 14 Dec. 1999, *Antonakopoulos and a. v. Greece*, No. 37098/97, not published; 28 March 2000, *Dimitrios Geogiadis v. Greece*, No. 41209/98, not published; 20 July 2000, *Antonetto v. Italy*, No. 15918/99, not published; 11 Jan. 2001, *Lunari v. Italy*, No. 21463/93, not published; 22 May 2003, *Kyrtatos v. Greece*, Reports 2003-VI.

383. ECtHR, 12 Feb. 1985, *Colozza v. Italy*, Series A No. 89.

384. ECtHR, 27 Feb. 1980, *Deweert v. Belgium*, Series A No. 35, § 25.



Ratione materiae, on the other hand, matters are entirely different. The right to a fair trial applies not in all cases but only in the “determination of ... civil rights and obligations or of any criminal charge”. These are autonomous concepts interpreted widely by the European judges.

[102] *Disputes involving determination of civil rights and obligations*

The concept of a dispute must not be taken in too technical a sense, a substantive rather than a procedural definition being preferable. The dispute must be real and serious, which means that the appeal must not be without at least some chance of success.³⁸⁶ It may concern issues of fact as much as points of law and bear on the actual existence of the right, its extent and the procedure for exercising it. In reality, the main question is whether the outcome of the proceedings will be decisive for the rights and obligations at issue.³⁸⁷

Civil rights and obligations cover the whole of private law and may even go beyond it, since they include disputes between an individual and the state to the extent that the latter has been acting as a private person.³⁸⁸ The determining factor is the nature of the right at issue, that is, in practical terms, its content and effects: consequently, the type of law is immaterial, and it matters little whether it is civil, commercial or administrative law; moreover, the same applies to the competent courts, whether they are ordinary, administrative or even constitutional.³⁸⁹ In reality, the main thing is to ascertain whether or not the right at issue is private in nature or not³⁹⁰ and whether the dispute is pecuniary in nature or not.³⁹¹

Public-law cases *a priori* represent a limit to the application of Article 6, whether the issue is the extradition or deportation of aliens,³⁹² elections³⁹³ or parliamentary immunity.³⁹⁴ Generally speaking, all proceedings involv-

385. ECtHR, 1 July 1961, *Lawless v. Ireland*, Series A No. 3, § 7.

386. ECtHR, 23 Sep. 1982, *Sporrong and Lönnroth*, Series A No. 52, § 81.

387. ECtHR, 16 July 1971, *Ringeisen v. Austria*, Series A No. 13, § 94; 28 June 1978, *König v. Germany*, Series A No. 27, § 90. See also: ECtHR, 28 June 2001, *Mayllard Bous v. Portugal*, No. 41288/98, not published.

388. *Ringeisen*, op. cit.

389. ECtHR, 23 April 1987, *Ettl v. Austria*, Series A No. 117; 29 March 1989, *Bock v. Germany*, Series A No. 150; 23 June 1993, *Ruiz-Mateos v. Spain*, Series A No. 262.



ing the prerogatives of sovereign authority escape the ambit of Article 6. The fact remains that these principles are not always very strictly applied, so that while in theory public-sector cases fall outside Article 6, this may not be the case when the claims at issue relate to pecuniary rights:³⁹⁵ this means that the safeguards of the European Convention cover civil servants³⁹⁶ unless access to the civil service is at the heart of the dispute; however, more generally, application of the pecuniary criterion raises difficulties.³⁹⁷ Tax cases also fall outside Article 6 in principle,³⁹⁸ for the same reasons.

Some cases comprise aspects of both public and private law, and the Court judges each individually. This is the case, for example, with judgments delivered by Bar Councils, and if private-law aspects predominate Article 6 applies:³⁹⁹ the applicability of the European Convention on Human Rights to disciplinary procedure before professional bodies has been established.⁴⁰⁰ It should be noted that Article 6 is applicable to pro-

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390. In particular, under Article 6 fall litigations relating to civil status (ECtHR, 8 July 1987, *H v. the United Kingdom*, Series A No. 120; 28 Nov. 1984, *Rasmussen v. Denmark*, Series A No. 87), property rights if civil character is predominant (ECtHR, 24 Oct. 1979, *Winterwerp v. the Netherlands*, Series A No. 33; 8 Dec. 1983, *Pretto v. Italy*, Series A No. 71; 23 Sep. 1982, *Sporrong and Lönnneroth v. Sweden*, Series A No. 52; 8 July 1986, *Lightow v. the United Kingdom*, Series A No. 102; 21 Feb. 1990, *Hakansson and Sturesson v. Sweden*, Series A No. 171-A; 28 June 1990, *Skärby v. Sweden*, Series A No. 180-B; 27 Nov. 1991, *Oerlemans v. the Netherlands*, Series A No. 219)
391. ECtHR, 26 March 1992, *Périscope*, Series A No. 234-B, § 40; 25 Nov. 1994, *Ortenberg v. Austria*, Series A No. 295-B § 28; 28 Sep. 1995, *Procola v. Luxembourg*, Series A No. 326, § 39. Compensation right falls under Article 6: ECtHR, 6 May 1981, *Buchholz v. Germany*, Series A No. 42 (compensation for loss of employment); 10 July 1984, *Guincho v. Portugal*, Series A No. 81 (damages for a road accident); 22 Oct. 1984, *Sramek v. Austria*, Series A No. 84; 23 Oct. 1990, *Moreira de Azevedo v. Portugal*, Series A No. 189 (damages for defamation); 7 July 1989, *Tre Traktörer v. Sweden*, Series A No. 159 (withdrawal of a licence to sell alcoholic drinks). For constituting oneself party claiming damages, see in particular: ECtHR, 27 Aug. 1992, *Tomasi v. France*, Series A No. 241-A; 26 Nov. 1995, *Acquaviva v. France*, Series A No. 33-A; 26 Oct. 1999, *Mayni v. France*, No. 31801/96, not published; 12 Feb. 2004, *Perez v. France*, No. 47287/99, not published.
392. ECmHR, 2 May 1979, *Singh Uppal and Others v. the United Kingdom*, DR 17/149.
393. ECtHR, 21 Oct. 1997, *Pierre-Bloch v. France*, Reports 1997-VI; ECmHR, 30 June 1995, *Estrosi v. France*, DR 82-A/56.
394. ECmHR, 17 Dec. 1976, *Agee v. the United Kingdom*, DR 7/164.
395. ECtHR, 2 Sep. 1997, *Nicodemo v. Italy*, Reports 1997-V, § 18; 30 Oct. 2001, *Devlin v. the United Kingdom*, No. 29545/95, not published; 24 Aug. 1993, *Massa v. Italy*, Series A No. 265-B, § 25; 23 Aug. 1993, *Scuderi v. Italy*, Series A No. 265-A; 2 Sep. 1997, *De Santa v. Italy*, Reports 1997-V, § 18.
396. ECtHR, 28 Aug. 1986, *Glaserapp v. Germany*, Series A No. 104, § 49.



ceedings to obtain administrative documents, the problem being regarded as a dispute concerning civil rights and obligations.⁴⁰¹

[103] Determination of a criminal charge

The concept of a criminal charge is interpreted broadly, since the European judges have accepted a substantive definition.⁴⁰² In general, a charge is the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence. However, it may take the form of other measures which carry the implication of such an allegation and which substantially affect the situation of the person concerned,⁴⁰³ in particular arrest, bringing of charges, opening of a preliminary investigation⁴⁰⁴ or even determination of the sentence.⁴⁰⁵ Only proceedings not relating to determination of a charge and determining neither guilt nor punishment fall outside the ambit of a fair trial.⁴⁰⁶

The criteria for criminal charges have been specified. The European judges take into account the indications provided by domestic law as well as the nature of the act or behaviour, a certain degree of seriousness being necessary for criminal law to be invoked. They also take account of the purpose and severity of the penalty, it being understood that these

397. ECtHR, 29 July 1998, *Le Calvez v. France*, Reports 1998-V; 8 Dec. 1999, *Pellegrin v. France*, Reports 1999-VIII.

398. ECtHR (Gr.Ch.), 12 July 2001, *Ferrazzini v. Italy*, Reports 2001-VIII. – See however: ECtHR, 9 Dec. 1994, *Schouten and Meldrun v. the Netherlands*, Series A No. 304.

399. ECtHR, 30 Nov. 1987, *H v. Belgium*, Series A No. 127-B; 29 May 1986, *Feldbrugge v. the Netherlands*, Series A No. 99; 29 May 1986, *Deumeland v. Germany*, Series A No. 100; 26 Feb. 1993, *Salesi v. Italy*, Series A No. 257-E.

400. ECtHR, 28 June 1978, *König v. Germany*, Series A No. 27; 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, Series A No. 43; 10 Feb. 1983, *Albert and Le Compte v. Belgium*, Series A No. 58. Also ECtHR, 29 Sep. 1999, *Serre v. France*, No. 29718/96, not published.

401. ECtHR, 18 Nov. 2003, *Loiseau v. France*, No. 46809/99, not published. (decision on admissibility). Finally, the Court decided that Article 6 was not violated in the case: ECtHR, 28 Sep. 2004, *Loiseau v. France*, No. 46809/99, not published.

402. ECtHR, 27 Feb. 1980, *Deweere v. Belgium*, Series A No. 35, § 42; 26 March 1982, *Adolf v. Austria*, Series A No. 49; 20 Oct. 1997, *Serves v. France*, Reports 1997-VI.

403. ECtHR, 10 Dec. 1982, *Foti and Others v. Italy*, Series A No. 56, § 52. Also ECtHR, 20 Oct. 1997, *Serves v. France*, op. cit.; *Aff. Deweere*, op. cit., § 42.

404. ECtHR, 27 June 1968, *Wemhoff v. Germany*, Series A No. 7.

405. ECtHR, 15 July 1982, *Eckle v. Germany*, Series A No. 51.

406. ECtHR, 27 June 1968, *Neumeister v. Austria*, Series A No. 8.



criteria are alternative and not cumulative ones.⁴⁰⁷ In any case, deprivation of liberty will undoubtedly be a sign of the criminal nature of the offence,⁴⁰⁸ as will very large fines or even the deterrent effect of the penalty.⁴⁰⁹ Since the concept of a criminal charge is interpreted broadly by the European judges, it can also encompass administrative, disciplinary and tax penalties.

2. *The requirements for a fair trial*

[104] *Multiple safeguards*

The right to a fair trial entails compliance with a certain number of safeguards. The European system of protection is effective, because not only are the safeguards in Article 6 of the Convention considerable, but they are also appropriately complemented by other provisions in the Convention and its additional protocols. There are both general safeguards for all parties to court proceedings and special safeguards reserved *a priori* for persons charged with criminal offences within the European meaning of the term.

a) General safeguards

[105] *Article 6, paragraph 1, of the Convention*

With the exception of imprisonment in default⁴¹⁰ the general safeguards for a fair trial are specified in the first paragraph of Article 6 of the Convention. This provision, which is of considerable importance, puts forward general safeguards for proper administration of justice, namely the right to an independent and impartial tribunal established by law, the

407. ECtHR, 25 Aug. 1987, *Lutz v. Germany*, Series A No. 123.

408. ECtHR, 28 June 1984, *Campbell and Fell*, Series A No. 80.

409. ECtHR, 21 Feb. 1984, *Oztürk v. the Federal Republic of Germany*, Series A No. 73, § 53.

410. Imprisonment for debt referred to in Article 1 of Protocol No. 4, under which no one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation is no longer very useful as this measure has become obsolete; it remains possible in the framework of a decision by public authorities and is considered as a penalty: ECtHR, 8 June 1985, *Jamil v. France*, Series A No. 317-B.



right to be tried within a reasonable time, and the right to a fair and public hearing.

[106] The right to an independent tribunal established by law

The first requirement of the right to a fair trial is the existence of a tribunal that must also be established by law. The latter point does not raise any serious difficulties: since the law is considered in the broad sense, the only important thing is for the tribunal to satisfy the criteria of clarity and accessibility.

The tribunal, an autonomous concept freed of national definitions, is distinguished by its judicial power to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.⁴¹¹ It is a judicial body that has full jurisdiction⁴¹² and which must therefore be accessible and appropriate, as well as qualified to judge. The fact that it has more than just judicial powers does not automatically imply that it is not a tribunal,⁴¹³ but the fact that it can deliver a binding judgment on a dispute does not necessarily mean that it is a tribunal.⁴¹⁴

[107] The right to an independent tribunal

The tribunal must be independent both of the executive and the parties to the case.⁴¹⁵ The manner of appointment of its members, the duration of their term of office, and the existence of guarantees against any outside pressures are factors by which this independence can be assessed.

411. ECtHR, 22 Oct. 1984, *Sramek v. Austria*, Series A No. 84, § 36.

412. ECtHR, 10 Feb. 1983, *Albert and Le Compte v. Belgium*, Series A No. 58 § 29; 28 June 1990, *Obermeier v. Austria*, Series A No. 179 § 70; 21 Sep. 1993, *Zumtobel v. Austria*, Series A No. 268-A

413. ECtHR, 28 June 1984, *Campbell and Fell v. the United Kingdom*, Series A No. 80, § 81s (Committee of Prison Visitors); ECtHR, 30 Nov. 1987, *H v. Belgium*, Series A No. 127, § 50 (professional association); ECtHR, 8 June 1976, *Engel and Others v. the Netherlands*, Series A No. 22, § 89 (penitentiary disciplinary organs); ECtHR, 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, Series A No. 43, § 51 (corporative disciplinary organs)

414. It is the case for a Minister or a Government: ECtHR, 23 Oct. 1985, *Bentham v. the Netherlands*, Series A No. 87, § 38.

415. ECtHR, 23 June 1981, *Le Compte, Van Leuven and De Meyere*, op. cit., § 55; 28 June 1984, *Campbell and Fell*, op. cit., § 78.



Appearances are taken into account.⁴¹⁶ However, the concept of independence does not create uncertainty because its content can be quite easily determined on the basis of functional and organisational criteria.

[108] *The right to an impartial tribunal*

Justice must be done by an impartial tribunal: this common-sense requirement is a fundamental right, observance of which raises some difficulties, especially as appearances are extremely important. Challenge procedures in domestic legislation, encouraged by the European Court,⁴¹⁷ moreover, are not always enough to restore the confidence of parties to court proceedings: there are many cases concerning impartiality of courts.

The impartiality requirement is determined both objectively and subjectively. The subjective test of impartiality is the absence of bias or prejudice.⁴¹⁸ The objective test of impartiality will take appearances into consideration, since it must be determined whether, taking account of appearances⁴¹⁹ and quite apart from the personal conduct of the judge, there are ascertainable facts which may raise doubts as to his impartiality:⁴²⁰ the Court then seeks to ascertain whether the apprehensions of the person concerned are objectively justified.⁴²¹

Application of the principles relating to impartiality is sometimes delicate. However, the fact that a judge has been involved twice in the same case is not necessarily contrary to the impartiality requirement, especially if his first involvement is not such as to influence the second.⁴²² The circumstances of the case are important, but the decisive criterion is undoubtedly that of involvement on the merits.⁴²³ The position of the European Court is therefore both guarded and pragmatic, including with

416. ECtHR, 22 June 1989, *Langborger v. Sweden*, Series A No. 155, § 32.

417. ECtHR, 1 Oct. 1982, *Piersack v. Belgium*, Series A No. 53.

418. ECtHR, 23 April 1996, *Remli v. France*, Rec. 1996 p. 529, § 48; 25 Feb. 1997, *Gregory v. the United Kingdom*, Reports 1997-I; 16 Sep. 1999, *Buscemi v. Italy*, Reports 1999-VI.

419. ECtHR, 25 Feb. 1997, *Findlay v. the United Kingdom*, Reports 1997-I; 24 Sep. 1997, *Coyne v. the United Kingdom*, Reports 1997-V (organisation of a court martial).

420. ECtHR, 24 May 1989, *Hauschildt v. Denmark*, Series A No. 154, § 48.

421. ECtHR, 24 May 1989, *Hauschildt v. Denmark*, op. cit.; 6 Dec. 1988, *Barberà, Messegué and Jobardo v. Spain*, Series A No. 146; 15 Oct. 2002, *Karakoç v. Turkey*, No. 27692/95, not published.

422. ECtHR, 22 Feb. 1996, *Bulut v. Austria*, Reports 1996-II, § 36.



respect to the principle of separation of judicial functions, which, despite being recognised,⁴²⁴ is applied with a certain flexibility,⁴²⁵ at least concerning investigation and trial:⁴²⁶ this flexibility, which does not rule out due care and attention,⁴²⁷ is all the more necessary for juvenile delinquents in order to ensure greater protection.⁴²⁸

[109] *The right to be tried within a reasonable time*

Everyone has the right to be tried within a reasonable time: hitherto it has been, above all, judicial delays that have been condemned by the European judges,⁴²⁹ but it is clear that hasty proceedings could also be penalised; it is therefore advisable to find a proper balance enabling justice to be done satisfactorily. In addition, states must ensure that parties to court proceedings have an effective remedy before domestic courts, allowing them to complain about delay in proceedings.⁴³⁰

The starting point for the period is usually the date on which the case is brought before the competent court for civil cases, while for criminal

423. ECtHR, 6 June 2000, *Morel v. France*, Reports 2000-VI (non violation of Article 6 § 1); 25 July 2000, *Tierce and Others v. San Marino*, Reports 2000-IX (violation of Article 6 § 1).

424. ECtHR, 26 Oct. 1984, *De Cubber v. Belgium*, Series A No. 86 § 29 (president of an assise court having taken part in the investigation of the case). Extension of the interdiction to exercising consultative and judicial functions: ECtHR, 28 Sep. 1995, *Procola v. Luxembourg*, Series A No. 326. Adde ECtHR, 27 Aug. 1991, *Demicoli v. Malta*, Series A No. 210, § 40.

425. ECtHR, 16 Dec. 1992, *Sainte-Marie v. France*, Series A No. 253-A. See also: ECtHR, 24 Feb. 1993, *Fey v. Austria*, Series A No. 255 (trial court judge having already interrogated the victim under letters rogatory by the investigating judge); 26 Feb. 1993, *Padovani v. Italy*, Series A No. 257-B (judge having before the trial questioned the applicant, taken measures restricting his liberty and summoned him to appear before him); 22 Feb. 1996, *Bulut*, op. cit. (trial court judge having interrogated two witnesses during the investigation). See however in a more severe way: ECtHR, 7 Aug. 1996, *Ferrantelli and Santangelo v. Italy*, Reports 1996-III (lack of impartiality when a member of the court judges an accused when he already judged a co-accused whose case was separated).

426. ECtHR, 25 Feb. 1992, *Pfeifer and Plankl v. Austria*, Series A No. 227.

427. ECtHR, 24 May 1989, *Hauschildt v. Denmark*, Series A No. 154; Aff. *Ferrantelli and Santangelo*, op. cit.

428. ECtHR, 24 Aug. 1993, *Nortier v. the Netherlands*, Series A No. 267.

429. See recently: ECtHR, 23 April 1998, *Doustaly v. France*, Reports 1998-II; 9 Nov. 1999, *Gozalvo v. France*, No. 38894/97, not published; 14 Nov. 2000, *Delgado v. France*, No. 38437/97, not published; 12 June 2001, *Brochu v. France*, No. 41333/98, not published; 8 March 2001, *Pinto de Oliveira v. Portugal*, No. 39297/98, not published.

430. ECtHR, 26 Sep. 2000, *Zannouti v. France*, No. 42211/98, not published.



cases the period taken into account begins on the date when the suspicions concerning the party concerned have serious repercussions on his situation, the date used being that of the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.⁴³¹ On the other hand, the final date of the period is the same for all types of case, with the period considered covering the entire proceedings, including expert opinions⁴³² and appeals.⁴³³

The respondent state must provide explanations for the length of proceedings, and the judges take into consideration the specific facts of a case, rejecting any abstract standard.⁴³⁴ Various criteria are thus taken into account, although none is determining, since the judges always assess the circumstances of the case as a whole. The first criterion is the complexity of the case: the European judges analyse the facts and the law, in particular the number of persons involved, difficulties relating to evidence, any international dimension of the case, uncertainty concerning the rules of law applicable,⁴³⁵ etc. The applicant's behaviour is also considered, and if it is the cause of the delay in proceedings, the applicant cannot allege an infringement of his right to be tried within a reasonable time: this will be the case if he has frequently changed lawyer, been slow in making documents available or made vexatious or malicious appeals.⁴³⁶ The European Court also takes into account the conduct of the competent authorities, showing itself to be particularly strict where a state is lacking in the speed required by Article 6:⁴³⁷ the state must provide its authorities with the necessary resources, especially with regard to the requirements of a fair trial;⁴³⁸ in any event, the judicial proceedings are supervised by the court,

431. ECtHR, 15 July 1982, *Eckle v. Germany*, Series A No. 51; 28 March 1990, *B v. Austria*, Series A No. 175.

432. ECtHR, 23 Nov. 1999, *Marques Gomes Galo v. Portugal*, No. 35592/97, not published; 23 Nov. 1999, *Galinho Carvalho Matos v. Portugal*, No. 35593/97, not published.

433. ECtHR, 29 March 1989, *Bock v. Germany*, Series A No. 150.

434. ECtHR, 24 Oct. 1989, *H v. France*, Series A No. 162-A.

435. ECmHR, 6 July 1976, *Neumeister v. Austria*, DR 6/115.

436. ECtHR, 25 Feb. 1993, *Dobbertin v. France*, A-256 D § 44. – See however: ECtHR, 26 Feb. 1998, *Pafitis and Others v. Greece*, Reports 1998-I, § 95.

437. ECtHR, 10 July 1984, *Guincho v. Portugal*, Series A No. 81, § 32.



which is responsible for ensuring prompt conduct of the trial.⁴³⁹ Lastly, what is at stake in the case is sometimes taken into consideration in assessing the reasonableness of length of proceedings: the consequences of the case for the applicant's personal and professional life are then studied,⁴⁴⁰ so that periods usually considered to be reasonable may cease to be so if exceptional diligence is required.⁴⁴¹

[110] The right to a public hearing

The importance of this safeguard is considerable, since a public trial is an essential precondition of the proper administration of justice: litigants must be protected against secret administration of justice with no public scrutiny, in which they could have no confidence.⁴⁴² It is not enough for justice to be done properly; everybody must be able to see it being done properly.

The holding of hearings in public and the public delivery of judgments is a fundamental principle⁴⁴³ but one which does not preclude exceptions: thus the right to a public hearing⁴⁴⁴ may be restricted in the interests of morals, public order or national security, or else to protect juveniles or the private life of the parties, or in special circumstances where publicity might prejudice the very interests of justice; in-camera sittings are possible, even before appeal courts.⁴⁴⁵

438. ECtHR, 26 Nov. 1992, *Lombardo v. Italy*, Series A No. 249-B § 23; 13 July 1983, *Zimmermann and Steiner v. Switzerland*, Series A No. 66 § 29; 7 July 1989, *Union alimentaria Sanders v. Spain*, Series A No. 157, § 40; 14 June 2001, *Adelino Santos and Others v. Portugal*, No. 41598/98.

439. ECtHR, 26 Oct. 1988, *Martins Moreira v. Portugal*, Series A No. 143, § 60.

440. ECtHR, 8 July 1987, *H v. the United Kingdom*, Series A No. 120 and 121; 29 March 1989, *Bock v. Germany*, Series A No. 150. Also ECtHR, 20 July 2000, *Caloc v. France*, Rec; 2000-IX; Compare ECtHR, 21 March 2000, *Gergouil v. France*, No. 40111/98, not published.

441. ECtHR, 31 March 1992, *X v. France*, Series A No. 236.

442. See in particular: ECtHR, 8 Dec. 1983, *Pretto v. Italy*, Series A No. 71, § 21; 8 Dec. 1983, *Axen v. the Federal Republic of Germany*, Series A No. 72, § 25; 22 Feb. 1984, *Sutter v. Switzerland*, Series A No. 74, § 26; 29 Oct. 1991, *Helmerts v. Sweden*, Series A No. 212-A, §§ 33 et 36.

443. ECtHR, 24 Nov. 1997, *Werner v. Austria*, Reports 1997-VII.

444. Only the debates can be the subject of a restricted publicity, but not the delivery of the judgment): ECtHR, 28 June 1984, *Campbell et Fell v. the United Kingdom*, Series A No. 80.

445. ECtHR, 26 May 1988, *Ekbatani v. Sweden*, Series A No. 134; 29 Oct. 1991, *Helmerts, Andersson and Fejde v. Sweden*, Series A No. 212-A-B-C; 20 May 1998, *Gautrin and Others v. France*, Reports 1998-III.



[111] *The right to a fair hearing*

The fairness requirement is powerful and demands an assessment of the particular circumstances of a case. The European judges undertake an overall analysis to determine whether proceedings have complied with the fairness requirement.⁴⁴⁶ Taking as their starting point the idea of fairness and the fact that interpretation must be based on the scope and purpose of the Convention, the European judges have established implicit safeguards, the most important of these being the obligation to give reasons for judgments, equality of arms, the right not to incriminate oneself and the fairness of evidence.

The obligation to give reasons for judgments is essential for fairness. The reasons for a decision must be clearly apparent, otherwise there is a risk of some arbitrariness, not to mention the difficulty of any review. The Court has clearly stated that Article 6 § 1 obliges courts to give reasons for their decisions:⁴⁴⁷ this obligation, inherent in a fair trial,⁴⁴⁸ must be determined in the light of the particular facts of the case.⁴⁴⁹ However, the court does not have to deal with all a litigant's arguments: only those which are relevant, i.e. likely to influence the outcome of the case,⁴⁵⁰ can be admitted.

The right to a fair hearing means that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent:⁴⁵¹ this principle of equality of arms is a vital element of a fair trial,⁴⁵² especially as it implies respect for the rights of the defence and the need for the involvement of

446. ECtHR, 28 March 1990, *Granger v. the United Kingdom*, Series A No. 174.

447. ECtHR, 19 April 1994, *Van de Hurk v. the Netherlands*, Series A No. 288, § 61.

448. ECtHR, 9 Dec. 1994, *Hiro Balani v. Spain*, and *Ruiz Torija v. Spain*, Series A No. 303-B.

449. See in particular: ECtHR, 1 July 1997, *Rolf Gustafson v. Sweden*, Reports 1997-IV; 19 Feb. 1998, *Higgins and Others v. France*, Reports 1998-I.

450. See *Hiro Balani*, op. cit.

451. See in particular: ECtHR, 27 Oct. 1993, *Dombo Beheer BV v. the Netherlands*, Series A No. 274, § 33; 22 Feb. 1996, *Bulut v. Austria*, Reports 1996-II, § 47; 18 March 1997, *Foucher v. France*, Reports 1997-II, § 34.

452. ECtHR, 24 Feb. 1997, *De Haes and Gijssels v. Belgium*, Reports 1997-I, § 53; 24 Nov. 1997, *Werner v. Austria*, Reports 1997-VII, § 67.



both parties.⁴⁵³ The principle of equality of arms prescribes a balance between the prosecution and the defence: for this reason the attendance of the Advocate General at deliberations has been held contrary to the requirements of Article 6⁴⁵⁴ and the fact that this officer had received the reporting judge's report and draft judgment before the hearing while these documents were not sent to the defence lawyers, created an imbalance that upset this equality.⁴⁵⁵ The adversarial principle is understood to mean the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.⁴⁵⁶ A similar concern emerges with the government commissioner, since his participation in the deliberations of the trial bench is a breach of Article 6 § 1 of the Convention: regardless of his acknowledged objectivity and despite the fact that he does not take part in the vote, this participation could afford him an additional opportunity of bolstering his submissions in favour of one of the parties.⁴⁵⁷

Although Article 6 says nothing on this point, given the spirit and purpose of this article the European Court has held that anyone charged with a criminal offence has the right to remain silent and not contribute to incriminating himself.⁴⁵⁸ However, the right to silence cannot be absolute: a defendant's decision to remain silent throughout the proceedings cannot be without its consequences, especially when the trial judge attempts to weigh the evidence against the accused.⁴⁵⁹

Lastly, to ensure a fair trial the police and courts have a duty of fairness when collecting evidence.⁴⁶⁰ The rights of the defence must be safe-

453. ECtHR, 29 May 1996, *Feldbrugge v. the Netherlands*, Series A No. 99.

454. ECtHR, 30 Oct. 1991, *Borgers v. Belgium*, Series A No. 214; 1 April 2004, *Quesne v. France*, No. 65110/01, not published.

455. ECtHR, 31 March 1998, *Reinhardt and Slimane Kaïd v. France*, Reports 1998-II; 27 March 1998, *J.J. v. the Netherlands*, Reports 1998-II; 1 April 2004, *Quesne v. France*, op. cit.

456. ECtHR, 25 Jan. 2000, *Slimane-Kaïd v. France*, No. 29507/95, not published; 8 Feb. 2000, *Voisine v. France*, No. 27362/95, not published. See also: ECtHR, 26 April 2001 and (Gr. Ch.) 26 July 2002, *Meftah v. France*, No. 32911/96, not published.

457. ECtHR (Gr.Ch.), 7 June 2001, *Kress v. France*, Reports 2001-VI.

458. ECtHR, 25 Feb. 1993, *Funke v. France*, Series A No. 256-A, § 44; 2 June 1993, *K v. Austria*, Series A No. 255-B, § 15; 3 May 2001, *J.B. v. Switzerland*, Reports 2001-III.

459. ECtHR, 8 Feb. 1996, *John Murray v. the United Kingdom*, Series A No. 30^a-A.



guarded, so that use of evidence obtained as a result of police incitement is in breach of the Convention.⁴⁶¹

b) Special safeguards

[112] Safeguards for persons charged with criminal offences

These safeguards cover criminal cases, since they are meant specifically to protect *everyone charged with a criminal offence*, although they may be construed broadly. These special safeguards are enshrined mainly in the second and third paragraphs of Article 6 of the Convention, although some are established by the additional protocols.

[113] The presumption of innocence

Article 6 § 2 states that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. This means that the burden of proof is on the prosecution and the benefit of the doubt is given to the person charged, who must always have an opportunity to explain his case.

The presumption of innocence is imperative above all in courts during criminal proceedings, but its scope is constantly growing. It may be invoked by any person not finally convicted against any formal finding of his guilt⁴⁶² and calls for neutrality on the part of state representatives regarding the suspect's legal situation. Furthermore, the presumption of innocence applies outside the trial proper, before the preparatory stage of the criminal proceedings has even started,⁴⁶³ and is interpreted broadly.⁴⁶⁴

The presumption of innocence, despite its considerable importance, does not preclude certain exceptions. For the Court, presumptions of guilt do not necessarily constitute a breach of Article 6 provided that they are

460. ECtHR, 6 Dec. 1988, *Barberà, Messegué and Jabardo v. Spain*, Series A No. 146.

461. ECtHR, 9 June 1998, *Teixeira de Castro v. Portugal*, Reports 1998-IV.

462. ECtHR, 26 March 1982, *Adolf v. Austria*, Series A No. 49. *Adde* ECtHR, 25 March 1983, *Minelli*, Series A No. 62 § 37; 25 Aug. 1993, *Sekanina v. Austria*, Series A No. 266-A.

463. Press Conference of the Minister of Interior and senior Police officials presenting the applicant as the instigator of the murder: ECtHR, 10 Feb. 1995, *Alenet de Ribemont v. France*, Series A No. 308.

464. ECtHR, 29 Aug. 1997, *E.L. and Others v. Switzerland*, Reports 1997-V.



confined within reasonable limits so that the principle is not deprived of its substance; the presumption of guilt must obviously not be irrebuttable, since it must be possible to bring proof to the contrary.⁴⁶⁵

[114] *The rights of the defence*

The third paragraph of Article 6 of the Convention sets out in detail the vital safeguard represented by the rights of the defence; this list is not, however, exhaustive.⁴⁶⁶

The person charged with a criminal offence must therefore be informed of the nature and grounds of the charge. This information must be given in detail and be provided promptly in a language which the person understands. The nature of the charge is merely its legal characterisation, while the grounds are taken to mean the acts with which the person is being charged.⁴⁶⁷ The right to be informed must therefore be effective, which may raise some difficulties in countries where the courts have the power to alter the charge at any point in the proceedings: the rule is that a different charge is always possible provided that the rights of the defence are respected; this means that the person charged must be clearly informed of this and must have an opportunity to explain his case fully.⁴⁶⁸ Effective enjoyment of the right to be informed requires, more generally, a proper understanding of the situation: the defendant must be able to understand perfectly what is going on.⁴⁶⁹

A person charged with a criminal offence must also have adequate time and facilities for his defence. His behaviour will obviously be taken into account, since he cannot use his own negligence as an excuse.⁴⁷⁰ However, it is the judicial authorities' attitude in particular that will be sub-

465. ECtHR, 7 Oct. 1988, *Salabiaku v. France*, Series A No. 141-A, § 28. *Adde* ECtHR, 25 Sep. 1992, *Pham Hoang*, Series A No. 243, § 33; 23 July 2002, *Janosevic v. Sweden*, Reports 2002-VII; 30 March 2004, *Radio-France v. France*, No. 53984/00, not published, § 24.

466. The text itself specifies that everyone charged with a criminal offence has the following minimum rights...

467. ECtHR, 19 Dec. 1989, *Kamasinski v. Austria*, Series A No. 168, § 79; 19 Dec. 1989, *Brozicek v. Italy*, Series A No. 167.

468. ECtHR (Gr.Ch.), 25 March 1999, *Pélissier and Sassi v. France*, Reports 1999-II.

469. ECtHR, 30 Jan. 2001, *Vaudelle v. France*, Reports 2001-I.

470. ECtHR, 22 June 1993, *Melin v. France*, Series A No. 261-A, § 25.



ject to close scrutiny by the European judges: here again, everything will depend on the specific facts of the case, since restrictions on this right may be either accepted or rejected, according to the circumstances.⁴⁷¹ It is obvious that, in order to prepare his defence properly, the person charged must have access to the court file, which may create problems: the Court has found⁴⁷² that each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent.⁴⁷³ Access to the file and copies of the documents in it is essential to a proper defence; nonetheless, the argument to the effect that it is not incompatible with the rights of the defence to restrict the right to inspect the court file to an accused's lawyer does not apply if the accused has chosen to conduct his own case.⁴⁷⁴

The right to defend oneself effectively has also been established. Everyone charged with a criminal offence has the right 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. The person charged is thus able to defend himself in person: this "personal defence" is, *a priori*, quite risky for the accused owing to his unfamiliarity with the courts and his lack of legal knowledge; this is why the courts are often led to insist on the appointment of a lawyer,⁴⁷⁵ especially as this assistance can be free if necessary. The right to a defence counsel is one of the requirements of a fair trial, and once a lawyer has been chosen the state authorities must guarantee unhindered communication with the client.⁴⁷⁶ Furthermore, a defendant who is absent from a hearing cannot, solely on this account, lose his right to be effectively defended by his lawyer.⁴⁷⁷

471. ECtHR, 7 July 1989, *Bricmont v. Belgium*, Series A No. 158, § 90; 28 Nov. 1981, *S v. Switzerland*, Series A No. 220.

472. ECtHR, 18 March 1997, *Foucher v. France*, Reports 1997-II.

473. ECtHR, 22 Feb. 1996, *Bulut v. Austria*, Reports 1996-II.

474. ECtHR, 18 March 1997, *Foucher v. France*, op. cit.

475. ECtHR, 25 April 1983, *Pakelli v. the Federal Republic of Germany*, Series A No. 64, § 38. Adde ECtHR, 25 Sep. 1992, *Croissant v. Germany*, Series A No. 237-B.

476. ECtHR, 28 Nov. 1991, *S v. Switzerland*, Series A No. 220, § 49.

477. ECtHR, 13 Feb. 2001, *Krombach v. France*, Reports 2001-II.



The importance of the right to witnesses⁴⁷⁸ is considerable: everyone charged with a criminal offence has the right to examine or have examined the prosecution witnesses and to obtain the attendance and examination of defence witnesses under the same conditions as the prosecution witnesses. It is nevertheless up to the national court to decide on the necessity or advisability of calling a witness.⁴⁷⁹ As regards the procedure for hearing witnesses, the rule is that the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument.⁴⁸⁰ Admittedly, on grounds of security and efficiency, use of anonymous testimony is possible but is subject to certain conditions:⁴⁸¹ such testimony, because it must nevertheless satisfy the requirements of a fair trial, must not constitute the main and determining evidence of guilt and must allow the defence an adequate and proper opportunity to challenge it;⁴⁸² furthermore, the witness must be examined by a judge who is aware of his identity.⁴⁸³ Despite these precautions, problems remain.⁴⁸⁴

The right to an interpreter is important: everyone charged with a criminal offence has the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court. This provision cannot be construed narrowly, since the assistance must be free whatever the outcome of the trial: even if Article 6 ultimately applies only to “persons charged with criminal offences”, it is certain that a person charged and finally convicted must also be entitled to this free assistance.⁴⁸⁵

478. The notion of witness is an autonomous one, interpreted broadly by the Strasbourg Court; the undercover agent is, so, a witness: ECtHR, 15 June 1992, *Lüdi v. Switzerland*, Series A No. 238, § 44,

479. ECtHR, 19 Dec. 1989, *Kamasinski v. Austria*, Series A No. 168, § 91.

480. ECtHR, 5 Dec. 2002, *Craxi v. Italy*, No. 34896/97, not published; 13 Nov. 2003, *Rachdad v. France*, No. 71846/01, not published.

481. ECtHR, 20 Nov. 1989, *Kostovski v. the Netherlands*, Series A No. 166 (conditions for common witnesses); 15 June 1992, *Lüdi v. Switzerland*, Series A No. 238 (conditions for special witnesses).

482. ECtHR, 19 Dec. 1990; *Delta v. France*, Series A No. 191.

483. ECtHR, 26 March 1996, *Doorson v. the Netherlands*, Reports 1996-II.

484. Compare *Doorson*, op. cit. and ECtHR, 23 April 1997, *Van Mechelen and Others v. the Netherlands*, Reports 1997-III.

485. ECtHR, 28 Nov. 1978, *Luedicke, Belkacem and Koç v. the Federal Republic of Germany*, Series A No. 29.



[115] Abolition of the death penalty

The death penalty is the subject of two additional protocols: Protocol No. 6, which abolishes it partially, and Protocol No. 13, which abolishes it entirely.

Article 1 of Protocol No. 6 abolishes the death penalty: no one shall be condemned to such a penalty or executed. But Article 2 of the same Protocol allows a state to make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war: this is the only derogation possible.

Protocol No. 13 abolishes the death penalty in all circumstances. It repeats the provisions of Protocol No. 6 but removes the exception contained in Article 2.

[116] Appeal

Under Article 2 § 1 of Protocol No. 7, everyone convicted of a criminal offence by a tribunal has 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, is governed by law.

The second paragraph of this article states that 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.

[117] The “non bis in idem” principle

Under Article 4 § 1 of Protocol No. 7, 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.⁴⁸⁶ But this 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

486. ECtHR, 23 Oct. 1995, *Gradinger v. Austria*, Series A No. 328-C.



defect in the previous proceedings which could affect the outcome of the case.

[118] Compensation for wrongful conviction

Article 3 of Protocol No. 7 states 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 was wholly or partly attributable to him.

II. Protection of aliens

[119] The Convention's silences

With very few exceptions,⁴⁸⁷ aliens are not covered by special provisions in the European Convention, which may seem logical inasmuch as Article 1 guarantees rights and freedoms to everyone regardless of nationality. This means that European protection for aliens is mostly indirect, even if some additional protocols provide direct protection.

A. Direct protection

[120] Article 4 of Protocol No. 4

Article 4 of Protocol No. 4 prohibits collective expulsion. However, an expulsion measure or, more generally, a removal measure⁴⁸⁸ taken by the competent authorities and compelling aliens as a group to leave the country is still possible: the measure must nevertheless have been taken after and on the basis of a reasonable and objective examination of each individual case.⁴⁸⁹ The mere fact of taking expulsion measures in identical

487. Article 5 § 1 f ECHR (right to liberty and security); Article 16 ECHR (restrictions on political activity of aliens); see also Article 14 prohibition of discrimination).

488. ECmHR, 3 Oct. 1975, *Becker v. Denmark*, DR 4/215 (removal, *reconduite à la frontière*, repatriation, etc.).



terms does not automatically make the expulsion a collective one if each situation has been examined individually.⁴⁹⁰

[121] Article 1 of Protocol No. 7

Article 1 of Protocol No. 7 states that an alien lawfully resident in the territory of a state shall not be expelled therefrom except in pursuance of a decision reached in accordance with law. He shall be allowed to submit reasons against his expulsion, to have his case reviewed and to be represented for these purposes before the competent authority or a person or persons designated by that authority.

However, expulsion is possible before these rights can be exercised if it is necessary in the interests of public order or for reasons of national security.

[122] Article 2 of Protocol No. 4

Under Article 2 of Protocol No. 4, everyone lawfully within the territory of a state has, within that territory, the right to liberty of movement and freedom to choose his residence. In addition, everyone shall be free to leave any country.

Thus freedom of movement for aliens is guaranteed, although the latter must be lawfully within the territory of the state concerned. It is important to point out that it is domestic law which will determine the conditions of lawful status.⁴⁹¹ Furthermore, a state can always impose restrictions on the rights guaranteed provided they are in accordance with law and justified by the public interest in a democratic society.

489. ECmHR, 3 Oct. 1975, *Becker v. Denmark*, op. cit.

490. ECmHR, 16 Dec. 1988, *Alikabs and Others v. the Netherlands*, No. 14209/88, not published; 16 Dec. 1988, *B and Others v. the Netherlands*, No. 14457/88, not published.

491. ECtHR, 26 April 1995, *Piermont v. France*, Series A No. 314.



B. Indirect protection

[123] *Protection “par ricochet”*

Aliens will be indirectly protected by the Convention if they can prove that measures to remove them will violate one of their rights guaranteed by the Convention, whether under Article 13 or under Articles 3 and 8.

[124] *Article 13 of the European Convention on Human Rights*

If an alien is subject to a removal measure he is entitled to an effective remedy before a national authority: under Article 13 of the Convention, 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. Furthermore, the appeal must have suspensive effect, otherwise the protection would be illusory.⁴⁹² However, the alien is guaranteed an effective and appropriate appeal, not a favourable outcome.⁴⁹³

[125] *Article 3 of the European Convention on Human Rights*

Any removal measure that may expose the alien concerned to ill-treatment in the country of destination is in breach of Article 3 of the Convention.

Extradition is not possible if such a risk appears to exist, although the risk must be real.⁴⁹⁴ It is worth noting that in this type of case we have a virtual violation rather than an alleged violation: the European Court anticipates a possible but hypothetical violation of human rights.

This solution has been extended to include aliens facing expulsion. Expulsion could, in certain exceptional cases, be in breach of Article 3 of the Convention if there are serious reasons to believe that in the state to which he is being sent the alien might be subjected to treatment prohib-

492. ECmHR, 13 Dec. 1984, *M v. France*, DR 41/104; ECtHR, 18 Dec. 1986, *Bozano v. France*, Series A No. 111, § 48 s.

493. ECmHR, 17 Dec. 1983, *C v. the United Kingdom*, DR 35/13.

494. ECtHR, 7 July 1989, *Soering v. the United Kingdom*, Series A No. 161. *Adde* ECtHR, 20 March 1991, *Cruz-Varas and Others v. Sweden*, Series A No. 201; 30 Oct. 1991, *Vilvarajah*, Series A No. 215. See also: ECmHR, 3 May 1983, *Altun v. the Netherlands*, DR 36/209.



ited by Article 3:⁴⁹⁵ the European authorities have nevertheless shown themselves to be strict on this point, as the risk of violation of Article 3 must be serious, the mere possibility of ill-treatment not in itself constituting a breach of this article.⁴⁹⁶ In future this judicial doctrine will apply to all measures to remove aliens: furthermore, in extreme cases the European judges will always hold that a removal measure is in breach of Article 3, especially in the case of serious illness that would thus result in a sudden and certain deterioration in a person's medical condition.⁴⁹⁷ More generally, removal of aliens is prohibited if this would expose them to living conditions contrary to human dignity.⁴⁹⁸

[126] Article 8 of the European Convention on Human Rights

The right to respect for private and family life is often relied on by aliens facing expulsion or extradition, but the family tie must nevertheless be real and effective.⁴⁹⁹ A removal measure may indeed interfere with the applicant's private and family life⁵⁰⁰ but Article 8 guarantees only the right to respect for family life: preventing entry of an alien into a territory in order to found a family, or removing him from this territory when he is able to rebuild his family life elsewhere, does not constitute a breach of Article 8.⁵⁰¹ But in any event the requirements of public order may lead a state to take steps to remove an alien without that state being accused of breaching the European Convention.⁵⁰²

495. ECmHR, 30 Sep. 1974, *X v. the Federal Republic of Germany*, DR 1/ 74.

496. ECtHR, 30 Oct. 1991, *Vilvarajah and Others v. the United Kingdom*, Series A No. 215. See also: ECtHR, 29 April 1997, *HLR v. France*, op. cit.

497. ECtHR, 2 May 1997, *D. v. the United Kingdom*, Reports 1997-III.

498. ECtHR, 11 July 2000, *Jabari v. Turkey*, Reports 2000-VIII (risk, in case of a deportation to Iran, to be sentenced to be stoned to death for having committed adultery).

499. ECtHR, 21 June 1988, *Berrehab v. the Netherlands*, Series A No. 138; 26 Sep. 1997, *Mehemi v. France*, Reports 1997-VI. It should be noted that Strasbourg judges seem to restrain foreigner's family life to the sole nuclear family: ECtHR (Gr.Ch.), 9 Oct. 2003, *Slivenko v. Lettonia*, No. 48321/99, not published.

500. ECtHR, 28 May 1985, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Series A No. 94; 21 June 1988, *Berrehab v. the Netherlands*, Series A No. 138.

501. ECtHR, 20 March 1991, *Cruz Varas and Others v. Sweden*, Series A No. 201, § 68.

502. ECtHR, 7 Aug. 1996, *C. v. Belgium*, Reports 1996-III.



The situation of second-generation immigrants and aliens arriving in early youth is more delicate. After initially adopting a fairly lenient stance,⁵⁰³ the European judges then started to become more open to arguments based on the need to protect public order.⁵⁰⁴ This stricter line has subsequently been confirmed:⁵⁰⁵ it is nevertheless true that the European judges apply the proportionality principle, so that present responses seem more finely shaded whilst remaining fairly strict; what is taken into account is, amongst other things, the seriousness of the charges, the closeness of the individual's personal ties to the host country, and, if appropriate, the duration of the measure.⁵⁰⁶

In terms of Article 8 of the European Convention on Human Rights, two particular situations are worth emphasising: family reunion and exclusion orders. Regarding the former, the Court does not guarantee the right to family reunion⁵⁰⁷ as a consequence of Article 8. Regarding the latter, an assessment of the particular circumstances by the Court and a varying interpretation of the proportionality between interference with family life and protection of public order mean that an exclusion order results sometimes in a finding of a violation⁵⁰⁸ and sometimes in a finding of non-violation;⁵⁰⁹ it nevertheless seems that we are moving towards a compromise solution in which, for somebody who has always lived in the country, an exclusion order is imposed only with caution and for very good reasons.⁵¹⁰

503. ECtHR, 18 Feb. 1991, *Moustaquim v. Belgium*, Series A No. 193; 26 March 1992, *Beldjoudi v. France*, Series A No. 234-A.

504. ECtHR, 24 April 1996, *Boughanemi v. France*, Reports 1996-II.

505. ECtHR, 29 Jan. 1997, *Bouchelkia v. France*, Reports 1997-I; 21 Oct. 1997, *Boujlifa v. France*, Reports 1997-VI; 26 Sep. 1997, *El Boujaïdi v. France*, Reports 1997-VI; 26 Sep. 1997, *Mehemi v. France*, Reports 1997-VI; 19 Feb. 1998, *Dalia v. France*, Reports 1998-I; 30 Nov. 1999, *Baghli v. France*, Reports 1999-VIII.

506. ECtHR, 2 Aug. 2001, *Boultif v. Switzerland*, Reports 2001-IX; 21 Dec. 2001, *Sen v. the Netherlands*, No. 31465/96, not published; 10 July 2003, *Benhebbba v. France*, No. 53441/99, not published; 10 July 2003, *Mokrani v. France*, No. 52206/99, not published.

507. ECtHR, 19 Feb. 1996, *Gül v. Switzerland*, Reports 1996-I.

508. ECtHR, 13 Feb. 2001, *Ezzoudhi v. France*, No. 47160/99, not published.

509. ECtHR, 19 Feb. 1998, *Dalia v. France*, Reports 1998-I.

510. In this sense, see Judge Costa's opinion in *Baghli*, op. cit.



[127] Guaranteed rights and the guarantee of these rights

The importance of the rights guaranteed by the European Convention on Human Rights and its additional protocols is considerable: whether civil and political rights or social and economic rights, their enshrinement at European level is a token of the strong determination to ensure effective protection of fundamental rights in Europe.

However, the importance of the rights guaranteed is a necessary but not the sole condition of their being effective. The guarantee of these rights, i.e. the system of protection, is just as essential and constitutes a vital aspect of their effectiveness. Admittedly, the domestic courts must be the first to take action to enforce the provisions of the Convention and its protocols, but if they fail to do so, the European Court will have to intervene. The system of protection must be capable of meeting the expectations of European citizens.



Part Two: The system of protection

[128] A period of reform

The human rights control system established by the European Convention on Human Rights has been quite remarkable from the outset: it represents an effective judicial review that is undoubtedly a consummate model for protection of fundamental rights at supranational level.

Designed in the 1950s, the review system has had to be strengthened and brought up to date: it was vital for the system itself to take account of new realities and become more effective. It was against this background that Protocol No. 11, adopted on 11 May 1994, entered into force on 1 November 1998. The whole system underwent a drastic reorganisation, and the new system was marked, amongst other things, by a considerable extension of the Court's jurisdiction: the European Commission of Human Rights was abolished, while the Committee of Ministers could no longer rule on alleged violations. Henceforth, the only institution able to intervene in judging a breach of the Convention's guarantees is the Court, which is a single and permanent body. In addition, the optional clauses concerning acceptance of individual right of appeal and the Court's jurisdiction have been deleted. With Protocol No. 11 real progress was made towards better protection of human rights, but numerous difficulties remained: very soon there arose the question of "reforming the reform", the problems arising mainly from an excessive caseload for the Court because of a very substantial increase in applications.⁵¹¹ Protocol No. 14 will endeavour to meet these concerns: opened for signature on 13 May



2004, it will enter into force shortly. Designed to increase the effectiveness of the review system established by the Convention, this protocol gives the Court the procedural means and flexibility it needs to process all applications in a timely fashion while allowing it to concentrate on the cases which require in-depth examination.

As matters stand, and despite the problems encountered, the Council of Europe's system of protection for human rights is exemplary: the Court can rule in law on alleged violations of the European Convention, and the Committee of Ministers supervises the execution of judgments delivered by the Court. This complementarity is a guarantee of effectiveness, since the judicial body has the power to deliver judgments while the policy body monitors their enforcement. This means that, although the European Court of Human Rights is the cornerstone of the system, the role of the Committee of Ministers is far from negligible.

Chapter 1: The European Court of Human Rights

[129] The Court's safeguards

Internationally, the European Court of Human Rights undoubtedly constitutes a particularly effective system of protecting fundamental rights and freedoms. The Court provides parties to court proceedings with particularly important safeguards, both institutional and procedural.

I. Institutional safeguards

[130] Continual strengthening of safeguards

From the outset the European Court of Human Rights has provided persons seeking justice with important safeguards, which largely explains its success. But in a field as sensitive as fundamental rights, a continual strengthening of safeguards is necessary, and the rights of Protocol No. 11 will soon be supplemented by the innovations of Protocol No. 14. This

511. In 2003, 39 000 new applications were referred to the Court. at the end of 2003, nearly 65 000 applications were pending before it: "Survey 2003" of the European Court of Human Rights, and Explanatory Report to Protocol No. 14.



dual strengthening of institutional safeguards is indicative of the determination to improve the effectiveness of the European system of protection.

A. The changes brought about by Protocol No. 11

[131] Features of the Court

Since the entry into force of Protocol No. 11, the European Court of Human Rights has been distinguished mainly by the fact that it is, on the one hand, a single and permanent body and, on the other, composed of various benches. The rules governing its organisation and operation are indicative of the clear ambitions of the reform's promoters, namely the introduction of a system effectively protecting human rights in Europe. No doubt the objective has not been fully achieved, but real progress has been made.

1. Organisation of the Court

[132] Judges of the Court

The Court consists of a number of judges equal to that of the High Contracting Parties.⁵¹² The judges may not engage in any activity which is incompatible with the requirements of independence and impartiality.⁵¹³ They 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.⁵¹⁴ They are elected by the Parliamentary Assembly from a list of three candidates nominated by the High Contracting Party,⁵¹⁵ which can present to the Parliamentary Assembly the candidature of a judge who is a national of another state party. Judges are elected for a period of six years and may be re-elected,⁵¹⁶ but their terms

512. Article 20 ECHR

513. Article 21-3 ECHR. Article 4, Rules of Court state that during their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office.

514. Article 21-1 ECHR.

515. Article 22-1 ECHR.

516. Article 23 ECHR.



of office expire when they reach the age of 70.⁵¹⁷ Before taking up office, each judge must take an oath.⁵¹⁸

A judge may not take part in the consideration of any case in which he has a personal interest or has previously acted either as the agent or adviser of a party or of a person having an interest in the case, or as a member of a tribunal or commission of inquiry, or in any other capacity. If a judge is prevented from taking part in sittings for which he has been convoked, or if he withdraws,⁵¹⁹ he must immediately inform the President of the Chamber: an *ad hoc* judge can be appointed if appropriate.⁵²⁰ Lastly, no judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.⁵²¹ He must first be heard by the plenary Court.

During the exercise of their functions the judges shall be entitled to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made under it.⁵²² They therefore cannot be arrested or prosecuted on the territory of any of the member states on the grounds of opinions or votes delivered during the hearings.

[133] *Presidency of the Court*

As provided for in Rule 8 of Rules of Court, the President is elected by the plenary Court, as are its two Vice-Presidents and the presidents of the sections, for a period of three years, provided that such a period does not exceed the duration of their terms of office as judges.

The President directs the work and administration of the Court whilst representing it, in particular in its relations with the authorities of the Council of Europe. He presides at plenary meetings of the Court as well as meetings of the Grand Chamber and the panel of five judges. Finally, the

517. Article 23-6 ECHR.

518. Article 3, Rules of Court: "I swear" or "I solemnly declare that I will exercise my functions as a judge honourably, independently and impartially and that I will keep secret all deliberations"

519. Article 28, Rules of Court.

520. Article 29, Rules of Court.

521. Article 24 ECHR; Article 7, Rules of Court.

522. Article 51 ECHR.



President of the Court may take part in the consideration of cases being heard by chambers but only if he is the judge elected in respect of a Contracting Party concerned. The President is assisted by the Vice-Presidents, who take his place if he is unable to carry out his duties or the office of President is vacant.⁵²³

[134] Court registry and legal secretaries

The Court has a registry, the functions and organisation of which are laid down in the Rules of Court.⁵²⁴ The plenary Court elects its registrar, who takes an oath before taking up office: he is elected for a term of five years and may be re-elected. The plenary Court also elects two deputy registrars.

The Court is assisted by legal secretaries⁵²⁵ who are assigned to the Court itself rather than to a judge.

2. Jurisdiction of the Court

[135] Advisory jurisdiction of the Court

At the request of the Committee of Ministers the Court may give advisory opinions on legal questions concerning the interpretation of the European Convention and its additional protocols.⁵²⁶ Such opinions cannot deal with any question relating to the content or scope of the rights guaranteed or with any other question having been the subject of an appeal before the organs of the Convention.⁵²⁷

The Court decides whether a request for an advisory opinion is within its competence⁵²⁸ and, if so, gives reasons for this advisory opinion.⁵²⁹ Finally, the advisory opinion is communicated to the Committee of Ministers.⁵³⁰

523. Article 10, Rules of Court. The Vice-Presidents also act as Presidents of Sections.

524. Article 25 ECHR. See also Article 15-18, Rules of Court.

525. Article 25, *in fine* ECHR.

526. Article 47-1 ECHR.

527. Article 47-2 ECHR. See the first decision on Court's competence to give an advisory opinion: ECtHR, 2 June 2004, not published.

528. Article 48 ECHR.

529. Article 49 ECHR. Any judge who does not share the opinion can deliver a dissenting opinion.



[136] *Legal jurisdiction of the Court*

The jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention, both for inter-state cases and individual applications.⁵³¹ The Court examines the admissibility of an application, ascertains the facts, attempts to achieve a settlement and then takes a decision on the merits.

In the event of dispute as to whether the Court has jurisdiction, it is the Court that decides.⁵³²

3. *Working of the Court*

[137] *Seat of the Court*

The seat of the Court is at Strasbourg, but if it seems expedient the Court may perform its functions elsewhere in the territories of the member states of the Council of Europe.⁵³³

At any stage of the examination of an application, and if necessary, the Court may decide that an investigation or other function should be carried out elsewhere by it or one of its members.⁵³⁴

[138] *Sessions of the Court*

The plenary sessions of the Court are convened by the President of the Court whenever the performance of its functions under the Convention so requires and in any event once a year to consider administrative matters. Moreover, the President of the Court must convene such a session if at least one-third of the members of the Court so request.⁵³⁵

The other sessions of the Court are governed by the provisions of Rule 21 of the Rules of Court: the Grand Chamber, the chambers and the com-

530. Article 49-3 ECHR.

531. Article 32 ECHR.

532. Article 32 § 2 ECHR.

533. Article 19 § 1, Rules of Court.

534. Article 19 § 2, Rules of Court.

535. Article 20, Rules of Court. It should be noted that the quorum of 2/3 of the elected judges in office is required for the functioning of the plenary Court; if there is no quorum, the President shall adjourn the sitting.



mittees sit on a permanent basis, but on a proposal by the President the Court fixes session periods each year. In urgent cases the Grand Chamber and the chambers may be convened by their presidents outside those periods.

[139] *Deliberations and votes*

The Court deliberates in private and its deliberations remain secret. Only the judges take part in them, and before a vote is taken on any matter in the Court, the President may request the judges to state their opinions on it.⁵³⁶

Votes are usually taken by a show of hands and majority rules apply. The decisions of the Court are taken by a majority of the judges present, and, in the event of a tie after a fresh vote, the President has a casting vote. The decisions and judgments of the Grand Chamber and the chambers, on the other hand, are adopted by a majority of the sitting judges, and abstentions are not allowed in final votes on the admissibility and merits of cases.

4. *Composition of the Court*

[140] *Plenary Court*

The plenary Court, which brings together all the judges and is the Court's highest bench, has administrative functions. It elects its President and one or two Vice-Presidents for a period of three years. It also elects the presidents of the chambers of the Court, who may be re-elected. The plenary Court further elects the registrar and one or more deputy registrars and sets up chambers, constituted for a fixed period of time: these chambers, which are referred to as *sections*, are set up on a proposal by the President for a period of three years;⁵³⁷ each judge is a member of a section, and the latter's composition must be geographically and gender balanced.⁵³⁸

536. Article 22, Rules of Court. *Reports*

537. Article 25-1, Rules of Court. There are at least four sections.

538. Article 25-2, Rules of Court.



Last but not least, the plenary Court adopts the Rules of Court. This is an important right, since these rules provide clarification, especially regarding procedures, which plays a part in the effectiveness of the European control system.

[141] Committees of three judges

The Court's chambers set up committees for a fixed period of time:⁵³⁹ they must include the Judge Rapporteur to whom the application has been assigned as soon as it is registered. This concerns only individual applications, since inter-state applications are heard directly by the chamber.⁵⁴⁰

These three-judge committees have the task of screening individual applications. They may, by a unanimous vote, declare an application inadmissible or strike it out of their list of cases where such a decision can be taken without further examination.⁵⁴¹ In accordance with the Parliamentary Assembly's wishes, the decision must be adequately justified.⁵⁴²

[142] Chambers of seven judges

These chambers of seven judges are constituted from the sections.⁵⁴³ For each case the chamber includes the president of the section and the judge elected in respect of any contracting party concerned. The other members of the chamber are designated by the president of the section in rotation from among the members of the relevant section. Lastly, the members of the section who are not so designated sit as substitute judges.⁵⁴⁴

The chamber of seven judges is the normal court of judgment: it is the linchpin of the control system. Subject to the powers specifically attrib-

539. Article 27 ECHR.

540. Article 29 § 2 ECHR.

541. Article 28 ECHR.

542. Parl. Ass. (opinion) 25 Jan. 1994, pt. V, Rev. Univ. Dr. Homme 1994 p. 57.

543. About the constitution of the sections: Article 25, Rules of Court.

544. Article 26-1, Rules of Court. It should be noted that, even after the end of their terms of office, judges shall continue to deal with cases in which they have participated in the consideration of the merits (Article 26-3, Rules of Court).



uted to the other benches, the chamber of seven judges has inherent competence to examine all individual and inter-state applications with regard to both admissibility and merits.⁵⁴⁵ However, the judgment on the merits delivered by the chamber of seven judges is not final, since the Grand Chamber may intervene if necessary.

[143] The Grand Chamber

Consisting of seventeen judges, the Grand Chamber is distinguished by the fact that its composition is variable: apart from the ex-officio members, who are the President and Vice-Presidents of the Court, the presidents of the sections and the judges elected in respect of the state party to a case, the judges are appointed for each case.⁵⁴⁶ Within it, a panel of five judges is composed of the President of the Court, the presidents or, if they are prevented from sitting, the vice-presidents of the sections other than the section from which was constituted the chamber that dealt with the case whose referral has been sought, and a further judge designated in rotation from among the judges other than those who dealt with the case in the chamber. No judge elected in respect of, or who is a national of, a contracting party concerned may be a member of the panel.⁵⁴⁷

The promoters of the reform wanted an “appropriate structure to ... enable a re-hearing in exceptional cases”. A procedure for referral from the chamber of seven judges to the Grand Chamber was thus established, together with the possibility of a re-hearing.

B. The innovations of Protocol No. 14

[144] The need to increase the effectiveness of the control system

Protocol No. 11 enabled the system of protection to be made more effective, but perpetual growth in the number of applications necessitated a further reform.

545. See Explanatory Report to Protocol No. 11, § 42.

546. Article 24, Rules of Court.

547. Article 24, Rules of Court.



The Court's excessive caseload is a reality to which a satisfactory answer must be found as soon as possible. The increase in applications is due not only to the accession of new states but also to a general increase in the number of applications brought against states which are party to the Convention.

In short, what is at stake is the effectiveness and credibility of the European system of protection. Hence the importance of the measures put forward in Protocol No. 14.

[145] Alterations to the control system

On the institutional level, a certain number of measures are planned in order to improve the effectiveness of the protection system. Admittedly, these measures are few in number, since the drafters of the protocol have laid more emphasis on the procedural dimension of the reform: nonetheless, they are important.

The judges' terms of office have been increased to nine years, but they can no longer be re-elected. This rule is intended to strengthen their independence and impartiality.⁵⁴⁸ In addition, a single-judge formation has been introduced into the list of the Court's judicial formations.⁵⁴⁹ the competence of single judges is nevertheless limited to taking decisions on inadmissibility or decisions to strike a case out of the list where such a decision can be taken without further examination. When sitting in a single-judge formation, the Court is assisted by rapporteurs who function under the Court's authority and form part of the Court's registry.⁵⁵⁰

As a response to criticism of the old system, states can no longer choose an *ad hoc* judge after the beginning of proceedings. Each state is required to draw up a reserve list of *ad hoc* judges from which the President of the Court will choose someone when the need arises.⁵⁵¹

548. Article 23 ECHR.

549. Article 26 ECHR.

550. Article 24 § 2 ECHR.

551. Article 26 § 4 ECHR.



II. Procedural safeguards

[146] Strengthening safeguards

Prior to the entry into force of Protocol No. 11, procedural safeguards were already substantial, and therefore drastic changes were unnecessary. The organisation of procedure resulting from this Protocol was indicative of a certain continuity, since the idea was to strengthen existing safeguards, in particular by making the control system entirely judicial. Nevertheless, problems still remained, making a new reform necessary. Protocol No. 14 provides solutions likely to improve the operation and therefore the effectiveness of the Court.

Rules of procedure constitute important safeguards for the parties to Court proceedings.⁵⁵² In particular, persons taking part in proceedings are accorded immunity⁵⁵³ and the chamber or its president may, at the request of a party or of any other person concerned, or of its own motion, indicate to states any interim measure necessary in the interests of the parties or of the proper conduct of the proceedings.⁵⁵⁴ Other safeguards appear more specifically throughout Court proceedings.

A. *Referral to the Court*

[147] The applicant and the respondent

The respondent can only be one or more states. But the applicant can be one or more states or one or more individuals: the application must be submitted in writing and be signed by the applicant or the applicant's representative,⁵⁵⁵ or, where appropriate, by the persons competent to represent the NGO or group of individuals.

552. Official languages are French and English, but the President of the Court may grant the applicant to use another language (Article 34, Rules of Court).

553. European Agreement concerning persons taking in proceedings before the European Court of Human Rights, Council of Europe 5 March 1996.

554. Article 39, Rules of Court. Contracting States have the obligation to comply with the interim measures: ECtHR, 6 Feb. 2003, *Mamatkulov v. Turkey*, No. 46827/99, not published.

555. Article 45-1, Rules of Court.



1. Inter-state applications

[148] Article 33 of the Convention

Under Article 33 of the European Convention, any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and its protocols by another High Contracting Party. The idea is that a state should submit to the Court matters affecting public order in Europe⁵⁵⁶ rather than taking action to enforce its own particular rights.

[149] Content of an inter-state application

The application must contain the name of the respondent state together with a statement of the facts and of the alleged violation. It must also contain a statement on compliance with the admissibility criteria (more specifically, exhaustion of domestic remedies and the six-month rule) as well as the object of the application and a general indication of the claim for just satisfaction. Lastly, the names and addresses of the persons appointed as agents must be given,⁵⁵⁷ and copies of any relevant documents and in particular decisions, judicial or otherwise, must be attached.

[150] The Judge Rapporteur

When an application is made, the chamber convened to consider the case designates a Judge Rapporteur (or possibly more than one), who is chosen from its members.⁵⁵⁸ This judge records the parties' observations and then makes a report on the admissibility of the inter-state application. If the application is declared admissible, the Judge Rapporteur submits such reports, drafts and other documents as may assist the chamber in carrying out its functions.⁵⁵⁹

556. ECmHR, 11 Jan. 1961, *Austria v. Italy*, YB. 4 p. 139.

557. These Agents may have the assistance of advocates or advisers: Article 35, Rules of Court.

558. Article 48 § 1, Rules of Court.

559. Article 48 § 2, Rules of Court.



2. Individual applications

[151] Article 34 of the Convention

Article 34 specifies that the Court may receive applications from any person, non-governmental organisation⁵⁶⁰ or group of individuals claiming to be the victim of a violation by one of the contracting states of the rights set forth in the Convention or its protocols.

An individual application can be made only by a person who is a “victim” of a violation of the rights guaranteed by the Convention. Unlike state applicants, an individual applicant must have a personal interest in bringing proceedings:⁵⁶¹ only a domestic measure or decision specifically infringing the applicant’s personal rights can warrant such an application. However, an applicant is held to be a victim if there is a sufficiently direct link between him and the alleged violation.⁵⁶² The European judges seem willing to establish a *pro victima* reading of Article 34 of the Convention, since the idea of a potential victim has been accepted:⁵⁶³ there are limits, however, as the European judges reject any applications in the form of an *actio popularis*.⁵⁶⁴

[152] Formal requirements for individual applications

Article 34 of the Convention does not specify any particular formal requirements for making applications. However, the Rules of Court state that an application must be made on the application form provided by the registry, unless the president of the section concerned decides other-

560. A public-law corporation can be considered as a non-governmental organisation: ECtHR, 9 Dec. 1994, *The Holy Monasteries v. Greece*, Series A No. 301-A; 23 Sep. 2003, *Radio-France v. France*, No. 53984/00, not published.

561. An individual applicant cannot require the Court to give a decision in abstracto on the compatibility of a national text with the Convention: ECtHR, 27 March 1962, *De Becker v. Belgium*, Series A No. 4; 18 June 1971, *De Wilde, Ooms and Versyp v. Belgium*, Series A No. 12; 6 Sep. 1978, *Klass v. Germany*, Series A No. 28.

562. ECmHR, 5 Feb. 1990, *Mendes Godinho v. Portugal*, DR 64/72; 4 Dec. 1995, *Tavira and Others v. France*, DR 83B/112.

563. See recently: ECtHR, 9 Jan. 2003, *L. and V. v. Austria*, Reports 2003-I; 9 Jan. 2003, *S.L. v. Austria*, No. 45330/99, not published.

564. ECtHR, 16 May 2002, *Segi and Others v. Germany and Others*, Reports 2002-V; 10 March 2004, *Senator Lines GmbH v. Austria*, No. 56672/00, not published.



wise.⁵⁶⁵ Applicants must provide information enabling it to be shown that the admissibility criteria have been satisfied and indicate whether they have at the same time applied to any other international tribunal.⁵⁶⁶ Applicants may request anonymity, but this exceptional measure must be justified.⁵⁶⁷

Where an application is made, the president of the section to which the case has been assigned designates a Judge Rapporteur, who examines the application.⁵⁶⁸ Judge Rapporteurs may request further information from the parties and decide whether the application is to be considered by a committee or by a chamber. If such a judge believes that the material submitted by the applicant on its own discloses that the application is inadmissible or should be struck out of the list, the application will normally be considered by a committee.⁵⁶⁹ The Judge Rapporteur submits such reports, drafts and other documents as may assist the committee, the chamber or its president in carrying out their functions.⁵⁷⁰

[153] Representation of applicants and legal aid

Rule 36 of the Rules of Court gives precise instructions regarding representation of applicants. It is first specified that individual applicants may initially present applications themselves or through a representative.⁵⁷¹ In the latter case, the applicant must be represented at any hearing decided

565. Article 47-1, Rules of Court. The form sets out the name, date of birth, nationality, sex, occupation and address of the applicant, occupation and address of the representative, if any; the Contracting Party or Parties against which the application is made; a succinct statement of the facts; a succinct statement of the alleged violation(s) of the Convention and the relevant arguments; a succinct statement on the applicant's compliance with the admissibility criteria (exhaustion of domestic remedies and the six-month rule); the object of the application and the main lines of the just satisfaction; and be accompanied by copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application.

566. Article 47-2, Rules of Court.

567. Article 47-3, Rules of Court.

568. Article 49, Rules of Court.

569. Article 49 § 2, Rules of Court.

570. Article 49 § 3, Rules of Court.

571. Article 36, Rules of Court. The representative shall be an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber: Article 36-4 a, Court Rules.



on by the chamber, unless the president of the chamber decides otherwise; in view of exceptional circumstances, owing in particular to the representative's conduct, the president of the chamber may request the applicant to appoint another. Where applicants are so represented, a power of attorney or written authority to act must be supplied by their representative or representatives.⁵⁷² The advocate and the applicant (if he is presenting his own case) may request permission to use their national language even if it is not one of the official languages of the Court.⁵⁷³ Lastly, it must be pointed out that communications or notifications addressed to agents or advocates shall be deemed to have been addressed to the parties.⁵⁷⁴

The president of the chamber may, of his own motion or at the applicant's request, grant free legal aid to the applicant in order that he may conduct his case effectively before the Court.⁵⁷⁵ However, legal aid is granted only on the dual condition that it is necessary for the proper conduct of the case before the chamber and that the applicant has insufficient means to meet all or part of the costs of the proceedings.⁵⁷⁶ It is intended to cover fees as well as travel and subsistence expenses, and more generally the costs of proceedings.

[154] Co-operation between High Contracting Parties

The High Contracting Parties undertake not to hinder the effective exercise of the right of petition.⁵⁷⁷ Any step taken by a state to obstruct the exercise of individual petition constitutes a breach of the Convention.⁵⁷⁸

572. Article 45-3, Rules of Court. A power of attorney or written authority to act shall be supplied to the applicant after his first correspondence with the Secretariat of the Court.

573. Article 36-5, Rules of Court.

574. Article 37-1, Rules of Court.

575. Article 91, Rules of Court.

576. Article 92, Rules of Court. If the applicant's means change, the President of the Chamber may revoke or vary the grant of legal aid: Article 96, Rules of Court.

577. Article 34 ECHR.

578. ECtHR, 25 Sep. 1997, *Aydin v. Turkey*, Reports 1997-VI, § 117.



B. Examination of admissibility

[155] An essential stage in the proceedings

The examination of an application's admissibility is a particularly important stage in the proceedings, especially as the very effectiveness of the entire system depends on it to a large extent. The solutions offered by Protocol No. 11 were on the whole satisfactory, but, in view of what was at stake and the changing situation, improvements became necessary for greater effectiveness: that is the purpose of Protocol No. 14, and its drafters have placed the emphasis more specifically on this stage of the proceedings.

1. The solutions introduced by Protocol No. 11

[156] Sole competence of the Court

Since Protocol No. 11, the Court has been solely competent to rule on any breach of the Convention or its protocols. Bringing proceedings entirely within the jurisdiction of the Court was an innovation calculated to strengthen the European system of protection of fundamental rights. The technical rules established for admissibility of applications reflect this philosophy of effectiveness and protection.

a) Admissibility criteria

[157] Exhaustion of domestic remedies

The Court may deal with a matter only after all domestic remedies have been exhausted.⁵⁷⁹ An applicant must provide evidence of this,⁵⁸⁰ and a respondent state which raises the objection of non-exhaustion must

579. Article 35-1 ECHR. It should be noted that an application which is aimed solely at obtaining compensation- for example, a claim that there is a malfunction in the public justice system- is generally subject to the requirement of exhausting an existing domestic remedy: ECtHR, 21 Oct. 2003, *Broca and Texier-Micault v. France*, No. 27928/02, not published; 29 July 2003, *Santoni v. France*, No. 49580/99, not published.

580. Article 47-2 a, Rules of Court. He cannot use his own failure in the fulfilment of procedural acts justifying a forfeiture: ECtHR, 20 Jan. 2000, *Yahiaoui v. France*, No. 30962/96, not published; ECmHR, No. 1994/63, *Louvain Inhabitants v. Belgium*, Eur. YB VII, p. 252.



prove the existence of domestic remedies that have not been exercised.⁵⁸¹ Exhaustion of domestic remedies is determined in relation to the date on which the application to the Court is submitted, although there may be exceptions to this rule.⁵⁸²

The infringement of the right at issue must have been raised in the domestic courts. While it is sufficient for the complaint to have been raised in substance,⁵⁸³ the Court wishes to prevent any abuses⁵⁸⁴ by dismissing the idea of a complaint raised in substance if only implicitly.⁵⁸⁵ It is imperative that the applicant give the domestic courts an opportunity to rule substantively on a violation of the Convention's rules.

However, the rule concerning exhaustion of domestic remedies ceases to be effective if the remedies provided under national law are illusory:⁵⁸⁶ the applicant is dispensed from pursuing any remedy that is uncertain or pointless because probably doomed to failure. The obligation to exhaust domestic remedies is confined to "appropriate", and therefore effective, remedies: they must be able to redress the situation directly.⁵⁸⁷ In a word, domestic remedy for the purposes of Article 35 of the European Convention must be sufficiently certain not only in theory but also in practice.⁵⁸⁸

581. ECtHR, 24 May 1989, *Hauschildt v. Denmark*, Series A No. 154, § 41; ECmHR, 7 March 1994, *Whiteside v. the United Kingdom*, DR 76/80; 16 Jan. 1998, *Spencer v. the United Kingdom*, DR 92/56.

582. ECtHR, 6 Sep. 2001, *Brusco v. Italy*, Reports 2001-IX. See however: ECtHR, 26 Sep. 2000, *Zannouti v. France*, No. 42211/98, not published.

583. ECmHR, 10 March 1977, *Guzzardi v. Italy*, DR 8/185; ECtHR, 23 April 1992, *Castells v. Spain*, A-236 § 30 s.; 16 Dec. 1992, *de Geouffre de la Pradelle v. France*, Series A No. 253-B, § 26.

584. ECtHR, 6 Dec. 1988, *Barberà, Messegué and Jobardo v. Spain*, Series A No. 146.

585. ECtHR, 19 March 1991, *Cardot v. France*, Series A No. 200, § 36; 15 Nov. 1996, *Ahmet Sadik v. Greece*, Reports 1996-V.

586. ECtHR, 22 May 1984, *De Jong, Baljet and Van den Brink v. the Netherlands*, Series A No. 77, § 39; ECmHR, 12 Oct. 1978, *the United Kingdom*, DR 16/32; 14 Oct. 1986, *Scoutt v. Ireland*, DR 49/144; ECtHR, 29 Oct. 1992, *Open Door and Others v. Ireland*, Series A No. 246-A, § 48; ECmHR, 8 April 1994, *Wingrove v. the United Kingdom*, DR 76/26; 24 June 1996, *Kuche v. the Federal Republic of Germany*, DR 86/63

587. ECmHR, 5 Oct. 1984, *Barano v. Portugal*, DR 40/130; 7 June 1990, *Kemmache v. France*, DR 66/249; 16 Jan. 1998, *Spencer v. the United Kingdom*, DR 92/56; 20 May 1998, *Durrand v. France*, DR 93/104; 23 April 1998, *El Guarti v. France*, DR 93/126.

588. ECtHR, 20 Feb. 1991, *Vernillo v. France*, Series A No. 198, § 27. ECmHR, 24 Feb. 1997, *Beer v. the Federal Republic of Germany*, DR 88/130; 7 April 1997, *Civet v. France*, DR 89/127.



[158] *The six-month rule*

The application must be submitted within a period of six months from the date on which the final decision was taken in the domestic courts.⁵⁸⁹ However, in the absence of an effective domestic remedy, the period runs from the date on which the decision (or measure) complained of took effect.⁵⁹⁰

The application of this rule is, however, relatively flexible. In general, the six-month period runs from the date on which the applicant was apprised of the final domestic decision if its content is sufficiently clear: this means that the period may run from the date of the judgment if the latter was delivered publicly in the presence of the applicant or his advocate, and provided that the latter was then able properly to understand the situation regarding the alleged violation;⁵⁹¹ otherwise, it is the date of notification that will constitute the start of the period.⁵⁹²

As a general rule, the date of introduction of the application is considered to be the date of the first communication from the applicant setting out, even summarily, the object of the application.⁵⁹³ However, the Court may for good cause decide that a different date shall be considered to be the date of introduction.⁵⁹⁴

[159] *Other admissibility criteria*

Article 35 of the European Convention on Human Rights sets out three successive provisions regarding the admissibility of an individual applica-

589. In principle, the jurisdiction of the Court only applies to facts occurred after the entry into force of the Convention for the respondent state. But former facts can be considered if they are susceptible to lead to a continuous violation of the rights guaranteed after this time: ECtHR, 24 June 1993, *Papamichalopoulos and Others v. Greece*, Series A No. 260-B § 39; 8 June 1994, *Yagci and Sargin v. Turkey*, Series A No. 319-A § 40.

590. ECmHR, 6 July 1988, *Hilton v. the United Kingdom*, DR 57/108; 27 Nov. 1995, *Worm v. Austria*, DR 83 B/17. If the violation is continuous (and supposing there is no domestic remedy), the time-limit starts only when the said violation has ceased... for all that the application be submitted within a reasonable time: ECmHR, 9 June 1958, *De Becker v. Belgium*, YB II p. 243; 5 Sep. 1994, *Cinar v. Turkey*, DR 79A/ 5.

591. ECmHR, 20 May 1976, *X v. Austria*, DR 6/15.

592. ECmHR, 4 May 1983, *X. v. France*, DR 32/266.

593. Article 47-1, Rules of Court.

594. Article 47-1 *in fine*, Rules of Court.



tion. Thus the Court does not deal with any individual application that is anonymous⁵⁹⁵ or that is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

Furthermore, the Court will declare inadmissible any application which it considers incompatible with the provisions of the Convention or its protocols, manifestly ill-founded, or an abuse of the right of application. Lastly, Article 35 states that the Court will reject any application which it considers inadmissible under this article; it may do so at any stage of the proceedings.

b) Admissibility proceedings

[160] Inter-state applications

When an inter-state application is made, the President of the Court informs the state concerned and assigns the application to one of the sections.⁵⁹⁶ The president of the section then constitutes the chamber and invites the respondent state to submit its observations in writing on the admissibility of the application. These observations are communicated by the registrar to the applicant state, which may submit written observations in reply.⁵⁹⁷ The chamber may invite either of the parties to submit further observations in writing.

The chamber then decides on the application's admissibility and decides on its merits. The decision on admissibility is taken separately unless the Court, in exceptional cases, decides otherwise.⁵⁹⁸

595. ECmHR, 1 Sep. 1958, *Amateur de tranquillité*, Digest V p. 334. The associations were recognised the right to submit an application even if their members are not identified: ECmHR, 5 May 1979, *Church of Scientology v. Sweden*, DR 16/68.

596. Article 51-1, Rules of Court.

597. Article 51-3, Rules of Court.

598. Article 29-2 ECHR.



[161] Individual applications

An individual application is assigned by the President of the Court to a section. The committee of three judges may, by a unanimous vote, declare an application inadmissible or strike it out of the list of cases: the decision is final and the applicant is informed of it by letter.⁵⁹⁹ If the committee does not take such a decision, it forwards the application to the chamber of seven judges, which decides on its admissibility and merits.⁶⁰⁰

The chamber may at once declare the application inadmissible or strike it out of the list of cases. Alternatively, the chamber or its president may request information and observations from the parties.⁶⁰¹

[162] Inter-state and individual applications

The respondent state may always raise a plea of inadmissibility. It must do so in its written or oral observations on the admissibility of the application.⁶⁰²

Accompanied or followed by reasons, the decision of the chamber will state whether it was taken unanimously or by a majority.⁶⁰³ The decision is then communicated by the registrar to the applicant.⁶⁰⁴

c) Proceedings after the admission of an application

[163] The consequences of admissibility

When an inter-state application has been declared admissible, the president of the chamber consults the parties concerned and lays down the time-limits for the filing of written observations on the merits and, where appropriate, for the production of further evidence: a hearing on the merits is then held at the request of one or more of the parties or if the chamber so decides of its own motion.⁶⁰⁵ If an individual application has

599. Article 53, Rules of Court.

600. Article 29 § 1 ECHR.

601. Article 54, Rules of Court.

602. Article 55, Rules of Court.

603. Article 56 § 1, Rules of Court.

604. Article 56 § 2, Rules of Court.

605. Article 58, Rules of Court.



been declared admissible, the chamber may invite the parties to submit further evidence as well as written observations. A hearing on the merits is held if the chamber so decides of its own motion or at the request of a party.⁶⁰⁶

After having declared an application admissible, the Court pursues the examination of the case together with the representatives of the parties. It may also, if necessary, undertake an investigation: in this case, the states concerned must furnish all the necessary facilities.⁶⁰⁷

[164] Claims for just satisfaction

Rule 60 of the Rules of Court specifies that, unless the president directs otherwise, any claim which the applicant may wish to make for just satisfaction under Article 41 must be set out in the written observations on the merits or in a special document filed no later than two months after the decision declaring the application admissible.

Itemised particulars of all claims made, together with the relevant supporting documents or vouchers, must be submitted. The chamber may at any time during the proceedings invite any party to submit comments on the claim for just satisfaction.

[165] Friendly settlement

If the Court declares an application admissible, it places itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter: these proceedings, provided for in Article 38 § 1 (b) of the Convention, are confidential.⁶⁰⁸ The chamber then takes any steps that appear appropriate to facilitate such a settlement.⁶⁰⁹

These negotiations, which imply mutual concessions, are important. However, there are limits, since friendly settlements must be guided by respect for human rights: this means that any bargaining about the rights guaranteed by the Convention is prohibited and compensation alone is

606. Article 59, Rules of Court.

607. Article 38 ECHR.

608. Article 38-2 ECHR.

609. Article 62-1, Rules of Court.



negotiable. If a friendly settlement is effected, the Court strikes the case out of its list by means of a decision which is confined to a brief statement of the facts and of the solution reached.⁶¹⁰ Otherwise, the proceedings take their course.

2. *The improvements introduced by Protocol No. 14*

[166] Improving the Court's screening capacity

The drafters of Protocol No. 14 wanted to improve the Court's screening capacity: this capacity has been increased by making a single judge competent to declare inadmissible or strike out an individual application. This new machinery is designed to increase the system's effectiveness whilst retaining the judicial nature of decision-making on admissibility.⁶¹¹

[167] A new admissibility criterion

A new admissibility criterion has been inserted in Article 35 of the Convention. With the entry into force of Protocol No. 14 the Court will be able to declare inadmissible any individual application if it considers that the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and its Protocols requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

[168] The search for greater flexibility

The drafters of the protocol wanted more latitude for the Court to rule simultaneously on the admissibility and merits of individual applications. In future, joint decisions on admissibility and merits of individual cases will not only be encouraged but will become the norm, although separate decisions will be possible.⁶¹²

610. Article 39 ECHR.

611. Article 26 new ECHR.

612. Explanatory Report to Protocol No. 14, pt 41.



The committee of three judges, which hitherto has merely been able to declare an individual application inadmissible if the decision is unanimous, may now, with Protocol No. 14, declare individual applications admissible and decide on their merits in a joint decision. It may do so when the questions they raise concerning the interpretation or application of the Convention are covered by well-established case-law of the Court.⁶¹³

C. Decision on the merits

[169] A judgment on the merits

At this stage of the proceedings, a judicial decision will be delivered by the European Court on the alleged breach of the Convention. Before considering the decision itself, we shall look at proceedings before the Court.

1. Proceedings before the Court

[170] General points

Before the Court, and generally speaking, the proceedings are governed by the principles of a fair trial. Some more specific rules provide clarification depending on the bench concerned: the chamber of seven judges or the Grand Chamber.

a) Proceedings before the chambers

[171] Hearings

The hearing is normally public unless there are exceptional circumstances relating to morals, public order or national security, or even the interests of juveniles or the need to protect privacy.⁶¹⁴

The president of the chamber directs hearings and prescribes the order in which the applicants' agents, advocates and advisers are called upon to speak. In the absence of a party, the chamber may proceed with the hearing if it is satisfied that such a course is consistent with the proper

613. Article 28, §§ 1 and 2 new ECHR.

614. Article 63 and s., Rules of Court.



administration of justice.⁶¹⁵ Lastly, any judge may put questions to any person appearing before the chamber.⁶¹⁶

[172] *Verbatim record of a hearing*

The registrar makes a verbatim record of the hearing.⁶¹⁷ After any corrections by the applicant's representatives, this verbatim record is signed by the president and the registrar and then constitutes certified matters of record.⁶¹⁸

b) Proceedings before the Grand Chamber

[173] *General points*

The rules governing proceedings before the chambers apply, *mutatis mutandis*, to proceedings before the Grand Chamber.⁶¹⁹ A distinctive feature of the system is the fact that the Grand Chamber may have a case referred to it either by a chamber or by one of the parties to the case.

[174] *Relinquishment of jurisdiction*

Article 30 of the Convention specifies that where a case pending before a chamber raises a serious question 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, the chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects. Reasons need not be given for the decision to relinquish.⁶²⁰

615. Article 65, Rules of Court.

616. Article 64 § 2, Rules of Court.

617. The record must include indications on: the composition of the Chamber during the hearing; the list of those appearing before the Chamber; the names, status and addresses of the witnesses, experts and others persons heard; the text of the submissions made, questions put and replies given; the text of any ruling delivered by the Chamber or its president during the hearing.

618. Article 70, Rules of Court.

619. Article 71, Rules of Court.

620. Article 72-1 *in fine*, Rules of Court.



The registrar notifies the parties of the chamber's intention to relinquish jurisdiction. The parties have one month from the date of that notification within which to file at the registry a duly reasoned objection. An objection which does not fulfil these conditions is considered invalid by the chamber.⁶²¹

[175] Referral

Under Article 43 of the Convention any party to the case may, within a period of three months from the date of the judgment of the chamber, request that the case be referred to the Grand Chamber.

However, this is possible only in exceptional circumstances, which must be stated in the referral request: a party may file in writing a request that the case be referred, specifying the serious question warranting this step.⁶²² A panel of five judges of the Grand Chamber⁶²³ examines the request and accepts it only if it considers that the case does raise a serious question.⁶²⁴ if the panel accepts the request, the Grand Chamber will decide the case by means of a judgment; if it refuses the request, reasons need not be given.⁶²⁵

2. The Court's decision

[176] A judicial decision

The European Court of Human Rights gives a judicial decision: the delivery of the decision is therefore an important stage, especially as the effect of the judgments given is greater than would appear at first sight.

621. Article 72-2, Rules of Court.

622. Article 73-1, Rules of Court

623. This panel is constituted in accordance with Article 24 § 6, Rules of Court.

624. Article 73-2, Rules of Court.

625. Article 73-2 and 3, Rules of Court.



a) Delivery of the decision

[177] Judgments of the Court

The judgments given by the European Court,⁶²⁶ drafted in either French or English, or even in both languages,⁶²⁷ are made public once delivered.⁶²⁸ They are signed by the president and the registrar and may be read out at a public hearing by the president or a judge that he has designated. The judgments are then transmitted to the Committee of Ministers, and the registrar sends copies to the parties, to the Secretary General of the Council of Europe, to any third party and to any other person directly concerned.⁶²⁹ They are published.⁶³⁰

[178] Reasons for judgments

Under Article 45 of the Convention, reasons must be given for judgments – as well as for decisions on admissibility. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge is entitled to deliver a separate opinion.

[179] Finding of a violation

The delivery of legal rulings on alleged violations of the European Convention on Human Rights is undoubtedly the primary function of the European judges, who indicate whether or not, in the specific cases submitted to their judgment, the provisions of the Convention have been observed.

626. A judgment contains: the names of the President and the other judges constituting the Chamber concerned, and the name of the Registrar or the Deputy Registrar; the dates on which it was adopted and delivered; a description of the parties; the names of the Agents, advocates or advisers of the parties; an account of the procedure followed; the facts of the case; a summary of the submissions of the parties; the reasons in point of law; the operative provisions; the decision, if any, in respect of costs; the number of judges constituting the majority; where appropriate, a statement as to which text is authentic: Article 74, Rules of Court.

627. Article 76, Rules of Court

628. Article 76 § 2, Rules of Court.

629. Article 77, Rules of Court. The original copy, duly signed and sealed, shall be placed in the archives of the Court.

630. Article 78, Rules of Court.



The European judges will thus decide whether or not, in the cases put before them, there is a violation of one or more of the rights set out in the European Convention on Human Rights and its additional protocols.

[180] Just satisfaction

Under Article 41 of the Convention, if the Court finds that there has been a violation of the Convention or its protocols, and if the internal law of the state concerned allows only partial reparation to be made, the Court will, if necessary, afford just satisfaction to the injured party. The Court should normally rule on just satisfaction in a judgment that is separate from the judgment on the merits: however, the Court very often adjudicates on compensation and the alleged violation in the same judgment,⁶³¹ which enables it to give immediate effect to the decision that there has been a breach.

As a rule, just satisfaction takes the form of financial compensation, damage being assessed on an equitable basis.⁶³² However, the European judges may hold that the finding of a violation by the judgment constitutes just satisfaction in itself.⁶³³

If a state does not meet its obligations and refuses to pay, the applicant can inform the Committee of Ministers, which is responsible for supervising enforcement of the judgment.

b) Scope of decisions

[181] Finality of judgments

The judgments delivered by the Grand Chamber are immediately final. On the other hand, the judgments delivered by the chambers are final only in three cases: when the parties declare that they will not request

631. This practice is, moreover, hallowed by Article 75-1, Rules of Court, which states that where the Chamber finds that there has been a violation of the Convention, it shall give *in the same judgment* a ruling on the application of Article 41.

632. ECtHR, 26 Oct. 1984, *De Cubber v. Belgium*, Series A No. 86, § 64; 23 Sep. 1982, *Sporrong and Lönnroth v. Sweden*, Series A No. 52, § 32. About the criteria assessing the just satisfaction, see: ECtHR, 28 Nov. 2002, *Ex-King of Greece v. Greece*, No. 25701/94, not published.

633. See, for ex.: ECtHR, 23 Sep. 1998, *McLeod v. the United Kingdom*, Reports 1998-VII.



that the case be referred to the Grand Chamber; three months after the date of the judgment if reference of the case to the Grand Chamber has not been requested; when the panel of the Grand Chamber rejects the request to refer under Article 43.

The fact nevertheless remains that, despite the finality of judgments delivered by the Court, adjustments are possible. Firstly, a party may request the interpretation of a judgment within a period of one year following the delivery of that judgment.⁶³⁴ Secondly, in the event of the discovery of a new fact, a party may request the Court, within a period of six months after that party acquired knowledge of this fact, to revise the judgment.⁶³⁵ Lastly, a factual or clerical error may be rectified by the Court, of its own motion or at the request of a party, but this request must be made within one month of the delivery of the decision or judgment.⁶³⁶

[182] *Binding force of judgments*

Pursuant to Article 46 § 1 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Despite the force of the wording in this article, the authority of the Court's judgments may seem relative in strictly legal terms. However, in reality, it is much greater than it appears. It is true that at first sight the authority of the Court's judgments may appear limited since, apart from the just satisfaction required from a state found to have violated the Convention, a judgment cannot have any direct consequences for domestic procedures. Nevertheless, states signatory to the Convention have undertaken to abide by the Court's judgments,⁶³⁷ and, above all, the incentive effect of European case-law is important since a

634. Article 79, Rules of Court. The request must be filed with the Registry. It shall state precisely the point or points in the operative provisions of the judgment on which interpretation is required. The original Chamber may decide of its own motion to refuse the request on the ground that there is no reason to warrant considering it. If it is not the case, the Registrar invites the parties to submit any written comments and the Chamber shall decide by means of a judgment. See, for ex.: ECtHR, 7 Aug. 1996, *Alenet de Ribemont v. France*, Reports 1996-III.

635. Article 80, Rule ECtHR, 20 Sep. 1993, *Pardo v. France*, Series A No. 261-B.

636. Article 81, Rules of Court.

637. Article 46 § 1 ECHR.



state found to have violated the Convention lays itself open to further applications similar to that which warranted the ruling against it ... as the same causes produce the same effects; consequently, to avoid the recurrence of rulings against them, states will, whether they like it or not, have to bring their positive law into line with the European Convention as interpreted by the Court's judges.

We might also ask whether the binding force of the Court's judgments does not apply to the European Court as well. Admittedly, *stare decisis* is not enshrined in European human rights law, and in addition the European Convention, a "living instrument," must be able to adjust to social change. Besides, the Court itself has stressed that it is not bound by its previous decisions.⁶³⁸ Even so, the Court has nevertheless stated that while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.⁶³⁹

[183] *Execution of judgments*

States are free to choose the means to be used, in their domestic systems, to fulfil their obligation to execute judgments.⁶⁴⁰ The state concerned must take action to end the violation in future and to ensure that its consequences have been erased as far as possible. As for just satisfaction, it is genuinely binding.

In certain cases the European judges have gone further, specifying the measures that the respondent state must take in order to put an end to the violations found. Thus the Court has on occasion decided that the states concerned must secure the applicants' release:⁶⁴¹ admittedly these were most unusual and exceptional situations.

638. See, for ex.: *Cossey*, 27 Sep. 1970, op. cit.

639. ECtHR, 18 Jan. 2001, *Chapman v. the United Kingdom*, op. cit.

640. See in particular: *Marckx*, op. cit. § 58; *Campbell and Cosans*, op. cit., § 36, etc.

641. ECtHR, 8 April 2004, *Assanidze v. Georgia*, No. 71503/01, not published; 8 July 2004, *Ilascu v. Moldova and Russia*, No. 48787/99, not published.



3. Advisory opinions

[184] Procedure applicable

For advisory opinions the procedure applicable has been set out in the Rules of Court.⁶⁴² The request, filed with the registry, must state precisely the question on which an opinion is sought. The President of the Court lays down the time-limits for filing written comments or any other documents.

If the Court considers that the request for an advisory opinion is not within its competence, it declares so in a reasoned decision.⁶⁴³

Advisory opinions are given by a majority vote of the Grand Chamber: they are read out in one of the two official languages by the President of the Court or a judge delegated by the President.

Chapter 2: The Committee of Ministers

[185] General points

In the context of this study we shall confine ourselves to those aspects directly relating to the European Convention on Human Rights and its additional protocols.

I. Composition of the Committee of Ministers

[186] A political body

The Committee of Ministers, which is the political organ of the Council of Europe, is a governmental body in which national approaches to problems facing European society can be discussed on an equal footing. It is also a collective forum where Europe-wide responses to such challenges are formulated. The Committee of Ministers is the organ which acts on behalf of the Council of Europe.⁶⁴⁴

642. Article 82-90, Rules of Court.

643. As a significant example: ECtHR, 2 June 2004, *op. cit.* (first decision on Court's competence to give an advisory opinion). Cf. *supra*, No. 135.

644. Article 13-21, Statute of the Council of Europe.



As provided for in Article 14 of the Statute of the Council of Europe, each member state is entitled to one representative on the Committee of Ministers: normally, this is the Minister for Foreign Affairs. However, a minister may nominate an alternate, who is usually the member state's permanent representative to the Council of Europe.

II. Role of the Committee of Ministers

[187] A limited role since Protocol No. 11

Since Protocol No. 11, the powers of the Committee of Ministers have been genuinely reduced, since it can no longer rule on alleged violations of the European Convention on Human Rights. It is true, however, that this particular right was tending to become theoretical since all the states signatory to the Convention had accepted the mandatory jurisdiction of the Court.

But although the role of the Committee of Ministers is limited, it is not unimportant for all that – on the contrary. On the one hand, it is at the request of the Committee of Ministers that the Court may give advisory opinions concerning the interpretation of the Convention and its additional protocols.⁶⁴⁵ On the other, above all, it supervises the execution of the final judgments delivered by the Court⁶⁴⁶ once it has been notified of them. The Committee of Ministers will more specifically examine whether any just satisfaction awarded by the Court to the applicant has been paid and whether the state has actually taken the necessary steps, either through individual measures to ensure that the violation has ceased or through general measures preventing further similar violations.⁶⁴⁷

In this respect, the Committee of Ministers first invites the state to inform it of the measures taken in consequence of the ruling against it: until the state responds, the case is placed on the Committee's agenda at

645. Article 47-1 ECHR.

646. Article 46-2 ECHR.

647. See in particular Rules adopted by the Committee of Ministers for the application of article 46 § 2 of the European Convention on Human Rights, text approved by the Committee of Ministers on 10 January 2001 at the 736th meeting of the Ministers' Deputies.



six-monthly intervals. Next, the Committee adopts a resolution in which it reports the situation on the basis of the information provided by the state: for a long time the Committee carried out its supervisory mission merely by recording the information provided by states, but subsequently it abandoned this token supervision in order to ascertain whether a state had actually taken steps to redress the violation found.⁶⁴⁸ The Committee of Ministers may also bring political and diplomatic pressure to bear. Finally, when it finds that a state has abided by the Court's judgment, it passes a resolution stating that it has met its commitments under Article 46 § 2 of the Convention.

[188] Stronger measures with Protocol No. 14

Protocol No. 14 empowers the Committee of Ministers to bring proceedings before the Grand Chamber of the Court against a state that has refused to abide by a final judgment by the Court.⁶⁴⁹ This decision requires a majority vote of two thirds of the representatives entitled to sit on the Committee. The aim of this procedure is to increase the effectiveness of the European system of protection of fundamental rights by obtaining from the Court a ruling on whether the state concerned has failed to comply with its obligation under Article 46 § 1 of the Convention, under which the High Contracting Parties undertake to abide by the final judgment of the Court in the cases to which they are parties.

In addition, the Committee of Ministers may ask the Court to interpret judgments.⁶⁵⁰ This is possible in certain circumstances, in particular if the Committee of Ministers considers that supervision of the execution of a judgment is hindered by a problem of interpretation of that judgment.

648. ResDH (88) 13, *Ben Yacoub v. the Netherlands*, and Final Resolution ResDH (92) 58; ResDH (89) 8, *Oztürk v. the Federal Republic of Germany*, and Final Resolution ResDH (89) 31; Res. DH (89) 9, *F v. Switzerland*

649. Article 46 § 4 new ECHR.

650. Article 46 § 3 new ECHR.



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